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THE CODE OF CRIMINAL PROCEDURE

(1898)

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

THE
CODE OF CRIMINAL PROCEDURE
(ACT V OF 1898)
WITH
EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

BY
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VOLUME II

SECTIONS 221 TO 430

THE ALL INDIA REPORTER, LTD.,
NAGPUR.

PRINTED AT
THE ALL INDIA REPORTER PRESS
NAGPUR.

ABBREVIATIONS EXPLAINED

1921 All., Bom., etc.	All India Reporter, Allahabad, Bombay, etc. section of the respective years.
Agra H. C. R.	Agra High Court Reports.
All.	Allahabad (I. L. R.).
All. L. Jour.	Allahabad Law Journal.
All. L. Reporter	Allahabad Law Reporter.
All. W. N.	Allahabad Weekly Notes.
All. W. R.	Allahabad Weekly Reporter.
Beng. L. R.	Bengal Law Reports.
Bom.	Bombay (I. L. R.).
Bom. H. C. R.	Bombay High Court Reports.
Bom. L. R.	Bombay Law Reporter.
Bom. P. J.	Bombay Printed Judgments.
Bourke	Bourke's Reports.
Bur. L. Jour.	Burma Law Journal.
Bur. L. R.	Burma Law Reports.
Bur. L. Tim.	Burma Law Times.
Cal.	Calcutta (I. L. R.).
Cal. L. Jour.	Calcutta Law Journal.
Cal. L. R.	Calcutta Law Reports.
Cal. W. N.	Calcutta Weekly Notes.
C. P. L. R.	Central Provinces Law Reports.
Cor.	Coryton's Reports.
Cri. Cas.	Criminal Cases.
Cri. L. Jour.	Criminal Law Journal.
Hay.	Hay's Reports.
Hyde	Hyde's Reports.
Ind. App.	Law Reports, Indian Appeals.
Ind. Cas.	Indian Cases.
Ind. Jur. (N. S.)	Indian Jurist (New Series).
Ind. Jur. (O. S.)	Indian Jurist (Old Series).
Knapp.	Knapp's Reports.
Lah.	Lahore (I. L. R.).
Lah. L. Jour.	Lahore Law Journal.
L. R. A.	Law Reports, Allahabad.
Low. Bur. Rul.	Lower Burma Rulings.
Luck.	Lucknow (I. L. R.).
L. C.	Lucknow Cases.
Mad.	Madras (I. L. R.).
Mad. Cr. C.	Madras Criminal Cases.
Mad. H. C. R.	Madras High Court Reports.

Mad. Jur.	... ...	... Madras Jurist.
Mad. L. Jour.	... ...	... Madras Law Journal.
Mad. L. Tim.	... ...	... Madras Law Times.
Mad. L. W.	... ...	... Madras Law Weekly.
Mad. W. N.	... ...	... Madras Weekly Notes.
Marsh.	... ...	... Marshall's Reports.
Moo. Ind. App.	... ...	... Moore's Indian Appeals.
Moo. P. C. C.	... ...	... Moore's Privy Council Cases.
Nag. L. Jour.	... ...	... Nagpur Law Journal.
Nag. L. R.	... ...	... Nagpur Law Reports.
N. W. P. H. C. R.	... ...	... North-West Provinces High Court Reports.
Oudh Cas.	... ...	... Oudh Cases.
Oudh L. Jour.	... ...	... Oudh Law Journal.
Oudh W. N.	... ...	... Oudh Weekly Notes.
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Pat. L. W.	... ...	... Patna Law Weekly.
Pun. L. R.	... ...	... Punjab Law Reporter.
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Sind L. R.	... ...	... Sind Law Reporter.
Suth.	... ...	... Sutherland's Privy Council Judgments.
Suth. W. R.	... ...	... Sutherland's Weekly Reporter.
U. P. L. R.	... ...	... United Provinces Law Reports.
Upp. Bur. Rul.	... ...	... Upper Burma Rulings.
Weir.	... ...	... Weir's Criminal Rulings.

Cl.	...	...	Clause.	Pt.	...	...	Point.
C. A.	...	...	Court of Appeal.	P. C.	...	...	Privy Council.
Cr.	...	...	Criminal.	S.	...	...	Section.
F. B.	...	...	Full Bench.	S. B.	...	...	Special Bench.
F-N	...	...	Foot-Note.	Sub-S.	...	...	Sub-section.
I. P. C.	...	...	Indian Penal Code.	W. R.	...	...	Weekly Reporter (Eng.)
N.	...	...	Note.				

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(ACT V OF 1898)

VOLUME II

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PART VI: PROCEEDINGS IN PROSECUTIONS—*(contd.)*

CHAPTER XIX

OF THE CHARGE: *Form of Charges.*

Charge to state offence.

221.* (1) Every charge under this Code shall state the offence with which the accused is charged. Sec. 221

Specific name of offence sufficient description.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

*(Code of 1882—S. 221—*Same as that of* 1898 *Code.*)

(Code of 1872—S. 439.)

PART X

Charge, Judgment and Sentence.

CHAPTER XXXIII

OF THE CHARGE.

Form of Charges.

Charge to state offence.

439. The charge shall state the offence with which the accused person is charged.

Specific name of offence, sufficient statement.

If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name.

If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the prisoner notice of the matter with which he is charged.

The Act and section or sections of the Act against which the offence is said to have been committed must be referred to in the charge.

Sec. 221

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

What implied in charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

Language of charge.

(6) In the presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

Previous conviction when to be set out.

(7) If the accused has been previously convicted of any offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If such statement is omitted, the Court may add it at any time before sentence is passed.

Previous conviction when to be set out.

(7) If the accused, *having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment or to punishment of a different kind, for a subsequent offence*, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the *Court may think fit to award for the subsequent offence*, the fact, date and place of the previous conviction shall be stated in the charge. If such statement *has been* omitted, the Court may add it at any time before sentence is passed.

What implied in charges.

The fact that the charge is made shall be equivalent to a statement that every legal condition, necessary by law to constitute the offence charged, was fulfilled in the particular case.

Language of charge.

A charge may be written either in English or in the language of the District. If not written in a language understood by the prisoner it must be read to him in a language which he understands.

Previous conviction to be set out in charge.

If the accused person has been previously convicted of any offence, and if it is intended to prove such previous conviction for the purpose of affecting the punishment which is to be awarded, the fact of the previous conviction must be stated in the charge. If it is omitted, it may be added at any time before sentence is passed, but not afterwards.

(*Illustrations same as in* 1898 *Code.*)

(Code of 1861—Sections 234 and 235.)

How the offence is to be described.

234. The charge shall describe the imputed offence as nearly as possible in the language of the Indian Penal Code, and shall refer to the section under which such offence is punishable.

Illustrations

(*a*) *A* is charged with the murder of *B*. This is equivalent to a statement that *A's* act fell within the definition of murder given in Sections 299 and 300 of the Indian Penal Code ; that it did not fall within any of the general exceptions of the same Code ; and that it did not fall within any of the five exceptions to Section 300 ; or that, if it did fall within Exception I, one or other of the three provisos to that exception applied to it.

(*b*) *A* is charged, under Section 326 of the Indian Penal Code with voluntarily causing grievous hurt to *B* by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by Section 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(*c*) *A* is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property mark. The charge may state that *A* committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property mark, without reference to the definitions of those crimes contained in the Indian Penal Code ; but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(*d*) *A* is charged, under Section 184 of the Indian Penal Code with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

Synopsis.

Other Topics.

Accused entitled to know exact value of charge made against him. See Note 1, Pt. 1.
Charge of previous conviction—Time to add. See Note 6, Pts. 9 & 10.
Charge under I. P. C., how to be stated. See Note 1.
Effect of omission to state previous conviction. See Note 6, Pt. 3.
Fact, date and place of previous conviction. See Note 6, Pts. 1 & 2.
For the purpose of affecting the punishment. See Note 6, Pt. 4.
Notice of the matter. See Note 1, Pt. 1.
Proof of previous conviction. See Ss. 310 & 511.
What is a previous conviction. See Note 6, Pts. 5 & 6.
Where the law gives no specific name. See Notes 2 & 4.
Words of the statute should be adhered to. See Note 4, Pt. 1.

1. Charge—general.

It is a fundamental principle of Criminal law, that the accused should be informed with certainty and accuracy the exact value of the charge brought against him. Otherwise he may be seriously prejudiced in his defence.[1] It is

235. It shall not be necessary to allege in the charge any circumstances for the purpose of showing that the case does not come, nor shall it be necessary to allege that the case does not come, within any of the General Exceptions contained in Chapter IV of the Indian Penal Code, but every charge shall be understood to assume the absence of all such circumstances.

Absence of General Exceptions under the Penal Code to be assumed.

Section 221—Note 1.

1. (1926) 1926 Cal 439 (440) : 26 Cri L Jour 567, *Chhakari Shaik v. Emperor.* (1925) 1925 Cal 160 (160) : 25 Cri L Jour

Sec. 221 Note 1

therefore imperative that before a person is convicted of any offence he should (subject to certain exceptions) be *formally charged* with having committed the offence specified and be given an opportunity to defend himself against such charge.[2] He can be convicted only on proof of the *particular offences so specified* and not for offences not so specified.[3]

A "charge" in this country corresponds to an "indictment" in English Law and is very much more than a mere form.[4] It should be carefully drawn up and in accordance with the offence disclosed.[5]

This section and the next two sections specify the particulars that should be stated in the charge, the object of such statement being to enable the accused person to know the substantive charge he will have to meet and to be ready for it before the evidence is given.[6] Reading them together, every charge should contain the following particulars:—

1. A statement of the *offence* with which the accused is charged (Section 221 Sub-Sections 1 to 3).
2. A statement of the law and the section of the law against which the offence is said to have been committed (sub-section 4).
3. Particulars as to the *time* and *place* of the alleged offence and the person against whom or the *thing* in respect of which it was committed (S. 222).

1186, *Balaram Kundu* v. *Emperor*.
(1916) 1916 Cal 188 (192) : 16 Cri L Jour 497 (501) : 42 Cal 957, *Amritlal Hazra* v. *Emperor*.
(1902) 15 C P L R 112 (113), *Emperor* v. *Vinayak Jageshwar*.
(1866) 3 Bom H C App 1 (29), *Vithoba Malhari* v. *Corfield*.

2. (1926) 1926 Cal 581 (582) : 53 Cal 466 : 27 Cri L Jour 606, *Harun Rashid* v. *Emperor*
(1932) 1932 Pat 215 (216) : 11 Pat 523 ; 33 Cri L Jour 864, *Ghyasuddin Ahmad* v. *Emperor*.
(1916) 1916 All 126 (126) : 17 Cri L Jour 407 (407), *Qasim Ali* v. *Emperor*.
(1903) 27 Bom 394 (399), *In re Vallabadas Jairam, Khimji Jairam & Bhanji Jairam*.
(1910) 11 Cri L Jour 274 (275) : 3 Ind Cas 344 (Mad), *A. G. Ganapathy Sastri, In re*. Order under S. 13 of the Legal Practitioners Act can only be made, after notice has been given to the pleader to show cause why he should not be suspended or dismissed. The notice must formulate the charges with sufficient precision, to enable the pleader to know the charges which he is called upon to meet.

3. (1925) 1925 Oudh 676 (676) : 26 Cri L Jour 1042, *Bishambar Nath Bajpai* v. *Emperor*.
(1933) 1933 Sind 225 (226) : 35 Cri L Jour 582, *Parsram Kundraj* v. *Emperor*. Charge on one set of facts — Conviction of same offence but on other set of facts—Conviction is illegal.
(1901) 1901 All W N 120 (121), *Emperor* v. *Lajja*. Persons charged with an offence under S. 365, Penal Code cannot properly be convicted of an offence under S. 498.
(1921) 22 Cri L Jour 311 (12) : 60 Ind Cas 999 (1000) (Pat), *Darbari Choudhury* v. *Emperor*. Where accused was charged with offence of theft, he cannot be convicted of abetment of theft.
(1890) Ratanlal 529 (530), *Empress* v. *Nathu Lalji*. Charge for storing wool — No conviction for storing cotton.
(1925) 1925 Cal 903 (904, 905) : 26 Cri L Jour 594, *Nayanullah* v. *Emperor*.
(1900) 27 Cal 661 (661, 662), *Jatu Singh* v. *Mahabir Singh*. Charge for theft—Accused cannot be convicted of rioting.
(1901) 5 Cal W N 567 (568), *In the matter of Chinibas*.
(1922) 1922 Lah 135 (136) : 23 Cri L Jour 5, *Girdhara Singh* v. *Emperor*. Conviction for an offence under a section which originally included but scored out by trial Court—Illegal.
(1930) 1930 Mad W N 249 (283) (F B), *C. K. N. Sundaresa Iyer* v. *Emperor*.
(1923) 24 Cri L Jour 119 (119) : 71 Ind Cas 247 (Cal), *Hajari Sonar* v. *Emperor*. [See also (1922) 1922 Oudh 280 (282) : 24 Cri L Jour 10 : 26 Oudh Cas 4, *Sarju Prasad* v. *Emperor*.]

4. (1926) 1926 Oudh 148 (149) : 27 Cri L Jour 62, *Sheo Shankar* v. *Emperor*.

5. (1901) 1901 Pun Re No. 5, page 15, *Mukerji* v. *Empress*.

6. (1916) 1916 All 60(60) : 17 Cri L Jour 411 (411), *Ram Chandar Sahai* v. *Emperor*.

4. Particulars of the *manner* in which the alleged offence was committed. This is, however, necessary only where the particulars mentioned in S. 221 and S. 222 do not give the accused sufficient notice of the matter with which he is charged. (S. 223).

The *extent* of the particulars necessary to be given will depend upon the facts and circumstances of each case.[7] In drawing up a charge, all *verbiage* should be avoided[8] as also matters which are not necessary for the prosecution to prove.[9] On the other hand, abbreviation, as by using the words "*et cetera*," should also be avoided.[10] In other words a charge should be *precise* in its scope and *particular* in its details.[11]

The charge should be stated to the accused by the Magistrate himself and not be left to be stated by others.[12]

2. "Shall state the offence"—Sub-section 1.

Every charge must *state the offence* with which the accused is charged. Where the offence has a name given to it by law it is *sufficient* to describe it by its *name* only (Sub-S. 2). Where it has no name given to it by law so much of the definition of the offence *must* be stated as to give the accused notice of the matter with which he is charged (sub-s. 3).

Where a person is charged with several offences all having reference to the *same subject matter or series of transactions*, a single charge may be framed with several *counts* or heads of charge for each of the several offences.[1]

3. Description of offence by name—Sub-section 2.

Where an offence has a *name* given to it by law such as "rioting", "theft", etc., the Court *may* describe it by its *name* only. The Court has, however, a discretion to give further details according to the facts and circumstances of each case. Where, however, further details are given they should be *fully and accurately* stated and should be such as to give the accused clear notice of the accusation against him.[1]

4. Definition of the offence—Sub-section 3.

In giving the definition of the offence charged, it is always a sound rule for the Court to adhere to the *language of the statute* as far as possible.[1] Thus for an offence under S. 211 of the Penal Code the charge should set

7. (1893) Ratanlal 659 (666), *Empress* v. *Waman*.
8. (1864) 1 Suth W R Cri Letters 1 (1, 2).
9. (1926) 1926 Oudh 245 (247, 248): 27 Cri L Jour 57, *Bhulan* v. *Emperor*.
10. (1864) 1 Suth W R Cri Letters 13 (13, 14).
11. (1919) 1919 Pat 27 (30): 20 Cri L Jour 161, *Mt. Kesar* v. *Emperor*.
(1926) 1926 Oudh 148 (149): 27 Cri L Jour 62, *Sheo Shankar* v. *Emperor*.
12. (1871) 16 Suth W R 43 (43), *Empress* v. *Jehangeer Buksh*.

Note 2.

1. (1928) 1928 Cal 675 (676): 29 Cri L Jour 1022: 55 Cal 858, *Satyanarayan Mohata* v. *Emperor*.
[See also (1915) 1915 Sind 50 (51): 16 Cri L Jour 573 (574): 9 Sind L R 37, *Dodo* v. *Emperor*. Charge means whole *series* of counts.]

Note 3.

1. (1865) 2 Suth W R Cri Letters 24 (24).
(1864) 1 Suth W R Cri Letters 10 (11).
(1865) 3 Suth W R Cri Letters 20 (20).

Note 4.

1. (1926) 1926 Cal 439 (440): 26 Cri L Jour 567, *Chhakari Shaik* v. *Emperor*.
(1913) 1916 Cal 188 (195): 16 Cri L Jour 497: 42 Cal 957, *Amritlal Hazara* v. *Emperor*.
(1892) 5 C P L R 18 (19), *Empress* v. *Jhengria*.
(1892-1896) 1 U B R 32, *Empress* v. *Nga Kyaw*.

Sec. 221 Notes 4—6

forth that the prisoner "falsely charged" and not that he "made an accusation."[2] A repetition of the words in the *marginal note* to the section is not enough.[3]

5. Section of law to be stated—Sub-section 4.

Where the section of the Penal Code with which a person is intended to be charged contains *several parts*, that *part* of the section which is applicable to the case should be stated.[1]

6. Previous convictions—Sub-section 7.

If a person is intended to be tried and punished with *enhanced punishment or with punishment of a different kind* as being a previous offender, the particulars of the previous conviction should be stated in the charge[1] though the *extent* of the former punishment need not be stated.[2] In the absence of such statement, the accused cannot be awarded enhanced punishment.[3] A statement of the previous conviction in the charge is, however, not necessary where such conviction is to be taken into consideration, not for the purpose of awarding the enhanced punishment under S .75 Penal Code, but merely for the purpose of exercising the discretion of the Court as to the extent of the punishment to be awarded *within the maximum fixed for the offence charged.*[4]

A "previous conviction" within the meaning of this section means a previous conviction by a British Indian Court and not by a foreign Court.[5] Further it means a conviction obtained before the moment of time when the *charge is framed.*[6] It may also be noted that for purposes of S. 75 of the

2. (1865) 2 Suth W R Cri Letters 2 (2),
3. (1865) 2 Suth W R Cri Letters 6 (6),
(1865) 2 Suth W R Cri Letters 7 (7),

Note 5.

1. (1890) 15 Bom 189 (193, 194), *Queen-Empress* v. *Abaji Ramchandra*, Charge under S. 475, Penal Code.

Note 6.

1. (1886) 9 Mad 284 (285), *Empress* v. *Dorasami.*
(1932) 1932 Nag 111 (112) : 28 Nag L R 18 : 33 Cri L Jour 573, *Gayaprasad* v. *Emperor.*
(1917) 1917 Low Bur 58 (1) (58) : 18 Cri L Jour 79 (79) : 8 Low Bur Rul 461, *Nga Hia* v. *Emperor.*
(1917) 1917 Mad 968 (968) : 17 Cri L Jour 288 (288), *Subramaniam* v. *Emperor.*
(1911) 12 Cri L Jour 233 (234) : 10 Ind Cas 241 (Lah), *Dungri Mohammad Ali* v. *Emperor.*
(1910) 11 Cri L Jour 217 (217): 5 Ind Cas 743 (Mad) : *In re Abbulu.* Omission to set out in due form is curable.
(1906) 3 Cri L Jour 97 (98) : (Kathiawar), *Ilahibaksh Khaja* v. *Emperor.*
(1874) 22 Suth W R 39 (40), *Queen* v. *Sheik Jakir.*
(1874) 21 Suth W R 40 (40), *Queen* v. *Esan Chunda Dey.*
(1873) 19 Suth W R 41 (42), *Queen* v. *Rajcoomar Bose.*
(1883) 1883 All W N 110 (110), *Empress* v. *Haidar.*
(1881) 1881 All W N 144 (144), *Empress* v. *Mundar.*
(1881) 1881 All W N 32 (32), *Empress* v. *Raghib Ali.*
(1902) 4 Bom L R 177 (177), *Emperor* v. *Govind.*
(1900) 2 Bom L R 304 (321, 322), *Empress* v. *Vinayak Narayan Bhatye.*
(1873) Ratanlal 78 (78), *Reg* v. *Jay Kison.*
(1873) Ratanlal 70 (72), *Reg* v. *Annaji Krishna.*
(1871) Ratanlal 52 (52), *Reg* v. *Tukaram Dowlat.*
(1878) 2 Weir 267 (268).
(1893-1900) 1893-1900 Low Bur Rul 310 (311), *Empress* v. *Nga Lugyi.*
(1872-1892) 1872-1892 Low Bur Rul 337 (337), *Empress* v. *Po Thaung.*
2. (1868-1869) 4 Mad H C App 11 (11).
3. (1883) 2 Weir 264 (265), *In re Ramanjulu Naik.*
(1874) 2 Weir 265 (265, 266).
4. (1928) 1928 Rang 200 (203, 205) : 6 Rang 391 : 29 Cri L Jour 869 (F B)., *Emperor* v. *Nga Ba Shein.*
(1933) 1933 Nag 315 (316) : 29 Nag L R 309 : 34 Cri L Jour 1166, *Abdul Karim* v. *Emperor.*
(1930) 1930 Sind 211 (214, 216) : 31 Cri L Jour 1046 : 24 Sind L R 252, *Baksho* v. *Emperor.*
5. (1913) 14 Cri L Jour 527 (527) : 1913 Pun Re No. 17, *Bahawal* v. *Emperor.*
(1930) 1930 Mad W N 173 (174), *Syed Khader Sahin* v. *Emperor.*
(1919) 1919 All 63 (63) : 42 All 136 : 21 Cri L Jour 144, *Bhanwar* v. *Emperor.*
6. (1879) 1879 Pun Re No. 21, page 64 (F B), *Empress* v. *Sultani.*

Penal Code a person cannot be charged with a conviction for an offence committed subsequent to the date of the offence for which he is on trial.[7] Similarly S. 75 of the Penal Code does not apply to a case where the subsequent offence is committed before the conviction for the former offence.[7a]

The word "punishment" in this section does not include an order under S. 565 *infra* for not notifying the address of the offender, and consequently it is not necessary for the purpose of making this order, that the previous conviction should be mentioned in the charge.[8]

Where the previous conviction has been omitted from the charge, it may be added at any time *before sentence* is passed. A sentence passed *already* cannot be enhanced by the subsequent discovery of the fact that the prisoner has been previously convicted.[9] The High Court, may, however, in revision, add the charge in proper cases and direct evidence to be taken on such charge.[10]

See also the undermentioned cases bearing upon S. 75 of the Penal Code.[11]

See also Notes under S. 311 *infra*.

7. Charge for offences one of which is triable as a warrant case and the other as a summons case.

Where it is intended to proceed to try a person for two offences one of which is triable as a warrant case (in which a charge is to be framed) and the other as a summons case (in which no charge need be framed), the charge in respect of the former offence should also state the latter offence.[1]

8. Liability to whipping, if to be stated in the charge.

It has been held in the undermentioned case[1] that when a person is tried for an offence which is liable to be punished with whipping, the liability to whipping must be stated in the charge.

9. Aggravating circumstances.

Where a person is charged of an offence which provides a certain punishment under certain circumstances and a higher punishment under aggravating circumstances, the existence of such aggravating circumstances should be set forth in the charge.[1]

10. Special exceptions.

Under Ss. 235 to 237 of the Code of 1861 the charge had to deny the existence of special exceptions where the section defining the offence charged

7. (1875) 1 Weir 39 (39).
7a (1926) 1926 Bom 305 (305) : 27 Cri L Jour 726, *Sayad Abdul Sayad Imam* v. *Emperor*.
8. (1913) 14 Cri L Jour 390 (390) : 9 Nag L R 88, *Emperor* v. *Jhagroo*.
9. (1889) Ratanlal 457 (458), *Empress* v. *Nahna*.
(1873) 19 Suth W R 41 (42), *Empress* v. *Rajcoomar Bose*.
(1889) Ratanlal 458 (458), *Empress* v. *Chimaba*.
10. (1879) 1879 Pun Re No. 19, page 56, *Kasim* v. *Empress*.
(1879) 1879 Pun Re No. 28, page 79, *Empress* v. *Yusuf alias Bahram*.
11. (1904) 1 Cri L Jour 1061 (1063) : 1904 Pun Re No. 17, *King-Emperor* v. *Khan Muhammad*. Conviction under Punjab Frontier Crimes Regulation — Not a previous conviction under I. P. C., so as to attract S. 75, I. P. C.

Note 7.

1. (1902) 29 Cal 481 (482), *Hosein Sardar* v. *Kalu Sardar*.
(1906) 3 Cri L Jour 350 (350) : 3 Low Bur Rul 113, *Emperor* v. *Maung Gale*.

Note 8.

1. (1882) 5 Mad 158 (158), *Badiya* v. *The Queen*.

Note 9.

1. (1871) Ratanlal 55 (56), *Reg* v. *Mukta*.
(1897) Ratanlal 921 (921), *Empress* v.

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had exceptions.[1] This is now no longer necessary as those sections have not been repeated in the present Code.

11. Constructive offences.

Under S. 149 of the Penal Code if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, every person who at the time of committing that offence is a member of the same assembly is guilty of that offence. Where a person is charged with an offence constructively by force of S. 149 the charge should specify such fact. Thus where the accused was only charged with an offence under Section 126 of the Railways Act, a conviction for an offence under that section read with S. 149 on the basis of constructive liability cannot be sustained where it has prejudiced the accused.[1] Where *A* is charged constructively for an offence, it clearly intimates to him that he did not himself commit the substantive offence but that he is guilty inasmuch as some body else in prosecution of the common object of the riot did commit such substantive offence. If the person charged with committing the substantive offence is acquitted of such offence, the offence by implication also disappears, and *A* cannot be convicted of the substantive offence.[2]

A charge under S. 149 is not for any specific *named* offence, and the fact that an offence is committed in *pursuance of the common object* is of the essence of the case. It is therefore necessary to mention the same in the charge unless it has already been set out in the main charge.[3]

See also the undermentioned case.[4]

12. Unnecessary averments in the charge—Surplusage.

As has been seen in Note 1 *ante* a charge should never contain more than what is necessary for the prosecution to prove.[1] Allegations in the charge which are not necessary to be proved to constitute an offence and which might be entirely omitted without affecting the charge against the prisoner and without detriment to the indictment are however considered as mere surplusage and may be discharged in evidence.[2]

Punja Sakharam. Charge under S. 395, I. P. C. — To justify conviction under S. 398, I. P. C., the carrying of arms must be specifically alleged in charge.

Note 10.

1. (1864) 1 Suth W R Cri L 9 (9).
(1866) 5 Suth W R Cri Cir 2 (2).
(1864) 1 Suth W R Cri L 10 (11).
(1879) 4 Cal 124 (126, 127) (Defamation), *Shibo Prosad Pandah, In Re.*
(1872) 9 Bom H C R 451 (457) (Defamation), *Reg* v. *Kikabhai Parbhudas.*
(1869) Ratanlal 20 (20). (Hurt).
(1867) 8 Suth W R Cri Circuit 3 (3).

Note 11.

1. (1924) 1924 Mad 338 (339) : 25 Cri L Jour 212, *Thaikkottathil Kunheen, In Re.*
(1925) 1925 Mad 1 (5, 6) (F B) : 47 Mad 746 : 25 Cri L Jour 1297, *Theethumalai Goundar In Re.* Conviction on such a defective charge is not bad unless the accused has been materially prejudiced in his defence.
2. (1912) 13 Cri L Jour 502 (503) : 15 Ind Cas 646 (Cal), *Reazuddi* v. *Emperor.*
3. (1912) 13 Cri L Jour 218 (219) : 39 Cal 781, *Kudrutullah* v. *Emperor.*
4. (1926) 1926 Nag 459 (460) : 27 Cri L Jour 830, *Deoji* v. *Emperor.* Where the accused was separately charged under S. 325 (grievous hurt) and S. 149 (unlawful assembly), but there was no mention of S. 149 in the charge under S. 325. *Held*, that the irregularity was curable under S. 537.

Note 12.

1. (1926) 1926 Oudh 245 (247, 248) : 27 Cri L Jour 57, *Bhulan* v. *Emperor.*
2. (1928) 1928 Cal 675 (676) : 55 Cal 858 : 29 Cri L Jour 1022, *Satya Narain Mohata* v. *Emperor.*
(1867) 4 Bom H C R Cri 17 (22), *Reg* v. *Francis Cassidy.*

13. Defective charge—Effect of—*See* Section 225.

14. Form of charge in various offences—*See* Section 223.

15. Cases where no charge need be framed.

No charge is necessary to be framed in the following cases:—

1. Inquiries under S. 117 *ante*.
2. In trials of summons cases—*See* S. 242, and
3. In summary cases where no appeal lies (S. 263).

There is a difference of opinion as to whether there should be a definite charge in prosecutions under the Insolvency Acts. According to the Judicial Commissioner's Court of Nagpur it is not essential that there should be a definite charge, a finding and a conviction as a foundation for a sentence under the said provisions. All that the law requires is that the principles underlying a criminal trial should be observed. So where an insolvent proceeded against under that section was informed of the nature of the proceedings, and the offence with which he was charged, it was held that the essentials of criminal trial were sufficiently complied with.[1] The High Court of Calcutta[2] and the Chief Court of Punjab[3] have, however, taken a contrary view.

222.* (1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

Particulars as to time, place and person.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 234:

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*(**Code of 1882—S. 222**—*Same as Sub-section* 1.)
(*Sub-section* 2 *was added in* 1898.)

(**Code of 1872—S. 440.**)

440. The charge shall contain such particulars as to the time and place of the alleged offence and the person against whom it was committed, as are reasonably sufficient to give notice to the accused person of the matter with which he is charged.

Particulars as to time, place and person.

(**Code of 1861**—*Nil.*)

Note 15.

1. (1918) 1918 Nag 214 (214, 215) : 19 Cri L Jour 627, *Ganpaty* v *Chimnaji*.
2. (1915) 1915 Cal 117 (117) : 27 Ind Cas 199: 16 Cri L Jour 135, *Harihar Singh* v. *Moheshwar Prasad*.
3. (1916) 1916 Lah 182 (183) 17 Cri L Jour 318 (319) : 1916 Pun Re No. 110: *Nawab* v. *Gopan Ram*.
(1920) 1920 Cal 624 (625) : 21 Cri L Jour 481, *J. M. Lucas* v. *Official Assignee of Bengal*.

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Provided that the time included between the first and last of such dates shall not exceed one year.

Synopsis.

Other Topics.

Charge and proof. See Note 2, F-N (3).
Charge to be definite—Else bad. See Note 6, Pt. 5; Note 2 F-N (1).
Cheating a corporation. See Note 4, F-N (2) and (3).
Conspiracy. See Note 3 F-N (2).
Dates extending for more than a year—Illegal. See Note 6, Pt. 16.
Defamation—Particulars needed. See Note 3, F-N (1).
Defects in charge—Prejudice. See Sec. 225, Note 1, F-N (1).
Definite charges even in specification of gross sum. See Note 6, Pt. 5.
Different offences not to be clubbed. See Note 6, Pts. 14 and 15.
Finding as to definite sum misappropriated needed. See Note 6, Pt. 6 and F-N (6).
General deficiency in accounts. See Note 6, Pts. 2, 9 and F-N (1).
House-breaking — Particulars. See Note 2, F-N (3).
Joining of other offences. See Note 6, Pt. 15.
Jurisdiction. See Note 6, Pt. 19.
Offence must relate to money and not to other property. See Note 6, Pt. 12.
Offence under S. 193, I. P. C. See Note 3, F-N (1).
Person with whom unnatural offence was committed—To be stated. See Note 2, F-N (1).
Place of rioting to be stated. See Note 2, F-N (1).
Places—Too broadly stated—Effect. See Note 2, F-N (2).
Public servant—To be named. See Note 4, F-N (3).
Second date being subsequent to complaint, bad—*Quaere*. See Note 6 F-N (16).
Section inapplicable to other offences. See Note 6, Pts. 13 and 14.
Specification of different items. See Note 6, Pts. 7 and 8, F-N (1).
Sub-section 2—Scope, object, and effect. See Note 6.
Sufficiency of particulars. See Note 2, Pt. 2, Note 3.
Sufficient notice. See Note 2, Pt. 2, Note 3, Pt. 1.
Theft—Particulars. See Note 4, Pt. 1, F-N (1).
Time generally stated—Irregularity cured. See Note 3, F-N (2).
Time of adultery. See Note 3 F-N (2).
Waging war with King. See Note 3, F-N (1).
Within the meaning of S. 234 and not other sections. See Note 6, Pt. 18.

1. Legislative changes.

Differences between the Codes of 1861 *and* 1872:

There was no corresponding section in the Code of 1861. The section was first enacted in the Code of 1872 as S. 440.

Changes introduced in 1882:—

The *thing* in respect of which the offence was committed was made one of the matters in respect of which particulars were to be given in the charge.

Changes made in 1898:—

Sub-Section 2 was added. *See* Note 6.

2. Scope of the Section.

In addition to the particulars specified in S. 221 *ante* it is necessary, as provided by this Section, that the charge should contain particulars as to the time and place of the alleged offence and the person (if any) against whom and the thing (if any) in respect of which the offence is alleged to have been

committed.[1] Such particulars of the above points must be given as are reasonably sufficient to give the accused notice of the matter with which he is charged.[2] But the charge is not necessarily invalidated by the giving of *more* particulars than are absolutely necessary.[3]

As to the effect of an omission to state or error in the statement of the particulars required by this Section, *see* Ss. 225 and 232 *infra*. As to when the manner of the commission of the offence should be given in the charge, *see* S. 223 and notes thereunder.

3. Time of offence.

The time of the alleged offence should be given in the charge with as much particularity as is necessary to give the accused sufficient notice of the matter of which he is charged.[1] Where it is impossible to specify the particular date on which the offence was committed, it will be sufficient to state two

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Section 222—Note 2.

1. (1891) 15 Bom 491 (503, 504), *Queen Empress* v. *Fakirappa.*
(1919) 1919 Mad 487 (490, 497) : 20 Cri L Jour 354, *Kumaramuthu Pillai* v. *Emperor.*
(1919) 1919 Pat 27 (30) : 4 Pat L Jour 74 : 20 Cri L Jour 161, *Mt. Kesar* v. *Emperor.* Charge to be precise in scope and particular in detail.
(1916) 1916 Mad 571 (572) : 16 Cri L Jour 298 (299), *In re Mala Me Kalakati Subbadu.* Vagueness of charge, place and name of articles stolen etc., not mentioned, bad.
(1907) 6 Cri L Jour 446 (448, 449) (Lah), *Gowardhan Das* v. *Emperor.* Charge for rioting should set out the period, place and the common object.
(1864) 1 Suth W R Cri Letters 2 (2). Forms of charge in cases of rape indicated.

(1884) 6 All 204 (207), *Empress* v. *Khairati.* Charge under S. 377, I. P. C., should allege the time when, the place where and any known or unknown person with whom the particular act charged as offence under S. 377 was committed.
(1912) 13 Cri L Jour 504(504):15 I C 648(Mad), *Govinda Reddy* v. *Emperor.* Charge under Rule 8 of S. 26 of the Madras Forest Act should state that the place where the tree was cut was reserved land.
(1894) Ratanlal 710 (713), *Empress* v. *Abdul Razak.* Place of the rioting should be stated.
(1874) Ratanlal 80 (80, 81), *Reg* v. *Gokuldas.* Charge under Indian Penal Code Ss. 193, 194 should specify before what court the alleged false statement was made.

2. (1902) 15 C P L R 112 (113), *Emperor* v. *Vinayak Jageshwar.* Charge of house trespass at Nagpur is too vague.
(1879) 1879 Pun. Re. No. 18 page 53, *Sher Ali* v. *Empress.* Charge of criminal conspiracy within limits of determinate area (e. g. a village) is not too vague.

3. (1878) 2 Weir 267 (268). Charge of breaking into a house with intent to commit theft. Mention of house-owner's name proper though not quite necessary.
[See also (1867) 4 Bom H C R 17 (22, 24). Unnecessary allegations in charge may be rejected as surplusage, and it is not necessary to prove them in order to sustain the charge.]

Note 3.

1. (1903) 30 Cal 402 (404), *Bishwanath Das* v. *Kesheb Gandhabanik.* The charge for defamation should contain the particular occasion on which the defamation was committed.
(1930) 1930 Sind 62 (63, 64) : 30 Cri L Jour 1073, *Ali Mahomed* v. *Emperor.* Number of instances in which the accused defamed the complainant—Charge should make clear which particular incident is being alluded to.
(1868) 10 Suth W R 37 (38), *Queen* v. *Futteali Biswas.* Charge under S. 193, I. P. C. The judicial proceeding and the particular stage of the judicial proceeding should be stated.
(1871) 16 Suth W R 47 (47), *Queen* v. *Moharaj Misser.* Charge of giving false evidence—The exact date in which, the Court or officer before whom, and the stage at which the evidence was given, should be alleged.
(1925) 1925 Mad 690 (691) : 26 Cri L Jour 1513 : 49 Mad 74, *Gam Mallu Dora alias Malayya, In Re.* Offence of waging war against the King — Single general charge without giv-

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dates between which the offence was committed.[2]

As to the effect of error or omission in regard to this particular, *see* Ss. 225 and 232.

4. Person against whom offence was committed.

The charge should also state with sufficient clearness the *person*, if any, against whom the alleged offence was committed. Thus, in a case of theft, the charge should state the person whose property was stolen.[1] Similarly, in a charge of cheating, the name of the person cheated must be stated.[2] *See also* the undermentioned cases.[3]

5. Thing in respect of which offence was committed.

Where the offence is committed in respect of any thing, the charge should specify the thing with sufficient particularity. For instances, *see* the undermentioned cases.[1]

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ing date held bad.

2. (1924) 1924 Cal 616 (617) : 25 Cri L Jour 997 : 51 Cal 488, *Bhola Nath Mitter* v. *Emperor*. Charge of adultery—Impossibility to specify the particular date when intercourse took place. It is sufficient to specify two dates between which the offence was committed.
(1915) 1915 Lah 16 (19) : 16 Cri L Jour 354 (357, 388, 398): 1915 Pun. Re. No. 17, *Bal Mokand* v. *Emperor*. Conspiracy—Specification of exact date of inauguration not necessary as in most cases it would be impossible to give. [See also (1926) 1926 Pat 347 (347) : 27 Cri L Jour 909, *Farzand Ali* v. *Emperor*. Charge of cheating—Month only given — Held irregularity is cured by S. 537].

Note 4.

1. (1865) 2 Suth W R Cri Letters 5 (5).
(1865) 2 Suth W R Cri Letters 15 (15). Form of charge in cases of theft or breach of trust by a servant indicated.
2. (1862-63) 1 Mad H C R 31 (34, 37), *Reg* v. *Williams*.
(1924) 1924 Cal 18 (41) : 25 Cri L Jour 1313, *P. E. Billinghurst* v. *Emperor*. Charge under S. 420, I. P. C. should state, the person or persons deceived and induced to issue a cheque.
(1904) 1 Cri L Jour 124 (129) (Cal), *Emperor on the prosecution of Hurjee Mull* v. *Imam Ali Sircar*. Attempt to cheat—Person intended to be cheated and manner of cheating should be set out in the charge.
[See also (1924) 1924 Cal 495 (498) : 26 Cri L Jour 330 : 51 Cal 250, *Supdt. and Remembrancer of Legal affairs, Bengal* v. *Manmatha Nath Bhusan Chatterjee*. Offence of cheating a corporation.]
3. (1892) 19 Cal 105 (110), *Ferasat* v. *Empress*. Charge under S. 152, I. P. C.—Particular public servant assaulted should be named.
(1866) 5 Suth W R Cri L 6 (6). Charge under S. 221, I. P. C. should state the names of the men suffered or ordered to escape—Charge for causing hurt should state the person to whom hurt was caused.
(1863) 1 Bom H C R 95 (96), *Reg* v. *Siddu Bin Balnath*. Charge under S. 411, I. P. C.—The name of the owner must be specified.
(1926) 1926 Sind 129 (129) : 27 Cri L Jour 32 : 20 S L R 3, *Hyder* v. *Emperor*. (Do).
(1868) 10 Suth W R 63 (64), *Empress* v. *D. Sheikh*. Person hurt must be specified.
(1870) 14 Suth W R 13 (13), *Queen* v. *Parbutty Charn Chackerbutty*. Charge under S. 403, I. P. C. should state the person whose property was dishonestly appropriated or converted.
(1865) 2 Suth W R Cri L 7 (7). Person from whom money was extorted should be stated — The public servants to whom false information was given should be stated.
(1934) 1934 Sind 57 (59) : 28 S L R 119 : 35 Cri L Jour 1337, *Dur Mohammad* v. *Emperor*. Charge of conspiracy—Defrauding *public* by deceitful means mentioned—Persons defrauded not specified—Charge not bad.
[See (1905) 2 Cri L Jour 381 (381) (Mad), *Anantha Goundan* v. *Emperor*. Imputation of unchastity to a married woman — Charge stating husband as the person defamed—Not bad].

Note 5.

1. (1890) Ratanlal 529 (530), *Empress* v. *Nathu Lalji*. Accused, having been summoned to answer a charge of storing *wool* under the City of Bombay Municipal Act of 1888, was convicted of storing *cotton*. *Held*, that the conviction was illegal, the accused having had no opportunity of meeting the latter charge.

6. Sub-section 2—Charge of criminal breach of trust or dishonest misappropriation.

Prior to the enactment of Sub-S. 2 in the Code of 1898 there was a conflict of decisions[1] as to whether, in a case of criminal breach of trust or dishonest misappropriation of money, it was necessary to frame a distinct charge in respect of each item of money misappropriated or whether it was sufficient to frame a charge in respect of the aggregate sum misappropriated though it might be composed of different items misappropriated on different occasions. This conflict is set at rest by the enactment of this sub-section. Where a person commits criminal breach of trust or dishonest misappropriation in respect of various sums at different times in the course of a single year, he may now be charged in respect of the total of all the sums as for a single offence without specifying the items of which it is composed or the dates on which they were misappropriated.[2] The amendment has removed two difficulties which used to be felt under the old Code.[3] Firstly, there was great difficulty in convicting

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(1906) 3 Cri L Jour 153 (159) : 33 Cal 295, *Pares Nath Sircar* v. *Emperor*. Charge under S. 147, I. P. C. should state the property in respect of which the riot is said to have taken place.

(1890) 15 Bom 189 (194), *Empress* v. *Abaji Ramchandra*. Charge under S. 475, I. P. C. It should state the particular papers, bearing a counterfeit mark or device, which the accused had in his possession with the intent mentioned in the Section.

(1935) 1935 Oudh 475 (475, 476): 36 Cri L Jour 1206, *Shakur* v. *Emperor*. Charge under S. 411, I. P. C. (receiving stolen property) must specify the articles alleged to be dishonestly received or retained.

Note 6.

1. *Cases holding that for each item there must be a separate charge* :—

(1871) 15 Suth W R Cri 5 (5), *In re C. A. Chettor*.

(1897) 2 Cal W N 341 (346), *Ekaram Ali* v. *Empress*.

(1897) 24 Cal 193 (196), *Empress* v. *Pursotham Dass Morarjee*.

(1875) 7 N W P H C R 196 (199), *Queen* v. *Dukaran*.

(1887) 14 Cal 128 (131, 132), *Lachminarain in the matter of*. So assumed in this case.

Cases holding that it was enough if the aggregate amount was specified :—

(1893) Ratanlal 659 (664, 665, 666, 667), *Empress* v. *Waman*.

(1895) 18 All 116 (118) (17 All 153 followed), *Budhu* v. *Babulal*.

(1895) 17 All 153 (155), *Empress* v. *Kellie*.

2. (1929) 1929 Cal 175 (175) : 30 Cri L Jour 706, *Anil Krista Das* v. *Badam Santra*.

(1932) 1932 Oudh 145 (147) : 6 Luck 435 : 33 Cri L Jour 343, *Shiam Sundar* v. *Emperor*.

(1910) 11 Cri L Jour 442 (443) : 7 I C 186: 33 All 36, *Emperor* v *Ebrahim Khan*.

(1907) 5 Cri L Jour 133 (135) : 29 Mad 558, *Thomas* v. *Emperor*.

(1905) 2 Cri L Jour 578 (580) : 30 Bom 49, *Emperor* v. *Datto Hanmant*.

(1906) 3 Cri L Jour 138 (139, 140) : 32 Cal 1085, *Sat Narain Tewari* v. *Emperor*.

(1904) 1 Cri L Jour 637, (638) : 27 All 69, *Emperor* v. *Ishtiaq Ahmad*.

(1904) 1 Cri L Jour 791 (793) : 31 Cal 928, *Samiruddin Sarkar* v. *Nibaran Chandra Ghose*.

(1927) 1927 Cal 409 (409) : 28 Cri L Jour 469, *Harendra Kumar Ghosh* v. *Emperor*.

(1902) 24 All 254 (255), *Emperor* v. *Gulzari Lal*.

(1931) 1931 All 267 (268) : 52 All 941 : 32 Cri L Jour 155 : *Emperor* v. *Prem Narain*.

(1908) 8 Cri L Jour 160 (160) : 1 Sind L R 38, *Emperor* v. *Ali Bux*.

(1934) 1934 Pat 232 (233) : 13 Pat 170 : 35 Cri L Jour 876, *Ramkishen Pershad* v. *Emperor*.

(1935) 1935 Nag 178 (179) : 31 Nag L R 337: 36 Cri L Jour 1216, *G. S. Ramsheshan* v. *Emperor*.

[See also (1912) 13 Cri L Jour 15 (16), *In re Theophilus Ramappa*. Where person receives money for the express purpose of using it for his master's benefit in a particular way, he is entrusted with money, and his appropriation of it to himself amounts to criminal breach of trust and not cheating.

(1935) 1935 Cal 312 (314) : 62 Cal 803, *Kashiram Jhunjhunwalla* v. *Hurdat Rai*. Acts of misappropriation may be treated as constituting "same transaction" for purpose of S. 235.

3. (1925) 1925 Cal 260 (261) : 26 Cri L Jour

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an accused person where there was a running account between the parties and the prosecution was unable to specify the particular item in respect of which the offence was committed. This difficulty has been removed by the provision that it is not necessary to specify the items in respect of which the offence was committed and that it is enough to mention the *gross sum* in respect of which the offence was committed. The second difficulty was that under S. 234 more than three offences of the same kind could not be tried at the same trial. Hence, in the absence of any provision enabling the clubbing together of different items it was found impossible to try at one trial more than three acts of criminal breach of trust or dishonest misappropriation though committed in the course of the same year and by the same accused. The provision that a charge may be laid for the gross sum of which the different items (misappropriated in a single year) are composed and that such a charge constitutes only a charge for a *single* offence for the purpose of S. 234 has now removed this difficulty.

Though the sub-section dispenses with the specification of particular items or the dates on which they were misappropriated, it requires the gross sum alleged to have been misappropriated and the dates between which the offence is alleged to have been committed to be specified in the charge; a charge which does not specify even these particulars will be bad.[4] Similarly, the sub-section does not in any way affect the principle that the accused must have a definite charge to answer; a charge which contains the gross sum and the dates as mentioned in this sub-section may yet be bad as being too vague.[5] Nor does the section dispense with the necessity of a finding as to a definite sum having been misappropriated *before the accused can be convicted*.[6]

The sub-section does not *prohibit* the specification of particular items misappropriated where a gross sum is given as the subject-matter of the offence.[7] Nor does the fact that particular items are specified in the charge detract from its character as a charge for a single offence and convert it into a charge for as many offences as there are items particularised.[8]

The sub-section only provides that if and when a charge is laid for a gross sum instead of for particular items, the charge is to be treated as a charge for a single offence irrespective of the number of items of which the gross sum is composed. It does not prohibit the framing of different charges in

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532, *Khirode Kumar Mukerjee* v. *Emperor*.

(1932) 1932 Oudh 145 (147) : 6 Luck 435 : 33 Cri L Jour 343, *Shiam Sunder* v. *Emperor*.

4. (1927) 1927 Lah 109 (109) : 28 Cri L Jour 170, *Emperor* v. *Abdur Rahman*.

(1935) 1935 Oudh 273 (275) : 36 Cri L Jour 518, *Piary Lal* v. *Emperor*.

5. (1907) 6 Cri L Jour 137 (138, 139), *Mahommad Shah* v. *Emperor*.

6. (1920) 1920 All 274 (275) : 22 Cri L Jour 84 : 59 I C 372 : 42 All 522, *Mohan Singh* v. *Emperor*.

(1925) 1925 Cal 260 (261) : 26 Cri L Jour 532 : 85 I C 372, *Hirode Kumar Mukerjee* v. *Emperor*.

[But see (1928) 1928 Bom 148, (148, 149, 150) : 29 Cri L Jour 407 : 52 Bom 280, *Emperor* v. *Byramji Jamsetji Chaewalla*. Accused can be convicted where prosecution establishes that some of the money mentioned in the charge has been misappropriated by him even though it may be uncertain what is the exact amount so misappropriated.

7. (1904) 1 Cri L Jour 791 (793) : 31 Cal 928, *Samiruddin Sarkar* v. *Nibaran Chandra Ghose*.

(1905) 2 Cri L Jour 578 (580) : 30 Bom 49, *Emperor* v. *Datto Hanmant*.

(1930) 1930 Cal 717 (718) : 32 Cri L Jour 321, *Rahim Bux Sarkar* v. *Emperor*.

(1934) 1934 Pat 232 (233) : 13 Pat 170 : 35 Cri L Jour 876, *Ramkishen Pershad* v. *Emperor*.

8. (1927) 1927 Lah 109 (109) : 28 Cri L Jour 170, *Emperor* v. *Abdur Rahman*.

(1904) 27 All 69 (70), *Emperor* v. *Ishtiaq Ahmad*.

respect of different items;[9] nor permit such charges when framed to be treated as a charge for a single offence.[10] It applies not only to cases where there is a general deficiency and the prosecution is not able to specify particular items but also to cases where the particular items might have been, but are not specified.[11]

The Sub-Section only applies to cases of criminal breach of trust or dishonest misappropriation in respect of *money*. Where the offence has been committed in respect of any other property, the sub-section does not apply.[12]

The Sub-Section applies only to offences of *criminal breach of trust or dishonest misappropriation*.[13] Thus, where the accused is alleged to have obtained on different occasions several sums from the complainant by false pretences, a single charge of cheating in respect of all the items is not tenable.[14] So also, this sub-section does not apply to cases where the accused is charged with criminal breach of trust or criminal misappropriation *and* some other offence, such as falsification of accounts, cheating, etc. The provision enabling different items to be lumped together and be charged as a single offence in the case of a criminal breach of trust or dishonest misappropriation cannot be made use of to justify a joint trial of such offence with an offence of a different character.[15]

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9. (1910) 11 Cri L Jour 337 (339) 5 I C 970 (Bom), *Emperor* v. *Kashinath Bagaji Sali.*
   (1930) 1930 Mad 978 (980) : 32 Cri L Jour 223, *Kanakayya* v. *Emperor.*
10. (1926) 1926 Bom 110 (114) : 49 Bom 892 : 27 Cri L Jour 305, *Emperor* v. *Manauk K. Mehta.*
    (1931) 1931 Rang 161 (162) : 32 Cri L Jour 1068, *Siva Subramanian* v. *Emperor.*
    (1931) 1931 Oudh 86 (88) : 6 Luck 441 : 32 Cri L Jour 540, *Dubri Missar* v. *Emperor.*
    (1933) 1933 Nag 327 (327) : 34 Cri L Jour 673, *Rameshwar Brijmohan* v. *Emperor.*
    [See also (1907) 5 Cri L Jour 341 (342) (Mad), *Kasi Viswanathan* v. *Emperor.*
11. (1907) 5 Cri L Jour 133 (135) : 29 Mad 558, *Thomas* v. *Emperor.*
12. (1922) 1922 Oudh 280 (280) : 26 Oudh Cas 4 : 24 Cri L Jour 10, *Sarju Prasad* v. *King Emperor.* Charge for criminal breach of trust of some ornaments—Particular acts of breach of trust must be set out.
    (1911) 12 Cri L Jour 567 (567) : 12 I C 655 (Mad), *Raghavendra Rao* v. *Emperor.* Does not apply to criminal appropriation of timber.
    (1918) 1918 Cal 233 (234) : 18 Cri L Jour 310 (311), *Asrafulla Sarkar* v. *Emperor.* Misappropriation of specific articles.
    (1927) 1927 All 223 (224) : 49 All 312 : 28 Cri L Jour 171, *Raman Lal* v. *Emperor.* Criminal breach of trust of ornaments.
    [See (1928) 1928 Bom 521 (521) : 30 Cri L Jour 329, *Dwarkadas Haridas* v. *Emperor.* Criminal breach of trust in respect of *Money*—What is —Agent entrusted with goods for sale misappropriating the sale proceeds is within the Section.]
    [See also (1908) 7 Cri L Jour 372 (374) : 35 Cal 161, *Bipra Das Giri* v. *Niradamoni Bewa.* Charge under S. 406, I. P. C. in respect of some deeds not good.]
13. (1931) 1931 Pat 102 (103) : 32 Cri L Jour 611, *Abdur Rahim* v. *Emperor.*
    (1926) 1926 Bom 110 (113) : 49 Bom 892 : 27 Cri L Jour 305, *Emperor* v. *Manauk K. Mehta.* Does not apply to the offences of falsification of accounts S. 477-A, I. P. C.
    (1915) 1915 Cal 296 (296) : 15 Cri L Jour 153 (154) : 41 Cal 722, *Raman Behary Das* v. *Emperor.* (Do).
    (1933) 1933 Nag 327 (327) : 34 Cri L Jour 673, *Rameshwar Brijmohan* v. *Emperor.* (Do).
    (1912) 13 Cri L Jour 21 (22) : 13 I C 213 (Mad), *Lakshminarain Apuram* v. *Emperor.* (Do).
    (1907) 5 Cri L Jour 341 (342) : 30 Mad 328, *Kasi Viswanathan* v. *Emperor.* (Do).
    (1899) 26 Cal 560 (564), *Queen Empress* v. *Mati Lal Lahiri.* (Do).
    (1902) 4 Bom L R 433 (434), *Emperor* v. *Nathalal Bajuji.* (Do).
    (1900) 10 Mad L Jour 147 (186), *N. A. Subramania Iyer* v. *Emperor.* Sub-S. 2 does not apply to the offence of bribery or extortion.
14. (1904) 1 Cri L Jour 977 (978, 979) (All), *Raja Khan* v. *King Emperor.*
    (1931) 1931 Pat 102 (103) : 32 Cri L Jour 611, *Abdur Rahim* v. *Emperor.*
15. (1907) 5 Cri L Jour 341 (342) : 30 Mad 328, *Kasi Viswanathan* v. *Emperor.*

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The sub-section requires that the period during which the offence is alleged to have been committed should not exceed *one year*. Thus, where the dates of misappropriation of the various items extend over a period of more than one year, they cannot all be lumped together in the same charge.[16]

The provision enabling it to be stated that the offence was committed *between* certain dates (instead of *on* a certain date) applies not only to cases where different items are alleged to have been misappropriated on different occasions and a charge is framed in respect of the gross sum made up of the different items, but also to cases where a *specific sum* is alleged to have been the subject of the offence.[17]

Where a single charge is framed under this section in respect of the embezzlement of different sums it is only a *single sentence* that can be passed on the accused; a separate sentence cannot be passed in respect of each of the items included in the charge.[18]

Under Section 181, sub-s. 2 a charge of criminal misappropriation or criminal breach of trust can be tried or inquired into either at the place where the offence was committed or at the place where any part of the property was received or retained by the accused. As this sub-section (of S. 222) enables any number of acts of misappropriation committed in the course of the same year to be combined in the same charge, jurisdiction to try the charge arises at any place where the offence was committed in respect of any of the items included in the charge or at any place where the money involved in the misappropriation of any of the items was received or retained by the accused.[19]

7. Applicability of Sub-Section 2 to cases where there are two or more accused persons.

There is a conflict of decisions as to the applicability of sub-s. 2 to cases where two or more persons are accused of criminal breach of trust or dishonest misappropriation so as to enable a single charge being framed in respect of the total sum misappropriated in a given period where such sum is made up of several items misappropriated on different occasions. On the one hand, it has been held by the Calcutta High Court that the sub-section contemplates only cases in which there is only *one* accused person and that where there are

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(1915) 1915 All 462 (462) : 38 All 42 : 16 Cri L Jour 813, *Kalka Prasad* v. *Emperor.*

(1926) 1926 Bom 110 (113) : 49 Bom 892 : 27 Cri L Jour 305, *Emperor* v. *Manauk K. Mehta.*

(1919) 1919 Lah 440 (441) : 19 Cri L Jour 187, *Emperor* v. *Jagat Ram.*

(1915) 1915 Cal 296 (296) : 15 Cri L Jour 153 (153, 154) : 41 Cal 722 : 22 I C 729, *Raman Behary Das* v. *Emperor.*

(1931) 1931 Rang 161 (162) : 32 Cri L Jour 1068, *Siva Subramaniam* v. *Emperor.*

(1908) 8 Cri L Jour 4 (5) : 30 All 351, *Emperor* v. *Mata Prasad.*

[See (1917) 1917 *Mad* 612 (612) : 17 Cri L Jour 369 (369), *In Re Krishnamurthi Ayyar.*

16. (1913) 14 Cri L Jour 219 (223) : 19 I C 315 (Cal), *Promothanath Ray* v. *Emperor.*

(1905) 2 Cri L Jour 130 (131) : 1905 Pun. Re. No. 14, *Dhanjibhay* v. *Karim Khan.*

(1935) 1935 Oudh 241 (244) : 36 Cri L Jour 477, *Munnoo Lal* v. *Emperor.* Accused prejudiced — Conviction set aside.

(1934) 1934 Pat 132 (133) : 35 Cri L Jour 693, *Deonarian Singh* v. *Emperor.* Conviction set aside as period exceeded one year.

[See (1924) 1924 Cal 908 (909) : 25 Cri L Jour 1058, *Harry Jones* v. *Emperor. Quaere*: Whether a charge under Penal Code, S. 409, is altogether bad as alleging an offence between two dates, the last of which is after the date of the complaint.]

17. (1928) 1928 Bom 557 (560) : 53 Bom 119 : 30 Cri L Jour 185 *Vinayak Laxman Bhatkande* v. *Emperor.*

18. (1931) 1931 All 267 (268) : 52 All 941 : 32 Cri L Jour 155, *Emperor* v. *Prem Narain.*

19. (1932) 1932 All 26 (27) : 33 Cri L Jour 127, *Sunder Lal* v. *Emperor.*

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two or more accused persons in a case, separate charges must be framed in respect of the several items as for different offences.[1] The Madras High Court has on the other hand, held that there is no reason to restrict the scope of the sub-section in this way and even in cases where there are two or more accused persons in a case it is open to the Court to lump together the different items misappropriated on different occasions and frame a single charge in respect of the total sum composed of the different items.[2] But where the charge alleges that some of the accused took part in the misappropriation only in respect of *some* of the items of which the total sum is composed the sub-section has no application and a single charge cannot be framed so as to cover the acts of all the accused.[3]

8. Charge under Sub-section 2—Whether trial for another item misappropriated during same period is barred.

Where an accused is charged under sub-S. 2 with criminal breach of trust in respect of a gross sum alleged to have been misappropriated by him between two given dates and is convicted or acquitted of such charge, he can be tried *again* in respect of another sum of money alleged to have been misappropriated by him during the same period but not included in the sum which was the subject matter of the previous trial.[1] Such a trial is not barred under S. 403 *infra*. The reason is that in such a case the subsequent trial is not for the same offence as formed the subject of previous trial. *A fortiori*, where the previous trial was not for a gross sum misappropriated between two dates but was for misappropriation of specific sums of money received on specific dates, a fresh trial for another offence in respect of a different sum of money said to have been misappropriated about the same time is not barred.[2]

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223.* When the nature of the case is such that the particulars mentioned in Sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

When manner of committing offence must be stated.

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*(**Code of 1882, S. 223**, and **Code of 1872, S. 441**—*Same.*)

(**Code of 1861**—*Nil.*)

Note 7.

1. (1912) 13 Cri L Jour 506 (507) : 15 Ind Cas 650 (Cal), *Girwar Narain* v. *Emperor*. [See also (1907) 6 Cri L Jour 442 (444) (Cal), *Tilak Dhari Das* v. *Emperor*.]
2. (1917) 1917 Mad 524 (525) : 17 Cri L Jour 30 (31), *In Re Appadurai Ayyar*.
3. (1931) 1931 Rang 90 (93, 94) : 8 Rang 632 : 32 Cri L Jour 930, *Meeriah* v. *Emperor*.

Note 8.

1. (1923) 1923 Cal 654 (656) : 50 Cal 632 : 25 Cri L Jour 156, *Nagendra Nath Bose* v. *Emperor*.
   (1931) 1931 All 209 (209) : 53 All 411 : 32 Cri L Jour 376, *Brijiwan Das* v. *Emperor*.
   (1910) 11 Cri L Jour 337 (339) : 5 Ind Cas 970 (Bom), *Emperor* v. *Kashinath Bagaji Sali*.
   [But see (1917) 1917 Mad 524 (525) : 17 Cri L Jour 30 (32), *In Re Appadurai Ayyar*.]
   [See also (1929) 1929 Cal 457 (459) : 57 Cal 17 : 31 Cri L Jour 747, *Sidh Nath Awasthi* v. *Emperor*.]
2. (1930) 1930 Mad 978 (979) : 32 Cri L Jour 223 : *Kanakayya* v. *Emperor*.

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Note 1

Illustrations.

(*a*) *A* is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(*b*) *A* is accused of cheating *B* at a given time and place. The charge must set out the manner in which *A* cheated *B*.

(*c*) *A* is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by *A* which is alleged to be false.

(*d*) *A* is accused of obstructing *B*, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which *A* obstructed *B* in the discharge of his functions.

(*e*) *A* is accused of the murder of *B* at a given time and place. The charge need not state the manner in which *A* murdered *B*.

(*f*) *A* is accused of disobeying a direction of the law with intent to save *B* from punishment. The charge must set out the disobedience charged and the law infringed.

Synopsis.

Other Topics.

Notice of the charge. See Note 1, Pt. 1.
Particulars as to the manner of commission. See Note 1, Pts. 3 to 7.
Particulars in case of abetment. See Note 17, F-N (1).
Particulars in Criminal conspiracy. See Note 17, F-N (1)
Public justice, offences against. See Note 17, F-N (1).
Vague charges. See Note 1, Pt. 1b.

1. Scope of the Section.

The description of offences in the Penal Code must of necessity be expressed in abstract terms, but the very object of the trial is to determine whether particular acts or omissions on the part of an accused fall or do not fall within the rule thus abstractedly stated.[1a] Conformably to this principle this Section lays down that, in cases in which the particulars in Ss. 221 and 222 *ante* are not sufficient to give the accused notice of the matters charged against him, the *manner* in which the offence was committed should also be stated in the charge.[1b] The models of charges set forth in Sch. V also contain or imply the setting forth with reasonable particularity of the matters alleged to constitute the offence. Thus, where an accused was charged that he "being a public servant knowingly disobeyed the direction of the law as to the way in which he had to conduct himself, etc.," it was held that the charge should set forth *what* the *direction* was and what the conduct was which contravened it.[1c]

Section 223—Note 1.

1a (1878) 2 Bom 142 (144), *Imperatrix* v. *Baban Khan.*

1b [See (1935) 1935 Sind 34 (37): 28 Sind L R 304: 36 Cri L Jour 598, *Ghousbux Mahomed Amin Khan* v. *Emperor* Good charge should contain particulars of manner in which offence is committed.]

1c (1878) 2 Bom 142 (144), *Imperatrix* v. *Baban Khan.*

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As has been seen in Notes to S. 221, the object of these sections is *firstly* to ensure that the accused has sufficient notice of the matter with which he is charged as otherwise he will be seriously prejudiced in his defence[1] and *secondly* to enable the Court to keep in view the real points in issue and to confine the evidence to such points.[2]

The section does not require that the manner in which the alleged offence was committed must be described in the charge in every case. When the nature of the case is such that the mere mention of the particulars specified in Sections 221 and 222 affords sufficient notice to the accused of the matter with which he is charged, this section does not apply and particulars as to the *manner of commission* of the alleged offence need not be given in the charge.[3] No general rule, however, can be laid down as to in what cases such particulars will be necessary, the matter depending on the circumstances of each case.[4]

As to the *extent* to which particulars of the manner of commission of an offence should be given in a charge, no hard and fast rule can be laid down. Each case must depend on its own circumstances, regard being had to the question whether the particulars given are such as to give the accused *sufficient notice of the matter he has to meet*.[5] Besides, the charge must allege all facts which are essential factors of the offence in question (*See*

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1. (1869) 1869 Pun Re No. 36 page 65, *Mewa Sing* v. *Crown*. Charge must be as definite and specific as possible.
   (1885) 11 Cal 106 (109, 110), *Behari Mahaton* v. *Empress*. Accused entitled to know with certainty and accuracy exact nature of the charge brought against him. Unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases; but it is more especially true in cases where it is sought to implicate an accused person for acts not committed by himself but by others with whom he was in company.
   (1890) 15 Bom 491 (503, 504), *Empress* v. *Fakirappa*.
   (1878) 2 Bom 142 (144), *Imperatrix* v. *Baban Khan*. Very object of trial is to determine whether particular acts or omissions on the part of the accused fall or do not fall within the rule thus abstractedly stated.
   (1867) 8 Suth W R Cri 95 (96), *In re Dowlat Moonshee*.
   (1916) 1916 Cal 188 (192): 16 Cri L Jour 497 (501): 42 Cal 957, *Amritlal Hazara* v. *Emperor*.
   (1916) 1916 All 60 (60): 17 Cri L Jour 411 (411), *Ram Chandar Sahai* v. *Emperor*.
   (1868) 10 Suth W R 37 (38), *Empress* v. *Fatte Ali Biswas*.
   (1918) 1918 All 322 (323): 19 Cri L Jour 35, *Sital* v. *Emperor*. In a case where it is doubtful what offence has been really committed by the accused, it is especially necessary that the charge should be clearly framed.
   (1923) 1923 All 325 (326): 24 Cri L Jour 197, *Abdul Wahid* v. *Abdullah*.
   (1925) 1925 Cal 603 (603, 604): 26 Cri L Jour 849, *Kedarnath Chakravarti* v. *Emperor*. Necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure.
   (1928) 1928 Cal 675 (676): 55 Cal 858: 29 Cri L Jour 1022, *Satya Narain Mohalla* v. *Emperor*. In order to convict a man of an offence, all the material facts which constitute the offence, and which are necessary to enable the parties to avail themselves of the verdict and judgment should the same charge be again brought forward, must be stated.
   (1919) 1919 Pat 27 (30): 4 Pat L Jour 74: 20 Cri L Jour 161 (F B), *Mt. Kesar* v. *Emperor*. Charges, to be precise in their scope and particular in their details.
   (1922) 1922 Pat 5 (7, 8): 23 Cri L Jour 114, *Bal Kesar* v. *Emperor*.
2. (1918) 1918 Pat 448 (450, 451): 19 Cri L Jour 169, *Ramdhari Singh* v. *Emperor*.
   (1869) 1869 Pun Re No. 36 page 65, *Mewa Singh* v. *The Crown*.
3. (1916) 1916 All 60 (60): 17 Cri L Jour 411 (411), *Ramchandar Sahai* v. *Emperor*.
4. (1912) 13 Cri L Jour 218 (219): 39 Cal 781, *Kiramatullah* v. *Emperor*.
5. (1925) 1925 Cal 603 (603, 604): 26 Cri L Jour 849, *Kedarnath Chakravarthi* v. *Emperor*.

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Section 221).[6] But a charge should not be prolix and rambling and should not contain unnecessary allegations.[7]

As to the effect of error or omission in regard to the statement of the particulars required by this Section: *See* Sections 225, 232 and 537 and notes thereunder.

(1870) 14 Suth W R Cri 13 (13), *Empress* v. *Parbutty Charan Chakrabutty.* Prisoner could be little prejudiced by the informal character of the charge if offence is stated in such a way that cannot reasonably be mistaken.
[See also (1893) Ratanlal 659 (666, 667), *Empress* v. *Waman.* If it is certain on the evidence, that there has been an offence, the Code is sufficiently wide in its provisions to enable a charge of such offence to be framed and does not require the prosecution to furnish for such charge more particulars than under the circumstances it can reasonably be expected to know].

(1864) 1 Suth W R Cri Letters 13 (13, 14), Words *et caetera* are inadmissible in charges—Explicit and full statements such as can easily be intelligible to an accused are always requisite in charges.

(1865) 2 Suth W R Cri Letters 5 (5). Mere mention of section under which accused is charged is not enough.

(1865) 2 Suth W R Cri Letters 11 (11). (Do).

(1933) 1933 Cal 676 (677): 60 Cal 1394: 34 Cri L Jour 1219, *Rajabuddin Mondal* v. *Emperor.* It is not sufficient merely to charge the accused in the bare words of a section of the Code.
[See (1910) 11 Cri L Jour 274 (275): 3 Ind Cas 344 (F B) (Mad), *In re Ganapathy Sastri.* Charges against legal practitioner in proceedings under Legal Practitioners Act must be precise and clear.]

(1910) 11 Cri L Jour 303 (303, 304): 6 Ind Cas 269 (P C), *In re Chanda Singh.* (Do.).

6. (1897) Ratanlal 921 (921), *Empress* v. *Punya Sakharam,* (Under S. 398 I P C the carrying of arms must be distinctly alleged in the charge.)

(1864) 1 Suth W R Cri Letters 9 (9). Charge under S. 109, I. P. C., should state that the act abetted was committed in consequence of the abetment.

(1864) 1 Suth W R Cri Letters 13 (13, 14), (Do).

(1865) 2 Suth W R Cri Letters 19 (19, 20), Charge under S. 471 and, if as would seem to be the case, S. 468 is alluded to with a view to specify the punishment, to which liability is incurred, the charge should have contained the words "punishable under S. 471 coupled with S. 468" and should contain the description of the document.

(1862) 3 Suth W R Cri Letters 7 (7). To bring charge under S. 467 the document forged should have been one of those described in that section and this should be stated in the charge.

(1865) 3 Suth W R Cri Letters 8 (8), Charge under S. 149, I. P. C., read with another section. Charge should state that an offence was committed "in prosecution of the common object," and not while the accused was a "member" of the unlawful assembly.

(1870) 14 Suth W R Cri 13 (14), *Empress* v. *Parbutty Charan Chakrabutty.* Where fraud or dishonesty is an ingredient of an offence, charge should specifically refer to fraud or dishonesty.

(1871) 16 Suth W R 53 (54), *Empress* v. *Mehar Dowalia.* Charge under S. 451, I. P. C., should be for mere trespass with intent to commit some specific offence punishable with imprisonment. If this is omitted then nothing remains but a charge for house trespass.

(1867) 8 Suth W R Cri 30 (30), *Empress* v. *Durbarro Police.* Charge under S. 436, I. P. C., charge of mischief by fire, with intent to cause destruction of dwelling house, should lay the intent as an intent to cause the destruction, not of a house *simply,* but of a house used as a human dwelling.

(1911) 12 Cri L Jour 483 (483): 12 Ind Cas 91 (Lah), *Lala* v. *Emperor.* Charge did not set out the motive of the house-breaking—Charge does not come within the provisions of S. 457

(1865-1867) 3 Bom H C App 1 (25), *Vothoba Malhari* v. *Corfield.* Charge under Bombay Regulation 1 of 1814 against servant absenting himself should set out that the accused left his employer's service without giving the required warning and without lawful excuse.

7. (1926) 1926 Oudh 245 (247, 248): 27 Cri L Jour 57, *Bhulan* v. *Emperor.*

(1866-1867) 4 Bom H C R 17 (22), *Reg* v. *Camidy.* Unnecessary allegations in a charge may be rejected as surplusage. It is not necessary for

2. Mode of framing charge in various cases—*See* Notes 3 to 9.

3. Offence of giving false evidence.

A charge of giving false evidence should be very carefully drawn up and must contain full particulars of the *manner* in which the offence was committed.[1] It should specify the *particular statements* which are alleged to be false.[2] Merely setting out the *entire deposition* without specifying what portions thereof are false is not enough.[3] Where a person is accused of giving false evidence on *several occasions* each occasion should form the subject of a distinct head of the charge.[4] The offence of giving false evidence is one with a

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the prosecution to prove all that has been alleged in the charge.

Note 3.

1. (1906) 4 Cri L Jour 227 (229) (Cal), *Hiranand Ojah* v. *Emperor.*
(1868) 10 Suth W R 37 (38), *Empress* v. *Fatte Ali Biswas.*
(1868) 9 Suth W R Cri 54 (56), *Empress* v. *Kali Charan.*
(1906) 3 All L Jour (Notes) 110 (110, 111), *Naurang* v. *Emperor.*
(1871) 3 N W P H C R 314 (314, 315), *Empress* v. *Sheo Charan.*
2. (1923) 1923 All 325 (326): 24 Cri L Jour 197, *Abdul Wahid Khan* v. *Abdullah Khan.*
(1924) 1924 Cal 104 (109): 25 Cri L Jour 177, *Oates* v. *Emperor.*
(1918) 1918 Pat 448 (450, 451): 19 Cri L Jour 169, *Ramdhari Singh* v. *Emperor.*
(1917) 1917 Pat 639 (639): 18 Cri L Jour 1039, *Bansi Pande* v. *Emperor.*
(1866) 5 Suth W R Cri Circuit 3 page 2.
(1865) 4 Suth W R Cri Letters 4 (4).
(1867) 8 Suth W R 95 (96), *Empress* v. *Daulat Munshee.*
(1875) 7 N W P H C R 137 (145), *Empress* v. *Jamurah.*
(1906) 3 All L J (Notes) 110 (110, 111), *Naurang* v. *Emperor.*
(1869) 1869 Pun Re No. 36 page 65, *Mewa Singh* v. *The Crown.*
(1900-1902) 1 Low Bur Rul 268 (269), *Crown* v. *Mi Shwe Ke.*
(1871) 16 Suth W R Cri 47 (47, 48), *Empress* v. *Maharaj Misser.*
(1872) 17 Suth W R Cri 32 (32, 33), *Empress* v. *Boodhun Ahir.*
(1890) Ratanlal 511 (514), *Empress* v. *Bhaikaji Rao.*
(1875) 23 Suth W R Cri 28 (30), *Empress* v. *Mungal Dass.*
(1889) Ratanlal 488 (490), *Empress* v. *Kalidas.*
(1895) 19 Bom 362 (363), *In re Jivan Ambaidas.*
(1901) 28 Cal 434 (437), *Reilly* v. *Emperor.*
(1883) 5 All 17 (22, 23), *Empress* v. *Niaz Ali.*
(1884) 6 All 105 (106), *Har Dial* v. *Durga Prasad.*
(1896) 18 All 203 (205), *Balwant Singh* v. *Umed Singh.*
(1899) 21 All 159 (162), *Empress* v. *Zakir Husain.*
(1897) Ratanlal 925 (926), *Empress* v. *Daulata Dhondi.*
(1865) 2 Suth W R 51 (51), *Empress* v. *Bhutto Laljee & Sheboo.*
(1866) 5 Suth W R 71 (71), *Empress* v. *Fazul Meeah.*
(1866) 5 Suth W R Cri 6 (6), *Queen* v. *Kodai Kahar.*
2 Shome L R 38, *In re Purushottam Lal Kheri.*
(1876) 25 Suth W R 46 (46, 47), *Empress* v. *Udit Singh.*
(1868) 9 Suth W R Cri 54 (56), *Empress* v. *Kali.*
(1868) 9 Suth W R Cri 14 (14), *Empress* v. *Feojdar Roy.*
(1868) 9 Suth W R Cri 25 (26, 27), *Empress* v. *Soonder Mohooree.*
(1909) 10 Cri L Jour 150 (153): 36 Cal 808, *Rakhalchandra Laha* v. *Emperor.*
(1871) 3 N W P H C R 314 (314, 315), *Empress* v. *Sheo Charan.* Charge that accused "on or about 15th April 1871 gave false evidence" is not enough. [Compare (1910) 11 Cri L Jour 277 (279): 4 Ind Cas 438 (P C), *In the matter of Lai Hing Firm.* Whole evidence of witness, a tissue of falsehood—Charge not admitting of being formulated in a series of specific allegations of perjury—Gist of accusation sufficiently clear to the accused—Accused not prejudiced by the charge—Proper.
(1866) 5 Suth W R Cri Circuit 2 (2).
(1900) 27 Cal 985 (987, 988), *Durga Das Rakshit* v. *Umesh Chandra.*
(1901) 5 Cal W N 615 (616), *Mohim Chunder* v. *Emperor.*
(1901) 28 Cal 348 (352), *Isab Mandal* v. *Empress.*
3. (1924) 1924 Cal 104 (106, 109): 25 Cri L Jour 177, *R. H. E. Oates* v. *Emperor.*
(1868) 9 Suth W R Cri 25 (26), *Empress* v. *Soonder Mohooree.*
(1876) 25 Suth W R 46 (46, 47), *Empress* v. *Udit Singh.*
4. (1912) 13 Cri L Jour 62 (63): 13 Ind Cas 398, (Cal), *Jang Bahadur Lal* v.

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specific name within the meaning of Section 221; it is therefore not necessary to state that the charge falls within a particular part of the Section.[5] Nor is it necessary to state that the subject of the false statement is material to the result of the inquiry.[6] Where there are several false statements in the same deposition, there should only be a *single* charge for all such statements.[7]

As to the mode of framing a charge where the accused has made two contradictory statements but it is doubtful which of them is false, *see* Section 236 and notes thereunder.

4. Rioting.

"Rioting" is an offence with a specific name and, under Sub-Section 2 of Section 221, may be described by its name only.[1] When a person is charged with "rioting" it means that the prosecution alleges that all the necessary ingredients constituting the offence of rioting are present; it is not necessary to set out what those ingredients are.[1a] There is however a conflict of opinion as to whether the *common object* of the unlawful assembly is necessary to be mentioned in the charge. On the one hand it has been held that the common object does not come within the particulars mentioned in Sections 221 and 222, nor within Section 223 as a *manner* in which the offence is committed and that therefore it is not necessary to be stated in the charge though it would be *desirable* to do so.[2] In *Kadrutullah* v. *Emperor*[2a] it was held that the offence of rioting "can be legally described by its specific name and the question whether any further particulars *are necessary under Section* 223 Criminal Procedure Code, must be a question of discretion according to the circumstances of each case". This seems to suggest that the common object may be considered as the *manner* in which the offence was committed. It is apparently in this view that it has been held in a number of cases that the common object must be stated in a charge of rioting.[3]

Emperor.
(1868) 9 Suth W R Cri 14 (14), *Empress* v. *Feojdar Roy*.

5. (1921) 1921 Bom 3 (13): 45 Bom 834: 22 Cri L Jour 241, *Purshottam Ishoar Amin* v. *Emperor*.

6. (1862) 1 Weir 146 (151), *Empress* v. *Aidrus Sahib*.

7. (1871) 1 Weir 160 (161).

Note 4.

1. (1912) 13 Cri L Jour 218 (219): 39 Cal 781, *Kudrutullah* v. *Emperor*.
(1928) 1928 Cal 732 (733, 734): 55 Cal 879: 29 Cri L Jour 823, *Emperor* v. *Ramchandra*.

1a (1928) 1928 Cal 732 (733, 734): 55 Cal 879: 29 Cri L Jour 823, *Emperor* v. *Ramchandra*.

2. (1933) 1933 Oudh 19 (20): 8 Luck 199: 34 Cri L Jour 393, *Ghaziuddin Khan* v. *Emperor*.
(1915) 1915 Lah 418 (422): 16 Cri L Jour 689 (693): 1915 Pun Re No. 16, *Dhian Singh* v. *Emperor*.

2a (1912) 13 Cri L Jour 218 (219): 39 Cal 781, *Kudrutullah* v. *Emperor*.

3. (1885) 11 Cal 106 (108), *Behari Mahaton* v. *Empress*.
(1899) 3 Cal W N 605 (607), *Chunder Coomar Sen* v. *Empress*.
(1894) 21 Cal 955 (973), *Wagadar Khan* v. *Empress*.
(1899) 26 Cal 630 (633), *Tafazzul Ahmed Choudury* v. *Empress*.
(1894) 22 Cal 276 (285), *Sabia* v. *Empress*.
(1905) 2 Cri L Jour 275 (277) (Cal), *Budhu* v. *Mt. Lachminia*.
(1907) 6 Cri L Jour 446 (448, 449) (Lah), *Gowardhan Das* v. *Emperor*.
(1865) 4 Suth W R Cri L 9 (9, 10), *Queen* v. *Hurpaul*.
(1894) 21 Cal 827 (831), *Basiraddi* v. *Empress*.
(1916) 1916 Mad 834 (834): 16 Cri L Jour 809 (809), *In re Ramaswamy Naidu*.
(1912) 13 Cri L Jour 218 (219): 39 Cal 781, *Kudrutullah* v. *Emperor*.
(1921) 1921 Cal 605 (606): 25 Cri L Jour 524, *Kashi Paramanik* v. *Damu Paramanik*.
(1925) 1925 Cal 913 (913): 26 Cri L Jour 827, *Amirudda Mawa* v. *Emperor*.
(1924) 1924 Mad 584 (584, 585); 25 Cri L Jour 396, *In re Kootoora Thevan*.
(1899) 4 Cal W N 190 (192, 193), *Jagat Chandra Roy* v. *Rakhal Chandra Roy*. Where the common object is to assert a *bona fide* belief in his

5. House-breaking, criminal trespass, etc.

A charge of house-breaking or lurking house-trespass under Section 457 Penal Code or an offence under Section 451 of the Penal Code is not an offence with a *specific name* and therefore so much of the definition of the offence as is necessary to give notice to the accused of the matter charged must be set out under Section 221 *ante*. Thus it must specify the intention with which the accused is alleged to have committed the trespass.[1] Where the charge does not specify any intention of the kind mentioned in the Section, the accused cannot be convicted under it,[2] unless, it is quite certain that he has not in any way been misled or prejudiced in his defence by the defect in the charge. (*See* Section 225 *infra*). Similarly it is not open to a Court to convict an accused under Section 457 Penal Code when the intention found to have been entertained by him is different from that specified in the charge[3] unless the accused has not been misled by the defect in the charge.[4] But where a charge purporting to be one under Section 457 Penal Code does not specify the intention of the accused it is open to the Court to convict him under Section 456[5] (*See* Section 238 *infra*).

See also the undermentioned cases.[6]

For a conviction under Section 447 which is an offence with a specific name, it is not necessary to specify the ulterior offence the accused intended to commit.[7]

6. Sedition, promoting class hatred, etc.

In a charge under Section 124-A Penal Code (Sedition) or Section 153-A Penal Code (promoting class hatred), it has been held that it is

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right to some interest in the land, Magistrates would do well to charge under S. 143, I. P. C., stating as the common object the object of enforcing their right or supposed right to the property.

(1924) 1924 Lah 667 (668): 25 Cri L Jour 43 *Allah Dad* v. *Emperor*.

(1928) 1928 Pat 405 (408): 29 Cri L Jour 390, *Aklu Main* v. *Emperor*. Charge should mention the principal and prominent common object and not incidental happenings.

(1908) 8 Cri L Jour 41 (46) (Kathiawar): *In re Koli Moti Hari*.

[See (1908) 8 Cri L Jour 129: 36 Cal 158, *Dasarathi Maha Patra* v. *Raghu Sahu*. Where the common object is set out in the charge the conviction is not bad merely because there is no express finding as to the common object.]

Note 5.

1. (1894) 22 Cal 391 (403), *Balmakand* v. *Ghansamran*.

(1864) 1 Suth W R Cri L 13 (13, 14).

(1871) 16 Suth W R 53 (54): *Empress* v. *Mehar*. Charge under S. 451.

[See also (1916) 1916 Mad 571 (572): 16 Cri L Jour 298 (299), *In re Mala Mekala Kati Subbadu*. A charge under Section 457 is defective if it does not mention the article stolen or the name of person whose house was broken into.]

2. (1911) 12 Cri L Jour 483 (483): 12 Ind Cas 91 (Lah), *Lala* v. *Emperor*.

3. (1922) 1922 Pat 5 (7, 8): 23 Cri L Jour 114, *Bal Kesar Singh* v. *Emperor*. Conviction under S. 457 with intent to commit adultery on a charge thereunder alleging intent to steal was held bad where the accused was prejudiced.

(1912) 13 Cri L Jour 224 (224): 14 Ind Cas 320 (Cal), *Jharu Sheikh* v. *Emperor*.

(1923) 24 Cri L Jour 119 (119): 71 I C 247 (Cal), *Hajari Sonar* v. *Emperor*.

4. [See (1901) 23 All 82 (83, 84), *Empress* v. *Kangla*. Conviction of different intent, e. g., to commit adultery, on a complaint alleging an intent to commit theft.]

5. (1917) 1917 Cal 824 (826): 17 Cri L Jour 424 (426, 427): 44 Cal 358, *Karali Prasad Guru* v. *Emperor*.

6. (1903) 16 C P L R 182 (183), *Emperor* v. *Mullu Teli*. Charge under S. 451—It is not necessary that the husband shall bring a specific charge of adultery.

7. (1911) 12 Cri L Jour 453 (454): 11 Ind Cas 797 (798) (Mad), *In re Kurnam Seshayya*.

(1906) 4 Cri L Jour 293 (328): 1906 Pun Re No. 12, *Ram Saran* v. *Emperor*.

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not necessary to set out the offending passages of the speech or writing in question where the case for the prosecution is that the speech or writing in question taken as a whole comes within the mischief of the law.[1] The requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged.[2]

7. Cheating.

As the illustration to Section 223 shows, in a case of cheating the charge must set out the *manner* in which the offence was committed so as to give the accused sufficient notice of the matter with which he is charged.[1] Whether the manner set out is reasonably sufficient to give the accused such notice depends upon the facts and circumstances of each case. Where the manner was described in the charge as follows:—"by deceiving with false representations and promises as well as by conduct" it was held that the expression used was too vague and indefinite.[1a] Where the charge is for an offence under the first portion of Section 415 Penal Code, it is not necessary to state that any *loss* was caused by the inducement[2] though it states that the property induced to be delivered is that of the prosecutor.[3] But where the charge is under the second portion of Section 415 it is necessary to state in what way the complainant would be a loser and the accused a gainer, as a result of the inducement.[4] A charge of an attempt to cheat should state the person upon whom the attempt was made and the manner in which he was induced.[5]

8. Defamation.

A charge of defamation should set out the words alleged to be defamatory.[1] But where the charge is clear and unambiguous and such that the accused cannot be misled in any way, the mere fact that the exact defamatory

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[But see (1896) 19 Mad 240 (241), *Empress* v. *Rayapadayachi*. Intention should be specified.]

Note 6.

1. (1908) 8 Cri L Jour 272 (279): 33 Bom 77, *Emperor* v. *Tribuvandas*.
(1909) 9 Cri L Jour 140 (141) : 1 Ind Cas 42 (Mad), *In re Chidambaram Pillai*.
(1910) 11 Cri L Jour 583 (587): 4 Sind L R 55 : *Emperor* v. *Virumal*.
(1909) 9 Cri L Jour 456 (460): 32 Mad 384, *In re Krishnaswami*.
[But compare (1909) 9 Cri L Jour 108 (112): 32 Mad 3, *In re Subramania Siva*. A charge of sedition is defective if it does not set out the speeches or the passages in the speeches which the prosecution alleges to be seditious, but this defect does not necessarily vitiate the charge.]
[See also (1931) 1931 Lah 186 (187): 32 Cri L Jour 1202, *Chint Ram* v. *Emperor*. Charge under S. 124-A, I. P. C., substance of the speech should be specified.]
2. [See cases in F-N. (1).]

Note 7.

1. (1904) 1 Cri L Jour 124 (129, 137) (Cal), *Hurjee Mull* v. *Inam Ali Sircar*.
(1933) 1933 Sind 169 (171): 34 Cri L Jour 1049, *Varumal Lahrumal* v. *Emperor*.
(1925) 1925 Cal 603 (604): 26 Cri L Jour 849, *Kedar Nath Chakravarti* v. *Emperor*.
(1918) 1918 Nag 22 (26): 19 Cri L Jour 657, *Jangilal* v. *Emperor*.
(1917) 1917 All 108 (108): 18 Cri L Jour 131 (131), *Meghraj* v. *Emperor*.
(1925) 1925 Cal 674 (675, 676): 26 Cri L Jour 906, *Gokul Khatik* v. *Emperor*.
(1922) 1922 Lah 424 (424): 23 Cri L Jour 595, *Janaki Das* v. *Emperor*.
1a (1925) 1925 Cal 603 (604): 26 Cri L Jour 849, *Kedar Nath Chakravarti* v. *Emperor*.
2. (1930) 1930 Lah 407 (408): 32 Cri L Jour 299, *Fateh Haidar* v. *Emperor*.
3. (1862) 1 Weir 471 (472, 475), *Queen* v. *Villians*.
4. (1917) 1917 All 108 (108): 18 Cri L Jour 131 (131), *Meghraj* v. *Emperor*.
5. (1904) 1 Cri L Jour 124 (129) (Cal), *Hurjee Mull* v. *Inam Ali Sircar*.

Note 8.

1. (1925) 1925 Cal 1121 (1125): 26 Cri L Jour 1539, *Pratap Chandra Guha Roy* v. *Emperor*.
(1912) 13 Cri L Jour 488 (489): 15 Ind Cas 488 (Cal), *Anathnath Dey* v. *Mohendranath*.

words are not reproduced does not vitiate the charge.[2] Where defamatory words are alleged to have been uttered by the accused on several occasions, the charge must give particulars of the various occasions.[3]

9. Falsification of accounts.

A charge of falsification of accounts under Section 477-A Penal Code must specify the entries alleged to be falsified.[1]

10. Hurt, grievous hurt, etc.

A charge under Section 324 Penal Code should follow the wording of the definition of the offence[1] inasmuch as it is not an offence with a specific name, but it need not deny that the hurt was caused on grave and sudden provocation.[2] Where two persons commit an affray and also cause hurt to each other the charge must be for the more serious offence of hurt.[3] Where the accused is alleged to have caused several hurts a general charge covering all the hurts without particularising the details will be bad.[4]

11. Forgery, etc.

A charge of forgery should contain a description of the document forged. It is not sufficient to say merely that the accused committed forgery by signing the name of a certain person (specified) on a document.[1] *See also* the undermentioned cases.[2]

12. Culpable homicide and murder.

Illustration (e) to this Section shows that the charge for murder need not set out the manner in which *A* murdered *B*. But as has been seen in the notes to Section 221, where the charge does give details it must be fully and correctly given. Thus it should follow the definition and language of Section 300 of the Code.[1a] Where the murder is alleged to have been effected by blows, it should set out that the blows were inflicted with the intention of causing death or that they were sufficient in the ordinary course of nature to cause death and that they were intentionally inflicted.[1] It should mention the

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2. (1932) 1932 Nag 158 (159): 34 Cri L Jour 154, *Samrathmal Marwadi* v. *Emperor*.
3. (1930) 1930 Sind 62 (64): 30 Cri L Jour 1073, *Ali Mahomed* v. *Emperor*.

Note 9.

1. (1912) 13 Cri L Jour 251 (251): 14 Ind Cas 603 (Mad), *Aiyagiri Venkataramiah* v. *Emperor*.
   [See also (1899) 26 Cal 560 (563), *Empress* v. *Mali Lal Lahir*. Particular registers and returns alleged to be falsified].

Note 10.

1. (1897-1901) 1 Upp Bur R 318 (318), *Empress* v. *Nya Seik*.
2. (1868) 4 Mad H C App 5 (5).
3. (1908) 7 Cri L Jour 498 (499): 4 Low Bur R 237, *Emperor* v. *Nga Ywe*.
4. (1892) 17 Bom 260 (262, 263), *Empress* v. *Bana Punja*.
   (1890) 15 Bom 491 (503, 504), *Empress* v. *Fakirapa*.

Note 11.

1. (1865) 4 Suth W R Cri L 4 (4).
2. (1913) 14 Cri L Jour 129 (130): 18 Ind Cas 881 (Cal), *Haidar Ali Pradhania* v. *Emperor*. Charge under S. 467, I. P. C.—Intention must be specified.
   (1869) 6 Bom H C R 43 (44), *Reg* v. *Gangaram Malji*. Charge under S. 471—If sentence is to be on footing of the document being one of the kind mentioned in S. 467, the charge should specify the nature of the document.
   (1864) 1 Suth W R Cri L 9 (9).
   (1865) 2 Suth W R Cri L 19 (19, 20).
   (1866) 3 Suth W R Cri L 8 (8).
   (1864) 1 Suth W R Cri L 10 (10).

Note 12.

1a. (1926) 1926 Oudh 148 (149): 27 Cri L Jour 62, *Sheo Shankar* v. *Emperor*.
1. (1926) 1926 Oudh 148 (149): 27 Cri L Jour 62, *Sheo Shankar* v. *Emperor*.
   (1882) 8 Cal 211 (213), *In the matter of Samiruddin*.
   (1893-1900) 1893-1900 P J L B 328 (328).
   (1865) 3 Suth W R Cri L 3 (3). Culpable homicide not amounting to murder

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fact of death having ensued[2] and in cases of wilful murder the words "culpable homicide amounting to murder" must be used.[3] Section 34 of the Penal Code cannot be used in a charge under the second part of Section 304 of that Code.[4] *See also* the undermentioned cases.[5]

13. Receiving stolen property.

A charge of *receiving stolen property* should state that the accused dishonestly retained or received stolen property knowing or having reason to believe that it had been stolen.[1] It should also mention the name of the person to whom the property belonged.[2]

14. Kidnapping and abduction.

In a charge of *kidnapping* under Section 366 Penal Code it should appear clearly whether the accused persons are being charged with kidnapping or with abduction and similarly whether the intent alleged was an intent to compel the victim to marry against her will or whether the kidnapping or abduction was with the knowledge that it was likely that the victim would be forced or seduced to illicit intercourse.[1] (*See also* cases in Notes 17 *infra*).

15. Extortion.

Where the offence charged involves consequences which may be stated in a general form such as may arise in a case of arson where a man may by one act of arson set fire and destroy several stacks of several persons no particulars are required, the nature of the offence being sufficiently stated by the date, time and place of setting of fire; but a charge for extortion or for obtaining money from persons by unlawful means should state with accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person.[1] (*See also* cases in Note 17 *infra*).

16. Unlawful Assembly.

In a charge for the offence of being a member of an unlawful assembly, what is necessary is that the accused shall have reasonably distinct notice of

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—Intention or knowledge in S. 299, I. P. C. should be specified.

(1866) 5 Suth W R (Recorder's Reference) 1 (2), *Government* v. *Ramasamy*.

2. (1865) 2 Suth W R Cri L 17 (17).

3. (1864) 1 Suth W R Cri L 9 (9). This decision under Code of 1861 says that the charge should deny the special exceptions. S. 300, I. P. C.—But now Sub-s. 5 removes that necessity.

(1864) 1 Suth W R Cri L 10 (12).

(1864) 1 Suth W R Cri L 13 (13). Under Code of 1861—Exceptions to Section should be denied in the charge.

4. (1925) 1925 Cal 913 (915): 26 Cri L Jour 827, *Anirudha Mana* v. *Emperor*.

5. (1935) 1935 Rang 299 (300): 36 Cri L Jour 1380, *Nga Tha Aye* v. *Emperor*. The question of intention or knowledge should never be mentioned in a charge of homicide.

(1935) 1935 Sind 23 (23): 28 Sind L R 295; 36 Cri L Jour 504, *Ditta* v. *Emperor*. Charge under S. 304, I. P. C. should indicate under which part of the section accused is charged.

Note 13.

1. (1898) 1898 All W N 70 (70), *Empress* v. *Gadlu*. Charge under S. 411, I. P. C.

(1865) 4 Suth W R Cri L 11 (11).

2. (1862-1865) 1 Bom H C R 95 (96), *Reg* v. *Siddu Bin Balnath*.

Note 14.

1. (1933) 1933 Cal 194 (195): 34 Cri L Jour 1107, *Mahomed Ali* v. *Emperor*.

(1929) 30 Cri L Jour 857 (858): 117 I. C. 862 (Cal), *Fedu Sheikh* v. *Emperor*, Notice of charge of kidnapping under S. 366 is not a fair, proper or sufficient notice of a charge of abduction under the same Section.

Note 15.

1. (1916) 1916 All 60 (60): 17 Cri L Jour 411 (411), *Ram Chander Sahai* v. *Emperor*.

the common object[1] imputed to them and of the manner in which that common object is to be brought within the language of Section 141. The charge of unlawful assembly with the common object of "harassing Hindus" is not too general or unfair or unjust to the accused.[2]

17. Other offences.

See the undermentioned cases.[1]

Note 16.

1. (1934) 1934 Sind 164 (169): 36 Cri L Jour 231, *Allahrakhio* v. *Emperor*.
(1923) 1923 Pat 1 (4): 2 Pat 134: 23 Cri L Jour 625, *Emperor* v. *Abdul Hamid*. Common object must be specified.
2. (1924) 1924 Mad 376 (377): 24 Cri L Jour 852, *In re Parakushiyil Ayamad*.

Note 17.

1. *Abetment of offences*:—
(1925) 1925 Cal 341 (345): 52 Cal 253: 26 Cri L Jour 487, *Alimuddi Nazkar* v. *Emperor*. Abetment of offence under S. 114, I. P. C.—Specific charge to that effect necessary.
(1865) 2 Suth W R Cri L 7 (7). Charge of abetment under Ss. 109 and 114 should state that abetter was present at offence.
(1865) 3 Suth W R Cri 5 (5).
(1925) 1925 Mad 364 (364): 25 Cri L Jour 1254, *Annavi* v. *Emperor*. Charge of abetment by being present at offence of mischief—No particulars as to any act before the offence—Charge bad.
(1865) 3 Suth W R Cri L 9 (9).
(1866) 5 Suth W R Cri L 6 (6). Charge for instigating another to commit an offence should specify the offence instigated.
(1901) 25 Bom 90 (100), *Empress* v. *Anant Puranik*. A general charge of instigating various persons to commit dacoities is bad; the separate acts of abetment must be distinctly specified.
(1901) 24 Mad 523 (546), *Emperor* v. *Tirumal Reddy*. Charge of abetment by conspiracy not alleging an overt act in pursuance, is bad.
(1922) 1922 Oudh 250 (251): 25 Oudh Cas 151: 23 Cri L Jour 687, *Girja Dayal* v. *Emperor*. Charge-sheet which does not specify which accused is charged for abetment and which accused for the principal offence is defective.
(1865) 2 Suth W R Cri L 7 (7). Abetment should form the subject of separate charge.
(1865) 2 Suth W R Cri L 9 (10). Abetment should be charged as a separate head.
(1866) 5 Suth W R Cri L 5. A mere charge of "Abetment" is not enough; the particular kind should be specified.
(1902) 25 Mad 61 (70, 71), *Subramania Ayyar* v. *Emperor*. (Do).
(1865) 3 Suth W R Cri L 17 (17). Mere charge of abetment is not enough.
(1915) 1915 Cal 719 (724): 16 Cri L Jour 9 (14): 42 Cal 1153, *Harsh Nath Chatterjee* v. *Emperor*.

Robbery and Dacoity:—
(1912) 13 Cri L Jour 125 (126): 13 Ind Cas 781 (Mad), *Mandi Ghasi* v. *Emperor*. If the charge for dacoity does not set out or indicate which particular dacoity an accused is tried for, the conviction must be set aside.
(1911) 12 Cri L Jour 193 (195): 10 Ind Cas 682 (Cal), *Rashidazzaman* v. *Emperor*. Dacoity—Not necessary that the charge should in such cases specify that other persons besides those convicted and acquitted took part in the dacoity or that they should be referred to in the charge.
(1871) Ratanlal 55(56), *Reg* v. *Mukta Manka*. Charge under I. P. C. S. 397.
(1866) 5 Suth W R Cri L 10 (10) (Do).
(1865) 2 Suth W R Cri L 11 (11). Charge of "robbery" is sufficient, but if the nature of the violence is described, the language of S. 390 should be adopted.
(1864) 1 Suth W R Cri L 10 (11).
(1897) Ratanlal 921, *In Re Punya*.
(1933) 1933 Cal 294 (295): 34 Cri L J 524, *Madhusingh Kaivarta* v. *Emperor*. Although charge under S. 396 has an incidental reference to a charge of murder there should be no conviction for murder without a specific charge under S. 302, I. P. C.
(1925) 1925 Lah 337 (337): 6 Lah 24: 26 Cri L Jour 1153, *Labh Singh* v. *Emperor*. If a dacoit commits murder during the dacoity he should be charged under S. 396, Penal Code and not under Ss. 304, 395 Penal Code.
(1877) 1 Weir 447 (448), *In the matter of Muthrulappan*. Proper charge: That you committed dacoity and that in commission of such dacoity murder was committed by one of the members and that you have thereby committed an offence punishable under S. 396, I. P. C.
(1926) 1926 Oudh 245 (247, 248): 27 Cri L Jour 57, *Bhulan* v. *Emperor*. Dacoity with murder.
(1911) 12 Cri L Jour 468 (468): 11 Ind Cas 1004 (Rang), *Chan Hebe* v. *Emperor*.

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Robbery.

(1924) 1924 Cal 643 (644) : 51 Cal 265 : 25 Cri L Jour 1024, *Emperor* v. *Ali Mirza*. Ss. 397, 398 do not create any offence.

(1865) 4 Suth W R Cri L 1 (1).

(1925) 1925 All 305 (305) : 47 All 59 : 26 Cri L Jour 570, *Dulli* v. *Emperor*.

(1906) 28 All 404 (405) Notes, *Emperor* v. *Nageshwar*.

(1866) 2 Suth W R Cri L 1 (1). In a charge of dacoity the words "with others to the number of five or more" are redundant.

(1924) 1924 Mad 584 (584) : 25 Cri L Jour 396, *In Re Kottoora Thevan*.

Extortion :—

(1916) 1916 All 60 (60) : 17 Cri L Jour 411 (411), *Ram Chandra Sahai* v. *Emperor*. Extortion against whom and what amount extorted and the nature of the extortion should be specified.

(1866) 5 Suth W R Cri L 4 (4). Extortion charge should state the offence punishable with death, transportation, etc., with which the persons threatened in order to extort property from a certain person.

Theft :—

(1869-70) 5 Mad H C App 37 (37) (theft).

(1921) 1921 Cal 605 (606) : 25 Cri L Jour 524, *Kashi Paramanik* v. *Damu Paramanik*. Charge of stealing paddy from a certain land must contain an accurate description of the land from which the paddy was stolen.

Criminal Conspiracy :—

(1916) 1916 Cal 188 (194) : 16 Cri L Jour 497 (502) : 42 Cal 957, *Amrit Lal Hazra* v. *Emperor*. Indictment must in the first place, charge the conspiracy.

(1933) 1933 All 498 (501) : 35 Cri L Jour 768, *Manabendra Nath Roy* v. *Emperor*. Charge need not contain names of all other conspirators.

(1911) 12 Cri L Jour 2 (2) : 38 Cal 559, *Emperor* v. *Ralit Mohan Chakravarti*. In a conspiracy case the accused can be charged with conspiracy with persons unknown, but if they are charged with conspiring with persons known then such persons must be named in the charge.

(1926) 1926 Oudh 161 (165) : 26 Cri L Jour 1602, *Bishambar Nath Kundon* v. *Emperor*. In the nature of things a charge of conspiracy would be vague if the defence expects the proof of the conspiracy to be included in the charge.

(1926) 1926 Sind 171 (173) : 20 Sind L R 18 : 27 Cri L Jour 243, *Kishan Chand* v. *Emperor*. Charge of conspiracy in respect of one agreement between several accused persons to cheat such members of the public as they could defraud by deceitful means is not bad.

(1924) 26 Cri L Jour 33 (40): 83 Ind Cas 513 (Cal), *Kali Das* v. *Emperor*. Accused may legally be charged merely with the offence of criminal conspiracy.

(1928) 1928 Rang 118 (123, 124) : 6 Rang 6 : 29 Cri L Jour 555, *Htin Gyaw* v. *Emperor*. Charge need not state in all its details the actual specific acts that the conspirators are alleged to have agreed to do or cause to be done. In most conspiracies the agreement amongst the conspirators is of a general nature.

(1927) 1927 Sind 161 (163,165, 166) : 28 Cri L Jour 426: 22 Sind L R 91, *Haji Samo* v. *Emperor*. Gist of the offence of criminal conspiracy is the agreement itself and where the object of the agreement is to do an unlawful act and not to do a lawful act by an unlawful means, it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object.

(1909) 10 Cri L Jour 125 (127) : 2 Ind Cas 681 (Cal), *Jogjiban Ghose* v. *Emperor*. Statement only that *A* "conspired" is defective.

(1912) 13 Cri L Jour 609 (650) : 16 Ind Cas 257 (Cal), *Pulin Behary Das* v. *Emperor*.

(1915) 1915 Lah 16 (47, 48) : 16 Cri L Jour 354 (357) : 1915 Pun Re No. 11. *Balmokand* v. *Emperor*.

(1934) 1934 Sind 57 (59, 60, 61): 28 Sind L R 119 : 35 Cri L Jour 1337, *Dur Mahomed* v. *Emperor*. Approximate dates as to when the conspiracy began and ended will be enough—Exact dates not necessary—No objection to acts done by conspirators in pursuance of the conspiracy being enumerated.

Offences relating to coins :—

(1865) 3 Suth W R Cri Letters 13 (13). Under S. 239, I. P. C. the nature of the counterfeit coin delivered as genuine should be mentioned.

(1865) 2 Suth W R Cri Letters 11 (11). Under Ss. 248, 249, I. P. C. the precise offence committed as to the coin *viz.*, that an operation was performed on the coin altering its appearance should be stated.

(1865) 2 Suth W R Cri Letters 5 (5). Offence which had been committed in respect of the coin of which the accused was said to be in possession should be expressly stated.

Offences against public justice :—

(1866) 5 Suth W R Cri Letters 6 (6).

Charge under S. 205, I. P. C. Nature of the admission or statement made by the accused in the assumed character should be fully stated.

(1866) 5 Suth W R Cri Letters 8 (8). S. 202, I. P. C. The nature of the office held by the accused so as to make them public servants should be stated in a charge for knowing commission of offence and negligent omission to give any information.

(1866) 5 Suth W R Cri Letters 1 (1). Under S. 224, I. P. C. the charge should state the offence for which the prisoner was lawfully detained when he escaped from custody.

(1892) 16 Bom 414 (424), *Empress* v. *Vajiram*. Under S. 206, I. P. C. the specification of the fraudulent transfer is necessary.

(1877) 2 Bom 142 (144, 145), *Imperatrix* v. *Baban Khan Valad Mhasteoji*. Charge under S. 217, I. P. C. that accused being a public servant knowingly disobeyed the direction of law as to the way in which he had to conduct himself as such public servant with respect to the property found in an investigation of theft. What the direction was and what the conduct was which contravened it the accused was not informed. Held, the charge was bad.

(1867) 8 Suth W R Cri 37 (38), *Queen* v. *Moosubro*. Ss. 202, 203, I. P. C. A charge in a case of omission to give information of offence should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false; and it should appear precisely what his duty was in the matter.

(1874) 22 Suth W R 42 (42), *Queen* v. *Ahmed Ali*. (Do).

Kidnapping and Abduction :—

(1865) 3 Suth W R Cri Letters 9 (9). Abduction of a woman to compel her to marry. The name of the person to whom she was to be married must be stated.

(1919) 1919 Pat 27 (30): 4 Pat L Jour 74: 20 Cri L Jour 161 (F B), *Mt. Kesar* v. *Emperor*. Charge under S. 366, I. P. C. should specify that the kidnapping was from somebody's (mentioned) custody. So also in a charge under S. 368, I. P. C.

Miscellaneous :—

(1932) 1932 Cal 651 (652): 33 Cri L Jour 771: 60 Cal 201, *Kailash Chandra* v. *Emperor*. Charge under S. 292, I. P. C. Some attempt should be made to indicate in the charge in what respect exactly the book was obscene.

(1926) 1926 Rang 188 (190): 4 Rang 257: 27 Cri L Jour 1241, *Ebrahim Mammojee* v. *Emperor*. Contempt of Court, formal charge is necessary.

(1876) 1 Cal 356 (358), *Queen* v. *Upendra Nath Doss*. A charge under S. 292 should be made specific in regard to the representations alleged to have been exhibited.

(1871) 16 Suth W R Cri 44 (44), *In the matter of the petition of Gair Mohan Singh*.

(1867) 8 Suth W R Cri Rule 37 (38), *Queen* v. *Moosubroo*. Charge of failing to give information of offence—Charge should state the particular offence in respect of which the accused either omitted to give information or gave information which he knew to be false and it should appear precisely what his duty was in the matter.

(1866) 5 Suth W R Cri Letters 6 (6). S. 221, I. P. C.—Charge should specify the office held by the accused so as to make him liable as a public servant.

(1872-1892) 1 Low Bur R 262 (262), *Empress* v. *Mi Miu Si*. Charge under Ss. 292 and 294, I. P. C. Obscene words or representations used must be set out.

(1900) 27 Cal 985 (987, 988), *Durga Das Rakhit* v. *Umesh Chunder Sen*. Charge under S. 177, I. P. C. Complaint that a written statement put in is false is not sufficient. Reference must be made to the particular statement made by the accused as being a false statement.

(1891) 15 Bom 189 (193, 194), *Queen-Empress* v. *Abaji Ramachandra*. Charge under S. 475, I. P. C. should distinctly specify the particular papers bearing a counterfeit mark or device which it was alleged the accused had in his possession with the intent mentioned in the Section.

(1920) 1920 Cal 624 (629): 21 Cri L Jour 481, *Lucas* v. *Official Assignee of Bengal*. Charge of preferring a creditor under the Presidency Towns Insolvency Act—The fraud practised and the name of the creditor preferred must be alleged.

(1865) 3 Suth W R Cri Letters 5 (5). Under S. 312, I. P. C. the description of the act by which the accused intended to prevent the child being born alive, and further that it was not caused in good faith to save the mother's life, should be stated in the charge.

(1865) 3 Suth W R Cri 69 (70), *Queen* v. *Setul Chunder Bagchee*. Charge of

Sec. 223 Note 18

18. Act done by several persons in furtherance of a common intention.— *See* the undermentioned case.[1]

Sec. 224

Words in charge taken in sense of law under which offence is punishable.

224.* In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

Sec. 225

Effect of errors.

225.† No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Illustrations.

(*a*) *A* is charged, under Section 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge.

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* **(Code of 1882, S. 224—*Same as above*).**

(Codes of 1872 and 1861—*Nil*).

† **(Code of 1882—*S.* 225).**

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission.

Effect of errors.

(*Illustrations—Same as in* 1898 *Code*).

(Code of 1872—*S.* 443).

443. No error either in the way in which the offence is stated, or in the particulars required to be stated in section four hundred and forty one, and no omission to state the offence, or to state those particulars, shall be regarded at any stage of the case as material, unless the person accused was in fact misled by such error or omission.

Effect of errors.

(*Illustrations—Same as in* 1898 *Code*).

(Code of 1861—*Nil*).

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attempting to obtain gratification for influencing a public servant in the exercise of his public functions is illegal, as disclosing no legal offence, when it omits to state the person or persons for whom the gratification was obtained, or the public servant to be influenced in the exercise of his public functions.

(1916) 1916 Cal 188 (192): 16 Cri L Jour 497 (501): 42 Cal 957, *Amritlal Hazara* v. *Emperor*. Charge under S. 4 (b) of Act 6 of 1908 (Explosive Substances Act) is defective if it omits to state that the accused were in possession of explosive substances or had them under their control "unlawfully and maliciously" and secondly that it was the intent of the accused to endanger life in British India.

(1892) 5 C P L R 18 (19), *Empress* v. *Jhengria*. Mischief.

(1867) 8 Suth W R 30 (30), *Queen* v. *Durbaroo Police*. (Do).

(1870) 14 Suth W R 13 (13), *Queen* v. *Parbutty Charn Chackerbutty*. Criminal misappropriation.

Note 18.

1. (1935) 1935 Rang 304 (308): 36 Cri L Jour 1393, *Nga Tha Htin* v. *Emperor*. It is not essential that the words of S. 34, I. P. C. should be incorporated in the charge, although it is desirable that some reference should be made to the common intention alleged against the accused and their confederates.

Unless it appears that *A* was in fact misled by this omission, the error shall not be regarded as material.

(*b*) *A* is charged with cheating *B*, and the manner in which he cheated *B* is not set out in the charge, or is set out incorrectly. *A* defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(*c*) *A* is charged with cheating *B*, and the manner in which he cheated *B* is not set out in the charge. There were many transactions between *A* and *B*, and *A* had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in this case, a material error.

(*d*) *A* is charged with the murder of Khoda Baksh on the 21st January 1882. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January 1882. *A* was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that *A* was not misled and that the error in the charge was immaterial.

(*e*) *A* was charged with murdering Haidar Baksh on the 20th January 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that *A* was misled, and that the error was material.

Synopsis.

Other Topics.

Abetment, waging war, sedition. See Note 3, F-N (2).
Aim of the section. See Note 1, Pt. 4.
Appellate Courts and Courts of Revision. See Note 1. See Sections 535 and 537. Also S. 232.
Armed with deadly weapon. See Note 3, F-N (1).
Common object of unlawful assembly. See Note 2 and Note 2, F-N (2).
False evidence — Particulars. See Note 3, F-N (2).
Immaterial and non-material errors or omissions. See Note 2, Pts. 1 and 2; Note 3. Note 1, F-N (1), See also S. 221.
Object of the section. See Note 1, Pt. 6.
Offence of dacoity. See Note 2, F-N (1).
Persons hurt—Charge defective, See Note 3, F-N (1).
Real prejudice—Considerations. See Note 1, Pts. 2 and 3; Note 2, Pt. 1.
Section compared with other sections. See Note 1.
Vague charges. See Note 1, F-N (5), Note 2, F-N (2), Note 3, F-N (2).

1. Scope of the Section.

This Section and S. 537, *infra* deal with cases where a *charge is framed* but there are errors or omissions in the statement of the particulars specified in Ss. 221 to 223, *ante*. This Section provides that such errors or omissions are *not to be regarded as material at any stage* unless the accused has been misled thereby and it has, in fact, occasioned a failure of justice;[1] while

Section 225—Note 1.

1. *Where accused not misled, defect in charge not material:—*
(1900) 27 Cal 776 (779), *Anookool Chundar Nundy* v. *Empress.*
(1894) Ratanlal 710 (713), *Empress* v. *Abdul Razak.*
(1903) 7 Cal W N 663 (665), *Shoshi Bhushan Bose* v. *Gobind Chandra Roy.*
(1908) 8 Cri L Jour 272 (276): 38 Bom 77, *Emperor* v. *Tribhuvan Das.*
(1907) 5 Cri L Jour 309 (321): 31 Bom 335, *Empress* v. *Bhagwan Das Kanji.*
(1909) 9 Cri L Jour 108 (112): 32 Mad 3, *In re Subramania Siva.*
(1909) 9 Cri L Jour 456 (489): 32 Mad 384, *In re Krishnaswamy.*
(1910) 11 Cri L Jour 597 (598): 8 Ind Cas 229 (Lah), *Wasava Singh* v. *Emperor.*

Sec. 225 Note 1

Section 537 provides that no finding, sentence or order in the case shall be *reversed or altered under Chapter 27 or on appeal or revision* unless it has occasioned a failure of justice. Section 535 *infra* deals with cases where *no charge has been framed at all,* and provides that no finding or sentence in the case should be deemed invalid in appeal or revision unless the Court considers that a failure of justice has been occasioned thereby.

It is for the Court to decide in each case whether the defect in the charge has misled the accused.[2] In considering the question whether the accused has been prejudiced in his defence by the defect in the charge regard must be had to the fact that the objection to the frame of the charge was not raised till a late stage in the proceedings.[3] (*See also* Section 537, Explanation).

The section is aimed among other things, at objections on the ground of variance between the charge and the evidence.[4] But the fundamental principle in all criminal charges is that the accused should not be prejudiced in his defence, and therefore where a charge expressed in vague terms has been understood in a certain sense and proceedings have gone on, on such basis, it is not thereafter open to the prosecution to contend that the charge means something else.[5] The object of the section is that technical defects in the charge should not be allowed to defeat the ends of justice. Hence, where the guilt of the accused has been proved, he can be convicted notwithstanding that the charge contains unnecessary allegations which the prosecution has not proved.[6]

This section lays down what errors and omissions in the charge should be regarded as material. Section 232 provides for the procedure to be followed

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(1915) 1915 Lah 16: (47, 48), 16 Cri L Jour 354 (357): 1915 Pun Re No. 17, *Balmokand* v. *Emperor.*
(1916) 1916 Cal 188 (192): 16 Cri L Jour 497 (501): 42 Cal 957, *Amritlal Hazara* v. *Emperor.*
(1915) 1915 Lah 418 (422): 16 Cri L Jour 689 (693): 1915 Pun Re No. 16, *Dhian Singh* v. *Emperor.*
(1932) 1932 All 73 (75): 33 Cri L Jour 373, *Mahomed Yakub* v. *Emperor.*
(1925) 1925 Cal 603 (603, 604): 26 Cri L Jour 849, *Kedarnath Chakravarthi* v. *Emperor,*
(1919) 1919 Pat 27 (30): 4 Pat L Jour 74: 20 Cri L Jour 161, *Mt. Kaser* v. *Emperor.*
(1930) 1930 Rang 114 (117): 7 Rang 821: 31 Cri L Jour 387, *Maung Ba Chit* v. *Emperor.*
(1925) 1925 Nag 147 (149): 25 Cri L Jour 1152, *Gangadhar* v. *Bhangi Sao.*

Where accused is prejudiced, defect is material:—

(1904) 8 Cal W N 278 (285) (F B), *Harjee Mull* v. *Inam Ali Sarkar.*
(1902) 15 C P L R 112 (113), *Emperor* v. *Vinayak Jageshwar.*
(1912) 13 Cri L Jour 125 (126): 13 Ind Cas 781 (Mad), *Mandi Ghasi* v. *Emperor.*

2. (1929) 1929 Pat 712 (714): 30 Cri L Jour 891: 9 Pat 642, *Mallu Gope* v. *Emperor.*

3. (1909) 9 Cri L Jour 108 (112): 32 Mad 3, *In re Subramania Siva.*
(1916) 1916 Cal 188 (192): 16 Cri L Jour 497 (501): 42 Cal 957, *Amritlal Hazra* v. *Emperor.*
(1933) 1933 Pat 488 (491): 34 Cri L Jour 892, *Sachidanand Prasad* v. *Emperor,*
[See also (1888) 1 Weir 471 (475). *Empress* v. *Williams.* Case bearing on S. 41 of Act 18 of 1862].

4. (1909) 9 Cri L Jour 456 (484): 32 Mad 384, *In re Krishnaswami.*
[But compare 1916 All 60 (60): 17 Cri L Jour 411 (411), *Ram Chandra Sahai* v. *Emperor.* It is not sufficient to say that at the close of the evidence the accused knows what is alleged against him. The object of Ss. 221, 222 and 223 is clearly to enable him to know the substantive charges which he will have to meet and to be ready for them *before* the evidence is given.]

5. (1878) 2 Bom 142 (145). *In re Baban Khan.* When accused has been convicted on a charge expressed in vague terms, the prosecution on appeal should be limited to the particular sense in which the charge has been understood at the trial.

6. (1867) 4 Bom H C R 17 (22) *Reg.* v. *Cassidy.*

in cases where an appellate or revisional Court considers that the defect in the charge is a material one. *See also* Notes under Sections 535 and 537.

2. Charge in cases of rioting, unlawful assembly, etc.

Under S. 223 *ante*, a charge of an offence of rioting (or connected offences) should specify the common object of the unlawful assembly. An error or omission in this respect will vitiate the trial if the accused has been prejudiced in his defence by reason of such defect in the charge.[1] But, if the accused has not been prejudiced by reason of such error or omission, the defect is not a material one.[2] Even in cases where the charge is to the effect that the accused is liable *constructively* under Section 149 of the Penal Code for the acts of his companions, the trial is not necessarily vitiated because the charge does not specify or states erroneously the common object in pursuance of which the act is alleged to have been done.[3]

3. Charges in other cases.

The undermentioned are cases in which the error or omission in the charge was considered material.[1] For cases in which the defect in the charge

Note 2.

1. (1895) 22 Cal 276 (285), *Sabir* v. *Empress.*
(1885) 11 Cal 106 (109), *Behari Mehton* v. *Empress.*
(1907) 6 Cri L Jour 446 (448) (Lah), *Gowardhan Das* v. *Emperor.*
[See (1924) 1924 Mad 584 (584): 25 Cri L Jour 396, *In re Kottoora Thevan.* Conviction for dacoity founded on a common object not charged is not sustainable.
(1906) 3 Cri L Jour 153 (159): 33 Cal 295, *Parasnath Sirkar* v. *Emperor.*
(1922) 1922 Cal 191 (191): 24 Cri L Jour 355, *Aminulla* v. *Emperor.*
2. (1894) 21 Cal 827 (832), *Basi Reddi* v. *Empress.*
(1906) 4 Cal W N 196 (199), *Rahamat Ali* v. *Empress.*
(1905) 2 Cri L Jour 275 (277, 278) (Cal), *Buddhu* v. *Mt. Lachminia.*
(1916) 1916 Cal 693 (695): 16 Cri L Jour 641 (646), *Ram Subhag Singh* v. *Emperor.*
(1926) 1926 Bom 314 (315): 27 Cri L Jour 744, *Emperor* v. *Yeshwant.*
(1918) 1918 Mad 350 (350): 19 Cri L Jour 200, *Dakshinamurti Rajali* v. *Emperor.*
(1917) 1917 Pat 453 (453): 2 Pat L J 541: 18 Cri L Jour 911, *Harinder Singh* v. *Emperor.*
(1926) 1926 Cal 439 (440): 26 Cri L Jour 567. *Chhakari Shaik* v. *Emperor.*
(1918) 1918 Pat 257 (258): 3 Pat L Jour 565: 19 Cri L Jour 735, *Mahangu Singh* v. *Emperor.*
(1927) 1927 Pat 398 (400): 6 Pat 832: 28 Cri L Jour 769, *Chhanka Dhanuk* v. *Emperor.*
(1918) 1918 Nag 64 (65): 20 Cri L Jour 760, *Maharaj Singh* v. *Emperor.*
(1933) 1933 Oudh 19 (20): 8 Luck 199: 34 Cri L Jour 393, *Ghazuddin Khan* v. *Emperor.*
(1917) 1917 Pat 453 (453): 2 Pat L J 541: 18 Cri L Jour 911, *Harinder Singh* v. *Emperor.* Want of specific allegation of common object in charge does not vitiate conviction if from the evidence it is clear what the common object is.
(1918) 1918 Nag 64 (65): 20 Cri L Jour 760, *Maharaj Singh* v. *Emperor.*
(1935) 1935 Oudh 488 (488): 36 Cri L Jour 1198, *Bishnath* v. *Emperor.*
(1908) 7 Cri L Jour 374 (377): 35 Cal 384, *Maniruddin* v. *Emperor.*
(1909) 10 Cri L Jour 471 (472): 36 Cal 865, *Silajit Mahoto* v. *Emperor.*
(1910) 11 Cri L Jour 121 (122): 37 Cal 340, *Babbon Shaikh* v. *Emperor.*
(1916) 1916 Cal 355 (355): 17 Cri L Jour 92 (93), *Abdul Sheikh* v. *Emperor.*
(1930) 1930 Mad 188 (189): 31 Cri L Jour 347, *Venkadu* v. *Emperor.*
(1928) 1928 Bom 286 (287): 30 Cri L Jour 467, *Hasan Ali Mujawar* v. *Emperor.*
(1931) 1931 Bom 520 (522): 55 Bom 725: 33 Cri L Jour 64, *Ramachandra Narayan Shastri* v. *Emperor.*
3. (1915) 1915 Lah 418 (422): 16 Cri L Jour 689 (693): 1915 Pun Re No. 16, *Dhian Singh* v. *Emperor.*
[But see (1912) 13 Cri L Jour 218 (219): 39 Cal 781, *Kudrutullah* v. *Emperor.* Submitted not correct.]

Note 3.

1. (1867) 8 Suth W R 95 (96), *In re Dowlut Moonshee.* S. 193, I. P. C. Charge under—Exact words not stated.
(1868) 9 Suth W R 14 (15), *Empress* v. *Feojdar Roy* (Do).
(1868) 9 Suth W R 25 (27), *Empress* v. *Soonder Mohooree* (Do).
(1916) 1916 All 60 (60): 17 Cri L Jour 411 (411), *Ramachandra Sahai* v. *Em-*

Sec. 225 Note 3

was considered *not* material, *see* the undermentioned cases.[2]

peror. Extortion—Charge of—Must state the amount alleged to have been obtained from each person and the nature of the extortion used against each—Conviction quashed.

(1925) 1925 Mad 690 (691) : 49 Mad 74 : 26 Cri L Jour 1513, *In re Gam Mallu Dora.* Conviction under S. 397 dacoity armed with a dangerous weapon and conviction under S. 395 dacoity, must be quashed as the charges did not give them sufficient particulars of what they had to meet.

(1912) 13 Cri L Jour 504 (504) : 15 Ind Cas 648 (Mad), *Govinda Reddi* v. *Emperor.* Charge framed under R. 8, S. 26, Madras Forest Act, must clearly state that the place from where the accused cut a tree was a "reserved forest."

(1913) 14 Cri L Jour 212 (213) : 19 Ind Cas 308 (Cal), *Sital Chandra Maitra* v. *Emperor.* In one charge two persons were charged with causing hurt to three others with a dao ; but there was no case of hurt with a dao by one of the accused and he was convicted under S. 352 for using lathi against two of the complainants. *Held*, that this was an irregularity which might have prejudiced the accused in their trial.

(1924) 1924 Lah 616 (617) : 25 Cri L Jour 471, *Jalaluddin* v. *Emperor.* Where accused is charged with having beaten the complainant at a particular place and at a particular time and the prosecution fails to establish that charge, the accused cannot on that evidence be convicted of having beaten the complainant at a different place on a different occasion.

[See also (1935) 1935 Pat 431 (432), *Satnarain Lal* v. *Emperor.* Accused charged under S. 304, but tried under S. 302, I. P. C.—Trial is illegal — S. 537, Cr. P. C., cannot cure illegality—Charge for minor offence and conviction for major offence are illegal].

2. (1873) 10 Bom H C R 373 (374), *Empress* v. *Rakhina.* Omission of the words "dishonestly" in a charge under S. 411, I. P. C., is not a ground for reversing conviction.

(1865) 2 Suth W R 51 (51), *Empress* v. *Bhuttoo Laljee.* Though charge does not distinctly specify the false statement on which the evidence of perjury is attempted to be established the omission is not material if the accused has not been prejudiced thereby.

(1876) 8 Suth W R 30 (30), *Empress* v. *Durbarro Police.* Charge under S. 436, I. P. C., should state that the house was used as a dwelling house and it is not enough if the charge merely refers to a house—But conviction upheld in the particular circumstances of the case.

(1905) 2 Cri L Jour 381 (381) (Mad), *Anantha Goundan* v. *Emperor.* Imputation of unchastity to married woman—Error in stating that the defamation was of the complainant, the husband, and not of the wife—*Held*, that it was an error or irregularity in the charge which had not prejudiced the accused or occasioned a failure of justice.

(1910) 11 Cri L Jour 597 (598) : 8 Ind Cas 229 (Lah), *Wasawa Singh* v. *Emperor.* Charge under S. 411, I. P. C., was as follows : "That you on or about . . . . . at *L* were found in possession of 2 boxes and some clothes, etc., which property you knew or had reason to believe to be stolen." It was urged that there was no such offence as being in possession, the offence defined in the Code being one of dishonest receipt or dishonest retention. *Held*, that though the plea was correct the accused was not misled and he knew what charge he had to meet.

(1912) 13 Cri L Jour 251 (251) : 14 Ind Cas 603 (Mad), *Aiyagiri Venkataramiah* v. *Emperor.* Charge under S. 477-A, I. P. C., non-specification of alleged false entries in the charge did not vitiate the trial as the accused knew the subject of the charge and was not prejudiced in his defence and did not object to it in the Court of Sessions.

(1916) 1916 Cal 693 (699) : 16 Cri L Jour 641 (646), *Ram Subhag Singh* v. *Emperor.* Charge under Ss. 147 and 323 — Omission to state the name of the person against whom the offence was committed — Defect is cured by S. 225.

(1924) 1924 Cal 18 (41) : 25 Cri L Jour 1313, *Billinghurst* v. *Emperor.* Charge under S. 420, I. P. C., should contain an allegation of the person or persons who were alleged to have been deceived and induced to issue a cheque. The omission cannot be regarded as fatal if the accused is not misled.

(1916) 1916 Cal 188 (197, 198): 16 Cri L Jour 497 (501) : 42 Cal 957, *Amritlal Hazara* v. *Emperor.* Charge under S. 4 (b), Explosive Substances Act (VI of 1908).

(1915) 1915 Lah 16 (19): 16 Cri L Jour 354 (357) : (1915) Pun Re No. 17, *Balmo-*

kand v. *Crown.* Charge of criminal conspiracy to commit murder—Omission to specify some of the places where the accused are said to have agreed—*Held*, that the accused not prejudiced by the use of the phrase "other places" as nothing had been unfairly sprung upon them under cover of that phrase.

(1925) 1925 Cal 603 (604) : 26 Cri L Jour 849, *Kedarnath Chakravarthi* v. *Emperor.* In a case of cheating the charge must set out the manner in which the offence was committed. The omission to set out the manner is material or not, according to the accused, having or not having been misled.

(1932) 1932 Cal 651 (651) : 33 Cri L Jour 771 : 60 Cal 201, *Kailash Chandra* v. *Emperor.* Charge under S. 292., I. P. C. It is better to indicate exactly in what respects the book is obscene. But if the accused is not prejudiced in his defence and the prosecution maintains that the whole book is obscene, mere failure to mention particular passages is not sufficient reason to interfere in revision.

(1933) 1933 Cal 481 (482) : 34 Cri L Jour 526, *Moutajaddin Choukidar* v. *Emperor.* Registration Act (16 of 1908), S. 82—Charge not specifying abetment — No failure of justice — Accused not misled — Omission is immaterial.

(1927) 1927 Lah 702 (704) : 28 Cri L Jour 821 : 9 Lah 280, *Shankar Lal* v. *Emperor.* In prosecution under S. 504, I. P. C., if the accused is aware of the words complained of but the Magistrate does not specifically mention the objectionable words in the charge the accused not being misled by the technical defect in the charge, his conviction is not vitiated.

(1931) 1931 Lah 186 (187) : 32 Cri L Jour 1202, *Chint Ram* v. *Emperor.* Omission to state the substance of speeches in a charge under S. 124-A is only an irregularity.

(1927) 1927 Lah 432 (432) : 28 Cri L Jour 419, *Allah Din* v. *Emperor.* In a charge under S. 498 if the accused are not not charged with knowledge that abducted woman was married one but the accused knew what they were charged with, the defect is not fatal.

(1925) 1925 Cal 674 (675) : 26 Cri L Jour 906, *Gokul Khatik* v. *Emperor.* Manner of cheating—Misdescription —Not material.

(1930) 1930 Cal 708 (708) : 58 Cal 580 : 32 Cri L Jour 228, *Nababali* v. *Emperor.* The word "or" by mistake used for word "and" between two charges framed under Ss. 221 and 342, I. P. C. Accused not prejudiced. *Held* conviction in respect of both charges not bad.

(1932) 1932 Cal 461 (462) : 59 Cal 113 : 33 Cri L Jour 549, *H. B. Spiers* v. *Johiuddin.* Wrong sections quoted in charge—Validity of conviction.

(1926) 1926 Pat 347 (347) : 27 Cri L Jour 909, *Farzand Ali* v. *Emperor.*

(1918) 1918 Nag 22 (26) : 19 Cri L Jour 657, *Jangilal* v. *Emperor.* Omission to state manner of cheating not material as it had not misled the accused.

(1928) 29 Cri L Jour 287 (288) : 107 Ind Cas 826 (Pat), *Jamuna Prasad* v. *Emperor.* Setting out the details of the charges in one comprehensive sentence instead of stating the substance in separate sentences is not an error in law.

(1932) 1932 Nag 158 (159) : 34 Cri L Jour 154, *S. Mal Marwadi* v. *Emperor.* Accused in complaint for defamation is not prejudiced although the exact words used are not given in the charge where the charge was clear and unambiguous and the accused was not liable to be misled by the charge as framed.

(1927) 1927 Sind 58 (59) : 27 Cri L Jour 947, *Tikamdas Mulchand* v. *Emperor.* Defamation—Plea that though there was publication, there was no publication to the person mentioned in the charge is a highly technical plea and the defect in the charge is curable under S. 537.

(1934) 1934 Lah 227 (228) : 35 Cri L Jour 1386, *Nura* v. *Emperor.* Omission to mention S. 34, I. P. C., by the application of which accused was convicted was held not material in the circumstances of the case.

[See also (1910) 11 Cri L Jour 303 (303, 304) : 6 Ind Cas 269 (P C), *In re Chanda Singh.* Proceedings against pleader under Legal Practitioners Act—Charges of misconduct against pleader not formally drawn up—Their substance understood by pleader—Proceedings good and the latter deliberately admitted them —Order passed by the Judge is not *ultra vires.*

(1909) 9 Cri L Jour 456 (460) : 32 Mad 384, *In re Krishnaswami Sarma.* Sedition—Failure to specify passages.

(1909) 9 Cri L Jour 108 (112) : 32 Mad 3, *In re Subramania Siva.* (Do).

(1925) 1925 Mad 106 (107) : 25 Cri L Jour 401, *Narayana Menon In re.* (Do).

(1909) 9 Cri L Jour 140 (141) : 1 Ind Cas 42 (Mad), *In re Chidambaram Pillai.* (Do).

Sec. 226

226.* When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges.

Procedure on commitment without charge or with imperfect charge.

Illustrations.

1. *A* is charged with the murder of *C*. A charge of abetting the murder of *C* may be added or substituted.

2. *A* is charged with forging a valuable security under Section 467 of the Indian Penal Code. A charge of fabricating false evidence under Section 193 may be added.

3. *A* is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under Section 235 of the Indian Penal Code cannot be added.

Synopsis.

Other Topics.

Altogether different offence. See Note 2, Pt. 7 and F-N (5) and (8).
Amendment of charges. See Note 2.
Charge-Meaning of. See Note 2, F-N (6).
Charge from original evidence itself. See Note 2, Pts. 8 and 9.
Charges not to be based on additional evidence. See Note 2, Pts. 8 and 9.
Charges not to be expunged. See Note 1, F-N (2).
New charges at re-trials. See Note 2, Pt. 13.
New charge need not be related to original charge. See Note 2, Pt. 7 and F-N (5) and (8).
Prior dismissal by Magistrate for offence. See Note 2, Pt. 10.
Quashing conviction. See Section 232.
Stages in which charges are to be amended. See Note 2, Pt. 3.

1. Legislative Changes.

Difference between the Codes of 1861 *and* 1872:

There was no corresponding Section in the Code of 1861. This Section was first enacted in the Code of 1872 as Section 446. But even under the Code of 1861 it was held that the Sessions Court had power under Section 244

*(Code of 1882, S. 226—*Same as above; *but illustrations were added in* 1898.)

(Code of 1872—S. 446.)

446. If a prisoner is committed to the Court of Session, either without any charge at all or upon a charge which the Court, upon reference to the proceedings before the committing Magistrate, considers improper the Court of Session may draw up a charge for any offence which it considers to be proved by the evidence taken before the committing Magistrate. A copy of such charge shall be given to the accused person.

How Court of Session may deal with charge.

(Code of 1861—*Nil.*)

(1918) 1918 Lah 397 (400) : 18 Cri L Jour 875 (878) : 1917 Pun Re No. 29, *Bisakhi* v. *Emperor*. Omission to specify previous conviction.

(1881) 1881 All W N 32 (32), *Empress* v. *Raghib Ali*. (Do).

(1861) 2 Weir 266 (266), *In re Yippaka Daligadu*. (Do).

(now Section 227) to amend the charge framed by the committing Magistrate.[1]

Changes made in 1882:—

1. The words "at all" which occurred after the words "without any charge" in Section 446 of the Code of 1872 were omitted.
2. The words "or with an imperfect or erroneous charge" were substituted for the words "or upon a charge which the Court, upon reference to the proceedings before the Committing Magistrate considers improper " which occurred in the Code of 1872.
3. The words "may draw up a charge" which occurred in the Code of 1872, were substituted by the words "may frame a charge or add to or otherwise alter the charge".[2]
4. The words requiring a copy of the new charge to be given to the accused were omitted.

Changes made in 1898:—

The illustrations to the section were added.

2. Scope of the Section.

Section 193, Sub-Section 1 provides that except as otherwise expressly provided by the Code or by any other law for the time being in force, no Court of Session can take cognizance of a case as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf. Similarly, under Section 194 the High Court is empowered to take cognizance of offences as a Court of original jurisdiction "upon a commitment made to it in manner hereinafter provided". The present Section is by way of an exception to these Sections.[1] It enables the High Court or the Sessions Court to amend or add to the charge on which an accused has been committed to it for trial. It also enables the High Court or the Sessions Court to frame a suitable charge in cases in which an accused has been committed without a charge. But the power is strictly limited to the cases specified in the Section, viz., cases in which a person is committed for trial without a charge or with an imperfect or erroneous charge.[2]

It is competent to the Sessions Judge to amend the charge even after the commencement of the trial (*See* Section 227, *infra*). But it is his duty before the commencement of the trial to scrutinise the charges and to amend them if necessary under this Section.[3] When the Sessions Judge finds the

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Section 226—Note 1.

1. (1870) 7 Bom H C R Cri 81 (82), *Reg* v. *Bapu Parbat.*
   (1867) 7 Suth W R Cri 8 (8), *In re Kalaram Singh.*
   (1864) 1 Suth W R Cri L 2 (2).
2. (1881) 7 Cal L R 143 (143), *Queen* v. *Porcshollah Sheikh.* Case under Code of 1872—*Held* that the Sessions Judge had no power to expunge the charge framed by the committing Magistrate.

Note 2.

1. (1915) 1915 Sind 50 (51, 52): 16 Cri L Jour 573 (573): 9 Sind L R 37, *Emperor* v. *Dodo.*
2. (1925) 1925 Oudh 158 (160): 25 Cri L Jour 1162, *Surat Bahadar* v. *Emperor.* Cmcmitting Magistrate framing charge under S. 471, I. P. C. As sanction of Court was necessary under Criminal Procedure Code, Sessions Judge converting it into charge under S. 474 though charge was not imperfect in form and though offence committed by accused fell under S. 471 and not S. 474—*Held* that he acted without jurisdiction.
3. (1918) 1918 Mad 821 (822): 18 Cri L Jour 346 (346), *Karuppa Goundan* v. *Emperor.*
   (1926) 1926 Oudh 245 (248): 27 Cri L Jour 57, *Bhulan* v. *Emperor.*
   [See (1892) 16 Bom 414 (426), *Queen* v. *Vajitram.* Application for framing additional charge in respect of another offence disclosed on the evidence recorded by the committing

Sec. 226 Note 2

charges framed by the committing Magistrate imperfect in any way, it is his duty to amend them under this Section and not acquit the accused.[4]

The Sessions Judge has power under the Section to "frame a charge or add to or otherwise alter the charge as the case may be." He can totally reject a charge framed by the Magistrate and substitute a new charge in its place.[5] (*See* illustration 1). Similarly, he can add a charge to that framed by the committing Magistrate[6] (*See* illustration 2).

The added charge need not be related to the original charge.[7] But it is on the facts disclosed on the evidence before the committing Magistrate *and on those facts alone* that any action under this Section can be taken.[8] Further, the Section refers to a case where the charge is defective *at the time of commitment*. Hence, an amendment or addition cannot be made under this Section on the basis of additional evidence taken by the committing Magistrate

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Magistrate—Decision on application —Postponement till a later stage of the proceedings is objectionable — Application must be disposed of at the very commencement of the trial.

4. (1882) 8 Cal 450 (453), *Empress* v. *Sreenath Kur*.
[But compare (1928) 1928 Bom 475 (476) : 30 Cri L Jour 191, *Emperor* v. *Mohanlal Aditram*. Accused committed to the High Court Sessions for kidnapping minor girl in Bombay and also of abetting rape on her committed at Ahmedabad under Ss. 376 and 114, I. P. C.—Prosecution seeking to amend the second charge of abetment of rape by omitting S. 114, I. P. C., and by substituting in its place S. 109, I. P. C.—Leave to amend the charge was refused on the ground that the proposed amendment would materially alter the nature of the case the accused had to meet at a late stage of the case and the second charge was therefore withdrawn from the jury.

5. (1882) 1882 All W N 165 (165), *Empress* v. *RamBakhsh*. Magistrate on the evidence before him ought to have committed on a charge of rape and not adultery — Sessions Judge can substitute a charge of rape.

6. (1915) 1915 Sind 50 (51, 52) : 16 Cri L Jour 573 (574, 575) : 9 Sind L R 37, *Emperor* v. *Dodo*. Charge means a whole series of counts or heads of charges of various offences so that even the word "alter" gives power to add additional counts to the charge.
(1924) 1924 Cal 625 (626) : 26 Cri L Jour 5, *Hassenullah Shaikh* v. *Emperor*. (Do).
(1924) 1924 Lah 413 (414) : 24 Cri L Jour 177, *Mula Singh* v. *Emperor*.
(1933) 1933 Oudh 375 (377) : 35 Cri L Jour 63, *Gulzari* v. *Emperor*.
[See also (1884) 8 Bom 200 (210), *Empress* v. *Appa Subhana Mendre* "Charge" refers to a statement of a specific offence and not a whole series of counts or heads of charges —But the expression "without a charge" covers cases where the Magistrate has not framed a charge for such offence as the Sessions Court may think the prisonsr ought to be tried for.]
[But see (1886) 8 All 665 (667), *Empress* v. *Kharga*. Submitted not good law.]

7. (1915) 1915 Sind 50 (52) : 16 Cri L Jour 573 (574, 575) : 9 Sind L R 37, *Emperor* v. *Dodo*.
(1933) 1933 Oudh 375 (377) : 35 Cri L Jour 63, *Gulzari* v. *Emperor*.
[But compare (1904) 1 Cri L Jour 794 (797) : 32 Cal 22, *Birendra Lal Bhaduri* v. *Emperor*. Sessions Court is not a Court of original jurisdiction and though vested with large powers for amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal, and not with regard to a matter, not covered by the indictment.
(1920) 1920 Mad 131 (133) : 21 Cri L Jour 57, *Muthu Goundan* v. *Emperor*. (Do).

8. (1915) 1915 Sind 50 (52) : 16 Cri L Jour 573 (574) : 9 Sind L R 37. *Dodo* v. *Emperor*.
(1924) 1924 Lah 413 (414) : 24 Cri L Jour 177, *Mula Singh* v. *Emperor*.
(1881) 3 Mad 351 (353), *M. K. Rama Varma Raja* v. *The Queen*.
[See also (1931) 1931 Cal 524 (526) : 32 Cri L Jour 1135, *Abdul Aziz Shah* v. *Emperor*. Illustrations to the Section show that the only new charges or additions or alterations which may be made are those which can be supported by the evidence which is relevant to the charge already made.]

under Section 219 *after commitment.*[9]

The power of the Sessions Judge to frame a charge under this Section is not fettered by the fact that a complaint in respect of the offence for which he proposes to frame a charge has been dismissed by the Magistrate.[10] But he cannot substitute a charge of adultery for one of rape framed by the Magistrate, the reason being that under Section 199 a charge of adultery cannot be taken cognizance of by any Court except upon a complaint of the husband or other persons mentioned therein.[11] (Compare Section 230). The Sessions Judge has no power under the Section to order the Magistrate to re-draw the charges.[12]

Where a case was remanded to a Court of Session by the High Court for trial on certain charges, it was held that the High Court did not intend to fetter the discretion of the Sessions Judge to amend the charges in any way he might think necessary.[13]

The fact that additional charges are framed by the Sessions Court does not make the questions at issue in the Sessions trial and in the preliminary inquiry substantially different and under Section 33 of the Evidence Act the evidence of witnesses who gave evidence in the preliminary inquiry and subsequently died may be admitted in the Sessions Trial.[14]

3. "Without a Charge."

This Section applies *inter alia* to cases in which a person is committed for trial without a charge. For instance, a commitment under Section 437 or Section 526 may be made without framing a charge.[1] In such cases, the Court of Session may itself frame a charge. It has been held that the expression applies not only to cases in which no charge has been framed *at all* by the committing Magistrate but also to cases in which a charge has been framed by him but there is no charge in respect of the offence which the *Sessions Judge* may think the prisoner ought to be tried for.[2]

4. "With an imperfect or erroneous Charge."

The word "imperfect" implies defect in form.[1] The expression covers an imperfection due to a misjoinder of charges.[2] In the undermentioned case[3] it was held by the Allahabad High Court that the fact that the evidence recorded by the committing Magistrate is such as to justify an additional head of charge being included does not make the charge as framed imperfect or erroneous and that the Sessions Court has no power under the Section to *add* a charge. But this view, it is submitted, is not correct. (*See* under Note 2 *supra*).

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9. (1933) 1933 Mad 247 (250) : 34 Cri L Jour 278, *Bhogi Reddy Ankamma In re.*
10. (1892) 16 Bom 414 (424, 427), *Empress* v. *Vaji Ram.*
11. (1902) 29 Cal 415 (416), *Cheman Gard* v. *Emperor.*
    (1882) 1882 All W N 165 (165), *Empress* v. *Ram Baksh.*
12. (1876) 25 Suth W R Cri 17 (17), *Queen* v. *Ramdhone Acharjee.*
13. (1904) 1 Cri L Jour 794 (797) : 32 Cal 22, *Birendra Dal Bhaduri* v. *Emperor.*
14. (1881) 7 Cal 42 (44), *Empress* v. *Rochia Mohato.*

Note 3.

1. (1904) 1 Cri L Jour 275 (277) : 27 Mad 54, *Kalagava Bupiah in the matter of.*
2. (1884) 8 Bom 200 (209), *Appa Subhana Mendre* v. *Empress.*
   [But see (1886) 8 All 665 (667), *Empress* v. *Kharga.*]

Note 4.

1. (1925) 1925 Oudh 158 (160) : 25 Cri L Jour 1162, *Surat Bahadur* v. *Emperor.*
2. (1882) 8 Cal 450 (453), *Empress* v. *Sreenath.*
3. (1886) 8 All 665 (667), *Queen* v. *Kharga.*

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227.* (1) Any Court may alter or, add to any charge at any time before judgment is pronounced, or in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

Court may alter charge.

(2) Every such alteration or addition shall be read and explained to the accused.

Synopsis.

Other Topics.

'Alter' whether includes "withdrawal". See Note 2, Pt. 5 and Note 4, Pt. 6.
Alteration after compromise petition. See Note 4, Pt. 12.
Alteration after verdict. See Note 6, Pt. 1.
Amendment should note prejudice the accused. See Note 4.
Curing illegality. See Note 4, Pts. 4—6.
Limits of power of amendment. See Note 4.
"May alter" addition of a new charge. See Note 3, Pts. 1, 2.
Omission to read and explain effect of. See Note 11, Pts. 2—5.
Powers of Sessions Court. See Note 2, Pt. 1.

1. Legislative Changes.

The words "or, add to" in Sub-Section 1 were for the first time introduced in the present Code.

2. Scope of the Section.

Section 226 *ante* applies to *Sessions Courts and High Courts* and is intended to apply to alterations and additions to the charge, at the *commencement of the trial.* This Section applies to *all* courts and is intended to apply to

*(Code of 1882—S. 227—*Same, except the addition noted in Note* 1.)

(Code of 1872—Ss. 444 and 445)

444. Any accused person may apply to the Court by which he is tried for an amendment of the charge made against him; and in considering whether any error in a charge did in fact mislead the accused person, the Court shall take into account the fact that he did or did not make such an application.

Prisoner may apply for amendment.

445. Any Court may, either upon the application of the accused person, or upon its own motion, amend or alter any charge at any stage of the proceedings before judgment is signed, or, in cases of trials before a Court of Session, before the verdict of the jury is delivered or the opinion of the assessors is expressed. Such amendment shall be read and explained to the accused person.

Court may amend a charge.

(Code of 1861—S. 244)

244. It shall be competent to any Court before which a trial is held, at any stage of the trial, to amend or alter the charge.

Amendment of Charge.

alterations and additions to the charge *during the course of the trial*.[1] In either case, however, the alterations or additions must be based *on the facts disclosed by the evidence recorded*,[2] the materials on which the court acts under Section 226 being the evidence recorded before the committing Magistrate, and those on which the court acts under this Section being the evidence *recorded before itself*.[3]

There are certain cases in which it is not necessary to amend the charge and the accused can be convicted of an offence though he was not charged with it.[4] (*See* Sections 237 and 238 *infra*).

The word "alter" in the Section includes a power to *withdraw* a charge.[5] (*See also* Note 4 *infra*).

3. "Or add to."

These words were absent in the corresponding Section of the old Codes, and there was a conflict of opinion as to whether the word "alter" included the addition of a new charge.[1] It is now clear that a new charge may be added to the original charge even if it be unconnected in any way with the latter.[2] In the latter case, however, the trial cannot proceed forthwith but the Court should proceed under Section 229 *infra*.

4. "May"—Discretion of Court.

The word "may" shows that the Court has a large discretion to alter or add to a charge framed under the Code.[1] In fact, the Magistrate must be

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Section 227—Note 2.

1. (1933) 1933 Mad 247 (250) : 34 Cri L Jour 278, *Ankamma* v. *Emperor*. S. 227 read with S. 237 can only apply after some evidence has been taken at the trial.
2. See Note 3 *infra*.
3. (1915) 1915 Sind 50 (52): 16 Cri L Jour 573 (573) : 9 Sind L R 37, *Emperor* v. *Dodo*.
4. (1935) 1935 All 935 (937), *Samuel John* v. *Emperor*.
5. (1890) 1890 All W N 178 (178), *Ramdai* v. *Parbati*.

Note 3.

1. (1884) 8 Bom 200 (210, 211), *Emperor* v. *Appa Subhana Mendre*. New charge cannot be framed.
   (1897) 10 C P L R 13 (14), *Empress* v. *Baliram*. 'Alter' does not include addition.
   (1879) 1879 Pun Re No. 21 page 64, *Empress* v. *Sultani*. Alteration does not include addition.
   (1889) 1889 Pun Re No. 18 page 69, *Crown* v. *Uma Shankar*. Charge under S. 501 not to be altered into charge under S. 500.
   (1871) 3 N W P H C R 337 (337, 338), *Queen* v. *Waris Ali*. Cannot add an entirely new charge.
   (1879-1901) 1 Upp Bur Rul 64 (65), *Nga Co* v. *Empress*. Cancelling of charge under one section and substitution of another not warranted by law.
   [See also (1894) 21 Cal 97 (103), *Empress* v. *Sukee Raur*. In a case committed under S. 372, I P C Court refused to add a charge of abetment of rape on the evidence recorded in the Sessions Court].
   (1888) 10 All 58 (60, 61), *Empress* v. *Wazir Jan*. New charges may be added.
   (1887) 9 All 525 (527), *Empress* v. *Gordon*. "Alter" includes addition of new charge.
2. (1915) 1915 Sind 50 (52) : 16 Cri L Jour 573 (574) : 9 Sind L R 37, *Emperor* v. *Dodo*.
   (1924) 1924 Cal 625 (626) ; 26 Cri L Jour 5, *Hassenulla Sheikh* v. *Emperor*.
   [But see (1927) 1927 Sind 28 (34) : 21 Sind L R 55 : 27 Cri L Jour 1217, *Emperor* v. *Stevart*. The doubt expressed in this case based on 3 Mad 351, a decision under the old Code, does not seem to have any basis.]

Note 4.

1. *See the following cases* :—
   (1926) 1926 Bom 255 (255) : 27 Cri L Jour 496, *Framji Bomanji* v. *Emperor*. A charge under S. 122 of Bombay City Police Act was altered into one under S. 352, I. P. C.
   (1871) 16 Suth W R 63 (63), *Queen* v. *Firman Ali*.
   (1863) 7 Suth W R 8 (8), *In re Kalaram Singh*.
   (1895) Ratanlal 773 (774), *Empress* v. *Abdul Husen*.
   (1872) 4 N W P H C R 16 (20), *Queen* v. *Bheebeekee*.
   (1893) 17 Bom 369 (372, 373), *Empress* v. *Khode Uma*.

Sec. 227 Note 4

ever ready, as the facts of the case are disclosed, to either alter or add to the charge, or to refer the case under Section 347 *infra*.[2] It often happens that in the course of the evidence an offence more aggravated than the one complained of, is discovered, and in such cases, it is no less the duty of the Court to charge the accused with the more aggravated offence.[3] The discretion is, however, a *judicial* one and must not be exercised *arbitrarily*.

The Section does not warrant the striking out of a charge for the purpose of *curing an illegality which had already been committed* and does not enable the court to proceed on those charges only that have been legally joined.[4] Thus where the accused was charged with more than three offences committed in the course of a year it was held that the trial was in contravention of Section 234 and that the illegality could not be cured by striking out the charges so as to reduce the number to three.[5]

Where, however, a charge is *properly* framed but it is found after taking evidence that it is groundless, the Court is not prevented from striking out such charge.[6]

The alteration or addition of a charge must be for an offence made out *by the evidence recorded in the course of the trial before the court*.[7] In *Birendra Lal Bhaduri* v. *King Emperor*[8] it was observed:—"The Sessions Court is not a Court of original jurisdiction and, though vested with large powers of amending and adding to charges, can only do so with reference to

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(1931) 1931 Oudh 73 (73, 74) : 32 Cri L Jour 330, *Sachchidanand* v. *Emperor*. A charge under S. 341, I. P. C., can be converted to one under Ss. 341 and 506, I. P. C.

(1914) 1914 Low Bur 65 (123) : 15 Cri L Jour 80 : 7 Low Bur Rul 143 (F B), *G. S. Clifford* v. *Emperor*. A charge of cheating by issuing false balance sheet was altered by adding words regarding subsequent conduct of the bank.

2. (1927) 1927 Mad 307 (308) : 28 Cri L Jour 164, *Kattuva Rowther* v. *Suppan Asari*.

(1910) 11 Cri L Jour 154 (155) : 4 Ind Cas 1039 (Mad), *Public Prosecutor* v. *Thavas Landi Thevar*. A charge under S. 211 was altered into one under S. 182-A, I. P. C.

(1924) 1924 Lah 718 (718) : 26 Cri L Jour 420, *Gokul* v. *Phuman Singh*. Case under S. 363, I. P. C., of kidnapping from lawful guardianship, a minor girl—On finding that the girl was not under 16 years of age, Magistrate must examine and decide the question whether the accused could be charged with an offence under S. 366, I. P. C.

3. (1929) 1929 Lah 838 (839) : 30 Cri L Jour 957, *Mangal Sen* v. *Emperor*.

4. (1907) 5 Cri L Jour 94 (95, 96) : 29 Mad 569, *Manawala Chetty* v. *Emperor*. [See also (1881) 7 Cal L R 143 (143). *Poreshollah* v *Empress*].

(1925) 1925 Mad 1065 (1066) : 26 Cri L Jour 1618, *Krishnamurthi Aiyar* v. *Narayanasami Aiyar*.

[But see (1929) 1929 Pat 275 (284) : 8 Pat 289 : 30 Cri L Jour 674, *Runj Subdudhi* v. *Emperor*. Where the language used implies that where the trial is open to attack on the ground of misjoinder or multifariousness of charges, a charge once framed may be dropped before the conclusion of the trial].

5. (1922) 1922 Cal 401 (401) : 49 Cal 555 ; 24 Cri L Jour 86, *Chetto Kalwar* v. *Emperor*.

(1926) 1926 Lah 193 (194) : 27 Cri L Jour 793, *Fitzmaurice* v. *Emperor*.

6. (1882) 11 Cal 85 (90), *Empress* v. *Jacquiet*.

(1890) 12 All 551 (552), *Dwarka Lal* v. *Mahadeo Rai*.

[Compare (1929) 1929 Pat 275 (284) : 8 Pat 289 : 30 Cri L Jour 675, *Runj Subdudhi* v. *Emperor*. Once a charge has been framed it should not be dropped until the conclusion of the trial unless on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges].

7. (1881) 3 Mad 351 (352, 353), *M. K. Rama Varma Raja* v. *The Queen*.

(1929) 1929 Sind 250 (251, 252) : 30 Cri L Jour 1121, *Wahid Bux Bhutto* v. *Emperor*.

8. (1904) 1 Cri L Jour 794 (797) : 32 Cal 22, *Birendra Dal Bhaduri* v. *Emperor*.

the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment." *See also* the following cases.[9]

Where an offence cannot be taken cognizance of without a sanction or a complaint as required by Sections 198 and 199 of the Code, the Court cannot under Section 238 *infra* convict a person for such offence where there is no such sanction or complaint. It follows that a charge which does not require such sanction or complaint cannot be altered into a charge for an offence which requires such sanction or complaint without getting such sanction or complaint.[10]

It will not be a sound exercise of discretion under this Section to add a serious charge after the defence evidence is heard and proceed with the case without allowing further time to the accused.[11] Again where the charge is of a compoundable offence and the parties file a compromise the Court should stay further proceedings and not frame charges subsequent to the application for leave to compromise.[12]

5. Record of reasons.

Where a Sessions Judge altered a charge under Section 395 Penal Code to one of robbery without assigning any reason it was held by the High Court of Calcutta that this should not have been done.[1]

6. Time for alteration of or addition to charge.

A charge can be amended or altered or added to at any time

1. before judgment is pronounced and,
2. in trials before the Court of Session or High Court before the verdict of the jury is returned, or the opinion of the assessors is expressed.[1]

The words 'return of the verdict' in the Section mean the return of

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9. (1920) 1920 Mad 131 (132) : 21 Cri L Jour 57, *Muthu Goundan* v. *Emperor*.
   (1910) 11 Cri L Jour 131 (133) : 4 Ind Cas 993 (Lah), *Shadin* v. *Emperor*. Persons committed for murder of *A*. Sessions Judge acquitting them cannot add and convict on a charge of causing grievous hurt to *B*.
   (1925) 1925 Cal 579 (580) : 26 Cri L Jour 302, *Biroo Sardar* v. *Ariff*. Summons to accused under one section —Evidence disclosing another offence—Amendment of charge.
   (1869-70) 5 Mad H C R 13 (14).
10. (1902) 29 Cal 415 (416), *Chemon Garo* v. *Emperor*.
    [See also (1925) 1925 Lah 631 (632) : 6 Lah 375 : 27 Cri L Jour 769, *Mt. Naurati* v. *Emperor*. Condition of S. 198 satisfied—Charge can be added].
11. (1902) 6 Cal W N 72 (78), *Emperor* v. *Mathura Thakur*.
    (1907) 5 Cri L Jour 164 (167) : 31 Bom 218, *Emperor* v. *Isap Mahmad*.
    (1909) 9 Cri L Jour 226 (231) : 33 Bom 221, *In re Balgangadhar Tilak*. Addition of a charge of previous conviction after the close of the case after return of verdict is not contemplated by the Code.
    [See also (1871) 3 N W P H C R 271 (272), *Queen* v. *Chotey Lal*].
12. (1914) 1914 Lah 561 (2) (563) : 16 Cri L Jour 81 (82) : 1914 Pun Re No. 29, *Hasta* v. *Emperor*.
    (1899) 3 Cal W N 548 (550) : *Mahomed Ismail* v. *Empress*.

Note 5.

1. (1912) 13 Cri L Jour 127 (128) : 13 Ind Cas 783 (Cal), *Paimullah* v. *Emperor*.

Note 6.

1. (1931) 1931 Mad 439 (440) : 32 Cri L Jour 756, *Subramania Aiyar* v. *Emperor*.
   (1926) 1926 Oudh 161 (163) : 26 Cri L Jour 1602, *Bishambhar Nath Tandon* v. *Emperor*.
   (1888) 1888 All W N 116 (117), *Empress* v. *Karim Baksh*.
   (1862) 1 M H C R 31 (37, 38), *Queen* v. *Willians*.
   (1864) 1 Suth W R 39 (39), *Queen* v. *Dhurmonarain*.
   (1868-69) 5 Bom H C R 9 (10), *Reg.* v. *Shek Ali valad Fakir Muhammad*. No power to alter after verdict.
   (1916) 1916 Lah 52 (53) : 17 Cri L Jour 454 (455) : 1916 Pun Re No. 33, *Harbans* v. *Emperor*. No power after assessors express opinion.
   (1864) 1 Suth W R 40 (40, 41), *Queen* v. *Dyee Bhala* (Do).

Sec. 227 Notes 6—9

the *final* verdict which the judge is finally bound to record.[2] The Judge has a discretion under Section 303 *infra* to question the jury as to the grounds of their verdict and no verdict can be said to be returned and finally recorded until the last of the questions has been answered.[3]

7. Amendment of charge after remand.

It was held in the undermentioned case[1] that the Court could, after remand by the superior Court, amend the charge, and that the remand order could not be intended to fetter this power.

7a. Amendment by Court of Session.

A Sessions Court not being a Court of original jurisdiction, though it is vested with large powers for amending and adding to charges, it can only do so with reference to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment.[1] *See also* the undermentioned case.[2]

8. Application for alteration of charges.

An application for the alteration of or addition to the charge should be made as early as possible[1] and, in jury cases, before the jury is chosen.[2] Orders on such applications should be passed at the same time and not be postponed.[3] The Court may refuse to entertain an application for amendment of a charge if made at a very late stage of the case.[4] It may also be noted that in determining whether any error or omission in a charge has occasioned a failure of justice within the meaning of Section 537 the Court should have regard to the fact whether the objection could or should have been taken at an earlier stage in the proceedings.

9. Amendment—How made.

Amendments in a charge ought to be made formally and should appear on the face of the record.[1] When a Magistrate amends a charge he should not write over the original charge but should leave it on the file for reference if necessary and should write the new charge separately and correctly date it.[2]

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2. (1884) 8 Bom 200 (211), *Empress* v. *Appa Subhana Mendre*.
(1874) 21 Suth W R Cri Rul 1 (2), *Queen* v. *Sastiram*.
3. [See cases cited in foot-note (2)].

Note 7.

1. [See (1899) 26 Cal 560 (563), *Empress* v. *Mati Lal Lahiri*].
[See also (1904) 1 Cri L Jour 794 (796) : 32 Cal 22, *Birendra Lal Bhadury* v. *Emperor*].

Note 7a.

1. (1904) 1 Cri L Jour 794 (797) : 32 Cal 22, *Birendra Lal Bhadury* v. *King-Emperor*.
2. (1926) 1926 Pat 253 (254) : 5 Pat 238 : 27 Cri L Jour 512, *Ramsunder Issur* v. *Emperor*. It is not a proper exercise of discretion to withdraw the charge which the committing Magistrate thought to be proved and put the accused under disadvantage by substituting another (triable with aid of assessors) so that he might be deprived of the right of trial by jury.

Note 8.

1. (1900) 27 Cal 839 (845) (F B), *In re Abdur Rahman*,
(1933) 1933 Cal 598 (598) : 34 Cri L Jour 836, *Davis Hewlet* v. *Emperor*. Application to amend in writing allowed at early stage—No prejudice to the accused.
2. (1862) 1 Weir 471 (475, 476), *Queen* v. *Williams*.
3. (1892) 16 Bom 414 (426), *Empress* v. *Vajiram*.
4. (1928) 1928 Bom 475 (476) : 30 Cri L Jour 191, *Emperor* v. *Mohanlal Aditram*.

Note 9.

1. (1868) 9 Suth W R 14 (15), *Queen* v. *Feojdar Roy*.
2. (1915) 1915 Low Bur 102 (103) : 16 Cri L Jour 2 (3), *Nga Pan Hlaing* v. *Emperor*.

10. Examination of accused after amendment.

It is not incumbent on the Court to re-examine the accused after the alteration of the charge under this Section since the trial does not commence *de novo* so that if the accused has already been called on to enter on his defence there is no further obligation to examine him,[1] although some of the witnesses have been recalled under Section 231 *infra* subsequent to the alteration of the charge.[2]

11. Sub-section 2.

For similar provisions requiring the charge to be read and explained, *see* Section 210 *supra* and Sections 255, 271 *infra*.

This Section deals with the alteration and addition of charges, but the alterations must be read and explained to the accused and the latter must know what he is charged with and what offence he has to answer. If the alteration is not read and explained to the accused and he is prejudiced in his defence the conviction is illegal.[1] But where the accused is defended by a counsel who was asked whether he wanted a new trial and the latter did not want it, it was held that the accused was not prejudiced by the omission of the judge to read and explain the alteration in the charge.[2] Since the object of the provision is that the accused should have notice of any charge that he has to meet, he should not be called upon to meet additional charges without notice nor can he be convicted under charges different from those which he was called upon to meet.[3] Where in the course of a trial it is found by the Judge that the offence was committed in a foreign territory the proper procedure is to direct the committing Magistrate to obtain permission under Act 1 of 1849 and on receipt thereof to amend the charges and give the accused the option to re-examine witnesses already examined.[4]

Note 10.

1. (1923) 1923 Mad 609 (615): 46 Mad 449: 24 Cri L Jour 547 (F B), *Varisai Rowther* v. *Emperor*.
2. (1922) 1922 Pat 393 (394): 1 Pat 54: 23 Cri L Jour 146, *Shamlal Kalwar* v. *Emperor*.

Note 11.

1. (1926) 1926 All 227 (227): 27 Cri L Jour 152, *Raghunath Kandu* v. *Emperor*.
   (1875) 23 Suth W R 59 (59), *Queen* v. *Salamat Ali*.
2. (1884) 8 Bom 200 (212), *Empress* v. *Appa Subhana Mendre*.
3. [See (1882) 8 Cal 195 (197), *Empress* v. *Radoinath Shaha*.]
   (1901) 3 Bom L R 675 (676), *Emperor* v. *Luis Mingel Fonceca*.
   (1900) 27 Cal 660 (661), *Jatu Singh* v. *Mahabir Singh*. Person charged of theft cannot be convicted in appeal under S. 147, I. P. C., without a charge.
   (1914) 1914 Cal 663 (663): 41 Cal 743: 15 Cri L Jour 190, *Mohamed Hossein* v. *Emperor*. Notice must be given of the amendment of charge as to the intention with which the offence of house breaking was committed.
   (1900) 27 Cal 990 (991), *Rahimuddi* v. *Asgaralli*. Conviction cannot be confirmed on a different common object of unlawful assembly while the object originally charged has failed.
   (1932) 1932 Pat 215 (216): 33 Cri L Jour 864: 11 Pat 523, *Ghyasuddin Ahmad* v. *Emperor*. The Court should see if the accused has notice.
   (1929) 1929 Rang 256 (256): 30 Cri L Jour 990: 7 Rang 316, *Emperor* v. *Nga Po Saik*. Conviction under S. 30 (a) cannot be altered to one under S. 37 if accused is not called to answer.
   (1923) 24 Cri L Jour 119 (119): 71 Ind Cas 247 (Cal), *Hajari Sonar* v. *Emperor*. There cannot be a conviction under S. 456, I. P. C., where the charge was only under S. 457.
   (1900) 3 Oudh Cas 314 (315, 316). *Girwar Singh* v. *Empress*. Person charged and convicted of a non-compoundable offence cannot in appeal be convicted of a compoundable offence without giving him an opportunity to compound the offence.
   (1921) 1921 Pat 496 (497): 22 Cri L Jour 485, *Mayadhar Mahanty* v. *Dauardan Kund*. Conviction of theft cannot be changed by appellate Court into one of assault, on theft not being proved.
4. (1870) Ratanlal 33 (33, 34), *Reg* v. *Poonja Kela*.

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12. Appeal.

Where the Sessions Judge refused to frame new charges and acquitted the accused on the charge framed it was held in the undermentioned case[1] that the Government could not appeal under Section 417 of the Code on the ground of refusal to add new charge or against any other interlocutary order made during the trial.

13. Revision.

As has been seen already the Section confers a *discretion* on the Court to allow amendment of a charge. A Court of appeal or revision would always be slow to interfere with the exercise of such discretion unless it has been exercised perversely or arbitrarily. Thus where the trial Court refused to alter the charge on the ground that the re-casting of charges would embarrass the jury and possibly prejudice the accused in his trial, it was held that it could not be said that such reason was capricious or involved any disregard of legal principles and that therefore the High Court would refuse to interfere with such discretion in appeal or revision.[1] Where an alteration in the charges occasions a failure of justice the Court of revision may interfere.[2]

14. Accused when can be convicted without charge.—*See* S. 237, *infra*.

Sec. 228

When trial may proceed immediately after alteration.

228*. If the charge framed or alteration or addition made under Section 226 or Section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

Synopsis.

Scope of the Section. Note No. **1.**

Other Topics.

Charges related—Section applies. See Note 1, Pt. 1.

1. Scope of the Section.

This Section provides when the trial of a case can go on uninterrupted after the amendment of a charge. It provides that if the amendment is of such a nature that proceeding immediately with the case is not likely to prejudice the prosecution or the defence, the trial may be proceeded with immediately. For instance, where the amended charge is closely related to the original

*(**Code of 1882, S. 228**—The words "or addition" were inserted after the word "alteration" in 1898; otherwise the section was the same).

(**Code of 1872, S. 447** and **Code of 1861, S. 245**—Materially the same).

Note 12.

1. (1892) 16 Bom 414 (428), *Empress* v. *Vajiram*.

Note 13.

1. (1927) 1927 Sind 28 (30, 35): 21 Sind L R 55: 27 Cri L Jour 1217, *Emperor* v. *Stewart*.
2. (1931) 1931 Mad 439 (440): 32 Cri L Jour 756, *Subramania Ayyar* v. *Emperor*.

charge, there is no objection to proceeding with the trial immediately.[1] In such a case, the Section provides that the trial may be proceeded which "as if the new or altered charge had been the original charge." Hence, where originally different charges were laid against the two accused in a case and subsequently the charges were amended so that the two accused were charged with the same offence *held* that the two accused could be said to be tried for the same offence within Section 30 of the Evidence Act and that under that Section the confession of one of the co-accused could be used against the other.[2]

Sec. 228 Note 1

229*. If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

When new trial may be directed, or trial suspended.

Sec. 229

Synopsis.

Scope of the Section. Note No. 1.

Other Topics.

Benefit of doubt as to prejudice, to accused. See Note 1, Pt. 2.
Evidence, at old trial — How far evidence at new trial. See S. 228, Note 1, Pt. 2.
Late amendment — Insufficient opportunity. See Note 1, Pt. 3.
Retrial or adjournment. See Note 1, Pt. 1.

1. Scope of the Section.

The previous Section provides for the procedure to be followed when the amendment of a charge is of such a nature that proceeding with the trial immediately will not prejudice the accused or the prosecution. This Section provides for the procedure to be followed in cases in which the amendment of the charge is of such a nature that proceeding immediately with the trial of the case will prejudice the prosecution or the accused. It provides that in

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* **(Code of 1882—S. 229).**

The words "or added" were inserted after the word "altered" in 1898. *Otherwise the section was the same.*

(Code of 1872—S. 448).

448. If the amendment or alteration is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused person in his defence, the Court may either direct a new trial, or suspend the trial for such period as may be necessary to enable the accused person to make his defence to the amended or altered charge; and, after hearing his defence, the Court may further adjourn the trial, to admit of the appearance of any witness whose evidence the Court may consider to be material to the case, or whom the accused person may wish to be *summoned in his* defence.

When new trial may be directed or trial suspended.

(Code of 1861—S. 246—*Same as that of* 1872 *Code.)*

Section 228—Note 1.

1. (1874) 11 Bom H C R 278 (279, 280), *Reg* v. *Gobind Kubal.*
2. (1874) 11 Bom H C R 278 (279, 280), *Reg* v. *Govind Kubal.*

Sec. 229 Note 1

such a case the trial should be adjourned or a retrial should be held.[1] Where it is doubtful whether proceeding immediately with the trial will prejudice the accused, the Court must lean in favour of holding that such procedure will prejudice the accused.[2] Where the accused has not been given a proper opportunity of defending himself against the altered charge, the proceedings can be set aside and a retrial ordered.[3]

Sec. 230

Stay of proceedings if prosecution of offence in altered charge requires previous sanction.

230*. If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Synopsis.

Scope of the Section. Note No. 1.

Other Topics.

Fresh sanction—When not needed. See Note 1, Pt. 2.

Opinion of sanctioning authority. See Note 1, F-N (2).

1. **Scope of the Section.**

There are some cases in which, before an offence can be taken cognizance of by a Court, it is necessary to obtain the sanction of the Local Government or of some other authority. (*See* for instance, Sections 196, 196-A and 197). Hence, where a charge is amended or a new charge is framed and the new or altered charge relates to an offence, for the prosecution in respect of which, previous sanction is necessary, the trial cannot be proceeded with till such sanction is obtained.[1] But if sanction has already been obtained for a prosecution on the same facts as those on which the new or altered charge is founded, fresh sanction is not necessary.[2] If, however, the facts on which the

*(**Code of 1882, S. 230**—*The words "or added" were inserted after the word "altered" in* 1898 ; *otherwise the Section was the same*).

(**Code of 1872—S. 450**).

Previous sanction to be obtained if offence in new charge requires it.

450. If the offence stated in the new charge be one for which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained ; unless sanction has been already obtained for a prosecution on the same facts as those on which the new charge was based.

(**Code of 1861**—*Nil.*)

Section 229—Note 1.

1. (1865) 3 Suth W R 40 (41), *Queen* v. *Mahomed Elim.*
   (1902) 6 Cal W N 72 (78), *Emperor* v. *Mathura Thakur.*
2. (1869) 6 Bom H C R Cri 76 (80-81), *Reg* v. *Govindas Haridas.* Case bearing on S. 1 of Act 18 of 1862—Court should lean in favour of the accused when there is a doubt if the amendment will prejudice him or not.
3. (1899) 1899 All W N 39 (40), *Queen* v. *Puran.*

Section 230—Note 1.

1. (1923) 1923 Lah 260 (261) : 3 Lah 440 : 23 Cri L Jour 709, *Arjan Mal* v. *Emperor.*
2. (1903) 30 Cal 905 (908), *Profulla Chandra Sen* v. *Emperor.* Sanction to prosecute for a substantive offence under

new or altered charge is founded are not the same as those on which the sanction was based, a fresh sanction is necessary.[3] Sec. 230 Note 1

231.* Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material. Sec. 231

Re-call of witnesses when charge altered.

Synopsis.

Scope of the Section. Note No. 1

Other Topics.

Effect of not re-calling. See Note 1, F-N(4). Re-call witness. See Note 1, Pt. 2.

1. Scope of the Section.

This Section provides that when a charge is altered or added to after the commencement of a trial, the prosecution and the accused should be allowed to re-call and examine with reference to such alteration or addition any witness who may have been already examined and also to call any further

*(Code of 1882—S. 231).

231. Whenever a charge is altered by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-summon and examine, with reference to such alteration, any witness who may have been examined.

Re-call of witnesses when charge altered.

(Code of 1872—S. 449).

449. In all cases of amendment or alteration of a charge, the prosecutor and accused person shall be allowed to re-call and examine any witness who may have been examined.

Prosecutor and accused person may re-call witnesses.

(Code of 1861—S. 247).

247. In all cases of amendment or alteration of a charge, the accused person shall be allowed to re-call and examine any witness who may have been examined.

Defendant may re-call and examine witnesses already examined.

S. 468, I. P. C.—No fresh sanction necessary to prosecute on charge of abetting the offence, as the latter charge was founded on the same facts as those, on which the original sanction was given.

(1920) 1920 Lah 367 (369, 370) : 1919 Pun Re No. 31 : 21 Cri L Jour 230, *Amar Singh* v. *Emperor*. Explosive Substances Act (1908), S. 7 — Proper course to adopt under S. 7 is to state briefly facts constituting offence and to give consent to trial upon those facts as constituting offence under one or other of Sections—Mere fact that constituting authority is of opinion that facts constitute offence under another Section—Court may alter charge but fresh consent is not necessary — S. 230, Criminal P. C., makes full provision for such contingency.

(1879) 4 Cal 712 (713), *Empress* v. *Nipcha*.

3. (1926) 1926 Rang 169 (171) : 4 Rang 131 : 27 Cri L Jour 1075, *U Nyan Ne Da* v. *Emperor*. Sanction to prosecute for conspiracy to wage war against King (S. 121-A, I. P. C.). Order of sanction not referring to facts on which it is based but merely stating that the accused at diverse times had conspired to wage war against the King—Conversion of charge into one of sedition — Fresh sanction necessary.

(1924) 1924 Pat 377 (379) : 24 Cri L Jour 478, *Rahim* v. *Emperor*. Where sanction was given to prosecute for the offence of "singing with a high sounding instrument" a conviction for the offence of "playing on a drum" was held illegal.

Sec. 231 Note 1

witness whom the Court may think material.[1] The Section is *mandatory* and the Court is *bound* to allow the prosecution and the accused to re-call and examine any witness who may have been already examined.[2] The prosecution and the accused are entitled to re-call and examine *any* witness who may have been examined; the right is not confined to the witnesses on whose evidence the alteration in or addition to the charge may be based.[3] The right of the prosecution and the accused in this respect is an *absolute* one and does not depend on the question whether the examination of the witnesses is necessary to avoid prejudice in the conduct of the case.[4] But the Court is not bound to *ask* the accused or the prosecution if it is desired to re-call and examine any witness. If no application is made for the re-calling of any witnesses and their examination it cannot be subsequently complained that the examination contemplated by the Section was not allowed.[5]

The Section applies to all cases where a charge is altered or added to after the commencement of a *trial*. Thus even where a charge is amended under the directions of the High Court, the Court is bound to allow the examination mentioned in the Section.[6] But where in the course of a trial the Magistrate alters the charge and decides to commit the case to the Sessions under Section 347 the proceedings before the Magistrate should be only treated as commitment proceedings and not as a *trial* and the provisions of this Section do not apply to them.[7]

Sec. 232

Effect of material error.

232.* (1) If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

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*(**Code of 1882, S 232**—*Same.*)

(**Code of 1872, S. 451**—*Materially the same.*)

(**Code of 1861**—*Nil.*)

Section 231—Note 1.

1. (1916) 1916 Lah 52 (53): 17 Cri L Jour 454 (455): 1916 Pun Re No. 33, *Harbans* v. *Emperor*. If charge is altered by Sessions Judge, he is bound to re-call witnesses for examination or cross-examination.
   (1930) 31 Cri L Jour 455 (457): 122 Ind Cas 785 (Mad), *Ramalinga Udayar* v. *Ramaswami Mudaliar*. Accused is entitled to have his new witnesses examined, unless the Magistrate thinks that application for the examination of such witnesses is made for the purpose of vexation or delay or for defeating the ends of justice in which case it is essential that he must record the grounds.
2. (1927) 1927 Pat 398 (400): 6 Pat 832: 28 Cri L Jour 769, *Chhanka Dhanuk* v. *Emperor*.
   (1924) 1924 All 665 (666): 25 Cri L Jour 798, *Mohan Lal* v. *Emperor*.
   (1932) 1932 Cal 486 (487): 33 Cri L Jour 265, *Nagendra Nath Sen Gupta* v. *Emperor*.
3. (1926) 1926 Lah 60 (61): 26 Cri L Jour 1497, *Hazara Singh* v. *Emperor*.
4. (1929) 1929 Mad 200 (201): 52 Mad 346: 30 Cri L Jour 223, *Ramalinga Udayar* v. *Emperor*.
   (1932) 1932 Cal 486 (487): 33 Cri L Jour 265, *Nagendra Nath Sen Gupta* v. *Emperor*. S. 231 mandatory and as Magistrate had acted in violation of S. 231 the trial was illegal irrespective of the question whether the accused was prejudiced or not.
5. (1930) 1930 All 215 (216): 52 All 455: 32 Cri L Jour 22, *Konmal* v. *Emperor*.
6. (1921) 1921 Cal 605 (606): 25 Cri L Jour 524, *Kashi Pramanick* v. *Damu Pramanick*.
7. (1931) 1931 All 434 (435): 55 All 692: 32 Cri L Jour 849, *Ram Ghulam* v. *Emperor*.

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Sec. 232 Note 1

Illustration.

A is convicted of an offence under Section 196 of the Indian Penal Code, upon a charge which omits to state that he knew the evidence which he corruptly used or attempted to use as true or genuine was false or fabricated. If the Court thinks it probable that *A* had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but if it appears probable from the proceedings that *A* had no such knowledge, it shall quash the conviction.

Synopsis.

Other Topics

Conviction for different offence. See Note 1, Pt. 2.
Other Sections compared and referred to. See Note 1, Pts. 8 and 9.
Prejudice and want of prejudice. See Note 1, Pts. 2, 3 and 5.
Quashing conviction. See Note 1, Pt. 10.
Sentence expired—Effect. See Note 1, Pt. 11
Waiver. See Note 1, Pt. 6.

1. Scope of the Section.

This Section provides for the procedure to be followed in cases where a person is *convicted of an offence,* and the appellate Court or the High Court is of the opinion that he has been misled in his defence by the absence of a charge or by an error in the charge. The Section provides that in such cases a re-trial may be ordered on an amended charge.[1] Thus, where an accused is charged with one offence and convicted of a different offence without a charge being framed in respect of it, a re-trial can be ordered if it is found that he has been misled in his defence by the absence of a charge.[2]

Section 232—Note 1.

1. (1916) 1916 Lah 52 (53) : 17 Cri L Jour 454 (455) : 1916 Pun Re No. 33, *Harbans* v. *Emperor.*
(1902) 7 Cal W N 301 (304), *Sarat Chandra Shah Chowdhary* v. *Emperor.*
[See (1916) 1916 Mad 1222 (1222) : 16 Cri L Jour 737 (738). A charge under S. 143 I.P.C. cannot be added by the appellate Court to charges under Ss. 426, 451, I.P.C.]
[See also (1923) 1923 Pat 1 (4) (S B): 23 Cri L Jour 625 : 2 Pat 134, *Emperor* v. *Abdul Hamid.* Common object of unlawful assembly.]
(1922) 1922 Lah 135 (136, 137) : 23 Cri L Jour 5, *Girdhara Singh* v. *Emperor.* Charge scored out by the trial Court—Conviction on such charge—Illegality.
(1902) 29 Cal 481 (482), *Hossain Sardar* v. *Kalu Sikdar.*
2. (1900) 5 Cal W N 567 (568), *In the matter of Chinibas Pal.*
(1901) 28 Cal 63 (65), *Gobinda Pershad Pandey* v. *G. L. Garthi.*
(1902) 30 Cal 288 (290), *Yakub Ali* v. *Lethu Thakur.*
(1875) 23 Suth W R 59 (59), *Queen* v. *Salamat.*
(1901) 5 Cal W N 296 (297), *Rameshwar* v. *Jogi Sahoo.*
(1915) 1915 Cal 181 (182) : 16 Cri L Jour 42 (43), *Harnarain Sardar* v. *Emperor.*
(1912) 13 Cri L Jour 593 (594) : 40 Cal 168, *Sita Ahir* v. *Emperor.*
(1913) 14 Cri L Jour 212 (213) : 19 Ind Cas 308 (Cal), *Sital Chandra Maitra* v. *Emperor.*
(1924) 1924 Mad 584 (585) : 25 Cri L Jour 396, *In re Kottoora Thevan.*
(1915) 1915 Cal 219 (219) : 15 Cri L Jour 704 (705), *Gena Manjhi* v. *Emperor.*
(1914) 1914 Cal 663 (663) : 41 Cal 743 : 15 Cri L Jour 190, *Mahomed Hossein* v. *Emperor.*
(1909) 9 Cri L Jour 406 (406) : 1 Ind Cas 867 (Mad), *In re Subramania Ayyar.*
(1927) 1927 All 75 (76) : 27 Cri L Jour 1351, *Achhut Rai* v. *Emperor.*
(1908) 7 Cri L Jour 372 (374) (Cal), *Bipra Das Giri* v. *Niradamoni Bewa.*
(1927) 1927 Rang 32 (32) : 4 Rang 355 : 27 Cri L Jour 1360, *Nga Shwe Zon* v. *Emperor.*
(1901) 28 Cal 63 (65), *Govinda Parshad*

Sec. 232 Note 1

Similarly, where a charge is framed in the alternative form in a case in which the Code does not authorise the charge to be framed in such a form and the accused is thereby misled into pleading guilty to one of the offences instead of pleading not guilty to both the charges, a re-trial may be ordered.[3] So also, Section 221, sub-section 7 requires that where a previous conviction of the accused is intended to be used for the purpose of enhancing the sentence, the charge should specifically allege the previous conviction. If the charge omits to do so and notwithstanding the omission the accused on conviction is awarded higher punishment, the sentence is liable to be reduced on appeal.[4]

But where the accused has not been misled in his defence by the absence of the charge or the error in the charge this Section does not apply and the defect in the proceedings does not afford sufficient ground for ordering a re-trial.[5] The fact that the accused was defended by a pleader who did not raise any objection to the proceedings is a factor to be considered while determining the question of prejudice to the accused.[6]

Where a re-trial is ordered under this Section, it must be from the point at which the irregularity occurred and not from the very beginning.[7]

The power of ordering a re-trial is not confined to this Section. Such a power is also conferred by S. 423. Thus, this Section refers to cases in which the accused has been *convicted*. Under Section 423 a re-trial can be ordered even in cases where the accused has been acquitted.[8] Similarly, under Section 423, a re-trial can be ordered on wider grounds than those mentioned in this Section. Thus a re-trial can be ordered on the ground that the accused had no proper opportunity of defending himself[9] (though the charge may be unexceptionable).

Sub-section 2 provides that the appellate Court or the High Court, as the case may be, shall quash the conviction when it comes to the conclusion

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Pandey v. *G. L. Garthi.*
(1890) Ratanlal 529 (530), *Empress* v. *Nathoo Lalji.*
(1888) Ratanlal 386 (386), *Queen-Empress* v. *Sarwel.*

3. (1886) 10 Bom 124 (129), *Empress* v. *Ramji.*

4. (1911) 12 Cri L Jour 233 (234) : 10 Ind Cas 241 (Lah), *Dungri* v. *Emperor.* [Compare (1918) 1918 Lah 397 (399) : 1917 Pun Re No. 29 : 18 Cri L Jour 875, *Bisakhi* v. *Emperor.* Defect is curable under Ss. 535 and 537 where the accused has not been prejudiced or misled.]

5. (1917) 1917 Mad 687 (688) : 17 Cri L Jour 384 (386), *In re Mannar Kishnan Chetty.*
(1929) 1929 Pat 712 (714) : 9 Pat 642 : 30 Cri L Jour 891, *Mallu Gope* v. *Emperor.*
(1932) 1932 Pat 215 (217) : 11 Pat 523 : 33 Cri L Jour 864, *Ghyasuddin Ahmed* v. *Emperor.*
(1924) 1924 Bom 502 (503) : 49 Bom 84 : 26 Cri L Jour 1000, *Emperor* v. *Ranchhod Sursang.*
(1929) 1929 Lah 867 (867) : 30 Cri L Jour 702, *Mohamad Sadiq* v. *Delhi Electric Supply & Traction Co.*
(1932) 1932 Cal 461 (462) : 59 Cal 113 : 33 Cri L Jour 549, *Spiers* v. *Johiuddin*
(1931) 1931 Mad 225 (227) : 32 Cri L Jour 753, *Sambasiva Mudali* v. *Emperor.*
(1914) 1914 Lah 101 (101) : 15 Cri L Jour 524, *Lal Khan* v. *Emperor.*
(1931) 1931 Cal 410 (412) : 58 Cal 1303 : 32 Cri L Jour 844, *Ramendra Chandra Ray* v. *Emperor.*
(1875) 24 Suth W R Cri 3 (3), *Queen* v. *Digambar Shaha.*
(1882) 8 Cal 450 (455), *Empress* v. *Sreenath Kur.*

6. (1886) 8 All 665 (667, 668), *Empress* v. *Kharja.*
(1920) 1920 All 72 (73) : 21 Cri L Jour 410, *Jagdeo Parshad* v. *Emperor.*
(1915) 1915 Sind 50 (52) : 16 Cri L Jour 573 (574, 575) : 9 Sind L R 37, *Dodo* v. *Emperor.*

7. (1925) 1925 Nag 147 (149) : 25 Cri L Jour 1152, *Gangadhar* v. *Bhangi Sao.*

8. (1899) 1899 All W N 39 (40) : *Empress* v. *Puran.*

9. (1899) 1899 All W N 39 (40), *Queen* v. *Puran.*
(1907) 5 Cri L Jour 420 (421) : 3 L B R 283, *Mimo Dha* v. *Emperor.*
(1907) 5 Cri L Jour 164 (167) : 31 Bom 218, *Emperor* v. *Isap Mahamad.*

that on the facts proved no criminal charge can be laid against the accused.[10] *See also* the undermentioned case,[11] where the Court declined to make an order for re-trial on the ground that the punishment already suffered by the accused was sufficient. **Sec. 232 Note 1**

See also Sections 225, 423, 535 and 537 and notes thereunder.

Joinder of Charges.

Sec. 233

233.* **Separate charges for distinct offences.** For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in Sections 234, 235, 236 and 239.

Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. *A* must be separately charged and separately tried for the theft and causing grievous hurt.

Synopsis.

	Note No.		Note No.
Joinder of charges and joint trials.	1	Separate charge.	4
Scope and object of the Section.	2	Non-compliance with the Section.	5
Distinct offences—Illustration.	3	Counter-cases.	6

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* (**Code of 1882**—*Section same as that of* 1898 *Code*).

(Code of 1872—S. 452.)

Joinder of charges.

452. There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter excepted.

Separate charges for distinct offences.

Illustration.

A is accused of a theft on one occasion and of causing grievous hurt on another occasion. *A* must be separately charged and separately tried for the theft and the causing of grievous hurt.

(Code of 1861—S. 241).

241. When it appears to the Magistrate that the facts which can be established in evidence show the commission of two or more offences falling within the same Section of the Indian Penal Code, the charge shall contain two or more heads charging such offences respectively.

Two or more offences punishable under the same Section.

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10. (1912) 13 Cri L Jour 127 (128) : 13 Ind Cas 783 (Cal), *Paimullah* v. *Emperor*.
(1930) 1930 Cal 138 (139) : 31 Cri L Jour 697, *Sunnat Mandal* v. *Makar Sheikh*.
(1911) 12 Cri L Jour 66 (67) : 9 Ind Cas 361 (Cal), *Lal Behary Singh* v. *Emperor*.
(1875) 23 Suth W R 59 (59), *Queen* v. *Salamat*.
(1901) 28 Cal 63 (65), *Govinda* v. *Garth*.
(1885) 10 Bom 124 (130), *Empress* v. *Ramji Sajoba Rao*.

11. (1902) 29 Cal 481 (482), *Hossein Sardar* v. *Kalu*.

Sec. 233 Note 1

Other Topics.

Applicability to appeals. See Note 2, Pts. 8 and 9.
Applicability to summons cases. See Note 1, Pt. 5.
Bribery. See Note 3 Pt. 15 and F-N. (6.)
Burden of proof on prosecution. See S. 235, Note 1, Pt. 3.
Cases and counter-cases. See Note 6.
Charges in the alternative. See Note 3, Pt. 17. See also S. 236.
Defects not cured by S. 537. See Note 5, Pts. 1, 2 and 2a.
Exceptions not mutually exclusive. See Note 1, Pts. 8 and 9. See S. 235, Note 11.
General rule—Exceptions to the Section. See Note 1, Pt. 2; Note 2, Pt. 3.
Irregularity cured by Section 537. See Note 5, Pt. 3.
Joint committal not prohibited. See Note 1, Pt. 7.
Joint enquiry under Section 107 not prohibited. See Note 1, Pt. 6.
Legislative changes. See Note 1, Pt. 1.
Misappropriation of distinct sums of money. See Note 3, Pt. 10.
Object of the Section. See Note 2, Pts. 4a, 5, 6 and 7.
Objection even in Appeal. See Note 5, Pt. 4.
Offences against several persons. See Note 3, Pt. 6.
Offences not distinct. See Note 3, Pts. 7 to 17.
Offences of same kind. See Note 3, Pts. 7 to 17.
Offences under different Sections. See Note 3, Pts. 2 to 4.
Offences under same Section on different occasions. See Note 3, Pt. 5.
Powers of Appellate Courts in joint trials. See Note 2, Pt. 9.
Receiving of stolen properties of several persons. See Note 3, Pt. 8 and F-N. (6.)
Separate trial. See Note 1, Pt. 2.
Several dacoities. See S. 235, Note 2, F-N. 23,
Theft. See Note 3, Pt. 7.
Two false statements in a single deposition. See Note 3, Pt. 9.
Using forged documents—Only one user. See Note 3, Pt. 13.

1. Joinder of charges and joint trials.

The law on the subject of joinder of charges and joint trials is contained in Sections 233 to 239. Before the Code of 1872 there were no provisions corresponding to these, and the strict rules of the English Common Law as to the joinder of charges and joint trials were being followed. By Sections 452 to 458 of the Code of 1872, which are reproduced with slight modifications in the present Code as Sections 233 to 239, the Legislature considerably widened the powers of the Court as regards joinder of charges and joinder of defendants.[1]

Section 233 lays down a general rule viz., that for every distinct offence, of which any person is accused, there shall be a separate charge, and that every such charge shall be tried separately. To this rule Sections 234 to 239 are exceptions.[2] The object of making such exceptions is to avoid the necessity of

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Section 233—Note 1.

1. (1908) 8 Cri L Jour 191 (194, 195): 1 Sind L R 73, *Emperor* v. *Ghulam.*
2. (1910) 11 Cri L Jour 337 (337): 5 Ind Cas 970 (Bom), *Emperor* v. *Kashinath Bagaji Sali.*
(1884) 7 All 174 (177) (F B), *Queen-Empress* v. *Juala Prasad.*
(1886) 9 All 452 (457), *Queen-Empress* v. *Abdul Kadir.*
(1898) 1898 All W N 205 (207): 21 All 127, *Queen-Empress* v. *Mathura Prasad.*
(1910) 11 Cri L Jour 285 (285): 32 All 219, *Sheo Saran Lal* v. *Emperor.*
(1913) 14 Cri L Jour 116 (117): 18 Ind Cas 676 (All), *Shanker* v. *Emperor.*
(1917) 1917 All 404 (404): 38 All 457: 18 Cri L Jour 47, *Emperor* v. *Beehan Pande.*
(1921) 1921 All 19 (21, 22): 22 Cri L Jour 641: *Sanuman* v. *Emperor.*
(1921) 1921 All 246 (247): 22 Cri L Jour 657, *Ram Prasad* v. *Emperor.*
(1921) 1921 All 408 (409): 22 Cri L Jour 397, *Ram Sahai* v. *Emperor.*
(1923) 1923 All 88 (88): 24 Cri L Jour 155, *Ganesh Lal* v. *Emperor.*
(1923) 1923 All 126 (126): 45 All 223: 24 Cri L Jour 149, *Durga Prasad* v. *Emperor.*
(1926) 1926 All 261 (261, 262): 48 All 236: 27 Cri L Jour 143, *Fauzdar Mahto* v. *Emperor.*
(1928) 1928 All 417 (417): 30 Cri L Jour 214, *Sewak* v. *Emperor.*
(1890) 15 Bom 491 (500), *Queen-Empress* v. *Fakirappa.*
(1908) 8 Cri L Jour 281 (302) (Bom), *Emperor* v. *Bal Gangadhar Tilak.*
(1929) 1929 Bom 296 (298): 53 Bom 479: 31 Cri L Jour 65, *Emperor* v. *C. E. Ring.*
(1932) 1932 Bom 277 (277): 33 Cri L Jour 619, *Krishnaji Anant Dange* v. *Em-*

the same witnesses giving the same evidence two or three times over in different trials, and to join in one trial those offences with regard to which the evidence would overlap.[3] The Sections are, however, so framed as to minimise the danger of prejudice to the accused by the joining together of more than one offence in the same trial.[3a] Of these exceptions Sections 234 to 238 apply to cases where *one* person may be dealt with at one trial for more than one offence, while Section 239 applies to the trial of *more* persons than one jointly.[4]

The principles applicable to criminal trial regarding joinder of charges and joint trial of accused persons embodied in Sections 233 to 239 are applicable to the trial of even summons cases[5] and to inquiries under Section 107.[6]

Sections 233 to 239 refer only to the *trial* of the accused and not to a preliminary inquiry before a committing Magistrate and therefore no objection could be taken to the commitment on account of any misjoinder of charges or joint trial.[7]

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peror.
(1904) 1 Cri L Jour 58 (60) (Cal), *Pram Krishna Saha* v. *Emperor.*
(1910) 11 Cri L Jour 325 (326): 37 Cal 604, *Ram Sewak Lal* v. *Maneshwar Singh.*
(1912) 13 Cri L Jour 593 (593): 40 Cal 168, *Sita Ahir* v. *Emperor.*
(1913) 14 Cri L Jour 428 (429) : 40 Cal 318, *Nitya Gopal Chuckerbutty* v. *Jiban Krishna Bagchi.*
(1916) 1916 Cal 693 (705) : 16 Cri L Jour 641, *Ram Subhag Singh* v. *Emperor.*
(1922) 1922 Cal 76 (77) : 23 Cri L Jour 685, *Banga Chandra De* v. *Ananda Charan Chowdhury.*
(1905) 2 Cri L Jour 34 (36) : 1905 Pun Re No. 2, *Bhagwati Dyal* v. *Emperor.*
(1928) 1928 Lah 34 (35) : 29 Cri L Jour 521, *Muhammad Khan* v. *Emperor.*
(1873) 7 Mad H C R 375 (375, 376), *Nanjan In re.*
(1886) 9 Mad 284 (285), *Empress* v. *Dorasamy.*
(1908) 8 Cri L Jour 11 (13) : 4 Nag L R 17, *Emperor* v. *Balwant Singh.*
(1916) 1916 Mad 571 (572) : 16 Cri L Jour 298, *In re Mala Mekalakati Subbadu.*
(1916) 1916 Nag 73 (76) : 13 Nag L R 35 : 18 Cri L Jour 339, *Gunwant* v. *Emperor.*
(1919) 1919 Mad 487 (492) : 20 Cri L Jour 354, *Kumaramuthu Pillai* v. *Emperor.*
(1925) 1925 Mad 690 (697, 699) : 49 Mad 74 : 26 Cri L Jour 1513, *Gammallu Dora* v. *Emperor.*
(1921) 1921 Oudh 49 (51) : 22 Cri L Jour 344, *Kallu* v. *Emperor,*
(1931) 1931 Oudh 86 (87) : 6 Luck 441 : 32 Cri L Jour 540, *Dubri Misir* v. *Emperor.*
(1920) 1920 Pat 230 (231) : 21 Cri L Jour 161, *Tepanidhi Gobinda Chandra Barathi* v. *Emperor.*
(1901-1902) 1 Low Bur Rul 361 (361), *San Daik* v. *Crown.*
(1903-1904) 2 Low Bur Rul 10 (13), *Nga Lun Maung* v. *Emperor.*
(1904) 1 Cri L Jour 537 (538, 539) : (1904) Upp Bur R 1st Qr, Cr P C, 2, *Emperor* v. *Asgar Ali.*
(1908) 8 Cri L Jour 497 (502) : 4 Low Bur R 294, *S. P. Chatterjee* v. *Emperor.*
(1914) 1914 L B 263 (264) : 7 Low Bur Rul 272 : 16 Cri L Jour 44, *Po Mya* v. *Emperor.*
(1933) 1933 Sind 255 (256) : 35 Cri L Jour 256, *Jethanand Murijmal* v. *Emperor.*
[See also (1925) 1925 Mad 1 (6) : 47 Mad 746 : 25 Cri L Jour 1297 (F.B.), *Theethumalai Goundar In re.*]

3. (1908) 8 Cri L Jour 191 (195) : 1 Sind L R 73, *Emperor* v. *Ghulam.*
(1925) 1925 Mad 690 (697) : 49 Mad 74 : 26 Cri L Jour 1513, *Gam Mallu Dora, In re.*

3a (1916) 1916 Mad 550 (552) : 16 Cri L Jour 323, *Virupana Goud* v. *Emperor.*

4. (1914) 1914 L B 263 (264) : 7 Low Bur Rul 272 : 16 Cri L Jour 44, *Po Mya* v. *Emperor.*
(1921) 1921 All 246 (247) : 22 Cri L Jour 657, *Ram Prasad* v. *Emperor.*
(1908) 8 Cri L Jour 11 (13) : 4 Nag L R 71, *Emperor* v. *Balwant Singh.*

5 (1905) 2 Cri L Jour 739 (744) : 3 Low Bur Rul 52, *Emperor* v. *San Dun.*
(1914) 1914 Cal 603 (606) : 41 Cal 694 : 15 Cri L Jour 73, *Biswas* v. *Emperor.*
(1912) 13 Cri L Jour 124 (124) : 13 Ind Cas 780 (Mad), *Emperor* v. *Arumugam Pillai.*
(1932) 1932 Mad 497 (500) : 33 Cri L Jour 589, *V. K. Lakshumana Mudaliar* v. *Emperor.*

6. (1904) 1 Cri L Jour 58 (60) (Cal), *Prankrishna Saha* v. *Emperor.*

7. (1902) 26 Mad 592 (594), *Govinda in the matter of.*
(1900) 1900 All W N 206 (206), *Queen-*

Sec. 233 Notes 1—2

On the question whether the exceptions under Sections 234 to 239 are mutually exclusive and cannot be combined there is a conflict of opinion. On the one hand it has been held that they are mutually exclusive and cannot be combined.[8] On the other hand other decisions[9] have held that there is nothing in the Sections themselves to show that they are mutually exclusive, or that a combination thereof, in a proper case is prohibited, provided the accused is not prejudiced by such a joinder. According to this view, as a general rule of interpretation, effect must be given to every part of a statute and it is far more consonant with reason and the wishes of the Legislature that in a proper case, such joinder should be made rather than be barred.

2. Scope and object of the Section.

The provisions of this Section are mandatory[1] and must be strictly applied.[2] Separate trial is the rule and joint trial, the exception.[3] The excep-

Empress v. *Salamatullah Khan.*

(1905) 2 Cri L Jour 432 (433) (Bom), *Emperor* v. *Sita.*

(1917) 1917 Mad 612 (612) : 17 Cri L Jour 369, *T. S. Krishnamurthy Iyer In re.*

(1919) 1919 Mad 190 (191) : 30 Cri L Jour 514, *In re Sessions Judge, Tanjore.*

(1929) 1929 Nag 237 (237) : 30 Cri L Jour 404, *Manbodh Singh* v. *Jhaboolal.*

8. (1910) 11 Cri L Jour 285 (286) : 32 All 219, *Sheo Saran* v. *Emperor.* Ss. 234 & 235.

(1922) 1922 All 214 (214) : 44 All 540 : 23 Cri L Jour 258, *Shuja Uddin Ahmed* v. *Emperor.* (Do).

(1926) 1926 All 261 (261, 262) : 48 All 236 : 27 Cri L Jour 143, *Faujdar Mahto* v. *Emperor.* (Do).

(1926) 1926 Bom 110 (112) : 49 Bom 892 : 27 Cri L Jour 305, *Emperor* v. *Manant K. Mehta.* (Do).

(1905) 2 Cri L Jour 34 (36): 1905 Pun Re No. 2, *Bhagwati Dial* v. *Emperor.* (Do).

(1927) 1927 Nag 22 (23): 27 Cri L Jour 1099, *Emperor* v. *Dhaneshram.* (Do).

(1933) 1933 Nag 327 (328) : 34 Cri L Jour 673, *Rameshwar* v. *Emperor.* (Do).

(1892-1896) 1 Upp Bur Rul 33 (33), *Nga Po Chun* v. *Queen-Empress.* (Do).

(1929) 1929 All 202 (204) : 51 All 544 : 30 Cri L Jour 687, *Janeshar Das* v. *Emperor.* Ss. 234, 235 and 236.

(1903-1904) 2 Low Bur Rul 10 (11, 14), *Nga Lun Maung* v. *King-Emperor.* Ss. 234, 235, 236 and 239.

(1924) 1924 All 316 (317) : 46 All 54 : 25 Cri L Jour 466, *Putto Lal* v. *Emperor.* Ss. 234 and 239.

(1918) 1918 Nag 139 (140) : 20 Cri L Jour 7, *Shyad Lal* v. *Emperor.* (Do).

(1926) 1926 Oudh 161 (165) : 26 Cri L Jour 1602, *Bishambhar* v. *Emperor.* (Do).

(1914) 1914 Low Bur 263 (264) : 7 Low Bur Rul 272 : 16 Cri L Jour 44, *Po Mya* v. *Emperor.* (Do).

(1908) 8 Cri L Jour 191 (198) : 1 Sind L R 73. *Emperor* v. *Ghulam.* (Do).

(1934) 1934 Mad 673 (674) : 58 Mad 178 : 35 Cri L Jour 1503, *Srirengachariar* v. *Emperor.* Ss. 235 and 236.

(1929) 1929 Cal 298 (300) : 56 Cal 1106 : 30 Cri L Jour 1015, *Tota Meah Chowdhury* v. *Emperor.* Ss. 236 and 239.

9. (1934) 1934 Pat 232 (234) : 13 Pat 170 : 35 Cri L Jour 876, *Ramkishoon Pershad* v. *Emperor.* Ss. 234 and 235.

(1932) 1932 All 25 (26) : 54 All 337 : 33 Cri L Jour 122, *Kashi Nath* v. *Emperor.* Ss. 235, 236 and 239.

(1931) 1931 All 49 (50) : 53 All 233 : 32 Cri L Jour 1007, *Shib Charan* v. *Emperor.* Ss. 235 and 236.

(1909) 9 Cri L Jour 226 (243) : 33 Bom 221, *In re Bal Gangadhar Tilak.* Ss. 234, 235 and 236.

(1913) 14 Cri L Jour 116 (117) : 18 Ind Cas 676 (All), *Shankar* v. *Emperor.* Ss. 234, 235 and 239.

(1934) 1934 All 811 (812, 813): 35 Cri L Jour 1224, *Niranjan* v. *Emperor.* Ss. 234 and 239.

(1923) 1923 Mad 181 (181) : 23 Cri L Jour 719, *Kavaganti* v. *Emperor.* (Do).

(1925) 1925 Rang 198 (199) : 26 Cri L Jour 319, *Ah Kit* v. *Emperor.* (Do).

(1908) 8 Cri L Jour 191 (198): 1 Sind L R 73, *Emperor* v. *Ghulam.* Ss. 236 and 239.

Note 2.

1. (1912) 13 Cri L Jour 593 (593) : 40 Cal 168, *Sita Ahir* v. *Emperor.*

(1925) 1925 Cal 341 (345) : 52 Cal 253 : 26 Cri L Jour 487, *Alimuddi Naskar* v. *Emperor.*

(1921) 1921 Pat 291 (292): 21 Cri L Jour 619: *Padmanabha Patnaik* v. *Emperor.*

2. (1921) 1921 All 246 (247) : 22 Cri L Jour 657, *Ram Prasad* v. *Emperor.*

(1916) 1916 Mad 571 (572) : 16 Cri L Jour 298, *Mala Mekalakati Subbadu* v. *King-Emperor.*

(1916) 1916 Mad 110 (115) (F B): 39 Mad 527: 16 Cri L Jour 593, *Public Prosecutor* v. *Kottaparambath.*

(1925) 1925 Mad 690 (697) : 49 Mad 74 : 26 Cri L Jour 1513, *Gam Mulla Dora In re.*

(1903) 4 Pun L R 613 (615), *Singhara* v. *Emperor.*

3. (1923) 1923 All 88 (88) : 24 Cri L Jour 155,

tions provided for are only empowering Sections and must be strictly construed and applied so as not to defeat the right of independent trial conferred by this Section.[4]

The object of the Section (which has been enacted for the benefit of the accused)[4a] in requiring that there shall be a separate charge for every distinct offence and a separate trial for every charge is twofold. *Firstly* to give the accused notice of the charges which he has to meet and *secondly* to see that he is not embarrassed by having to meet charges in no way connected with one another.[5] Another object is to prevent the mind of the Court from being prejudiced against the accused, if he were tried in one trial upon different charges resting on different evidence.[6] In other words the object is to prevent the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to the judge and to the accused.[7]

This Section applies not only to original trials but also to an appellate Court in altering a finding under Section 423 *infra*[8] or in the trial of two appeals arising out of two separate cases.[9]

3. Distinct offences—Illustration.

The words "distinct offence" in the Section mean, as the illustration to the Section shows, offences which have no connection with each other.[1] The following are all illustrations of distinct offences:—

1. Offences falling under *different Sections* of a penal enactment, as for example under two Sections of the Penal Code[2] or of a special or local

Ganesh Lal v. *Emperor.*
(1923) 1923 All 126 (126): 45 All 223: 24 Cri L Jour 149, *Durga Prasad* v. *King-Emperor.*
[See also (1925) 1925 Cal 341 (345): 52 Cal 253: 26 Cri L Jour 487, *Alimuddi Naskar* v. *King-Emperor.*]

4. (1918) 1918 Pat 168 (170): 3 Pat L Jour 124: 19 Cri L Jour 673, *Kailash Prasad* v. *Emperor.*
(1920) 1920 Pat 230 (231): 5 Pat L Jour 11: 21 Cri L Jour 161, *Tepanidhi Gobinda Chandra Bharati* v. *Emperor.*
(1917) 1917 All 404 (404): 38 All 457: 18 Cri L Jour 47, *Emperor* v. *Behan Pande.*
(1913) 14 Cri L Jour 116 (117): 18 Ind Cas 676 (All), *Shankar* v. *Emperor.*
(1905) 2 Cri L Jour 34 (36): 1905 Pun Re No. 2, *Bhagwati Dial* v. *Emperor.*

4a (1905) 2 Cri L Jour 34 (36): 1905 Pun Re No. 2, *Bhagwati Dial* v. *Emperor.*

5. (1916) 1916 Cal 693 (697): 16 Cri L Jour 641, *Ramsubag Singh* v. *Emperor.*

6. (1884) 7 All 174 (177), *Queen Empress* v. *Juala Prasad.*
(1921) 1921 All 19 (21): 22 Cri L Jour 641, *Samuman* v. *Emperor.*
(1890) 15 Bom 491 (497), *Queen-Empress* v. *Fakirappa.*
(1916) 1916 Mad 550 (553): 16 Cri L Jour 323, *Virupana Goud* v. *Emperor.*

7. (1903-1904) 2 Low Bur Rul 10 (12), *Nga Lun Maung* v. *King-Emperor.*

(1898) 18 All W N 205 (207): 21 All 127 *Queen-Empress* v. *Mathura Prasad.*
(1925) 1925 Mad 690 (697): 49 Mad 74: 26 Cri L Jour 1513, *Gam Mulla Dora In re.*

8. (1905) 2 Cri L Jour 694 (695): 1905 Pun Re No. 38, *Sahib Singh* v. *Emperor.*

9. (1928) 1928 Cal 230 (230, 231): 29 Cri L Jour 512, *Doat Ali* v. *Emperor.*
[See also (1877) 1 Bom 610 (614), *Reg* v. *Hanmanta.*]

Note 3.

1. (1916) 1916 Cal 693 (705): 16 Cri L Jour 641, *Ram Subag Singh* v. *Emperor.*

2. (1911) 12 Cri L Jour 82 (82): 9 Ind Cas 455 (Cal), *Kanta Neya* v. *Emperor*, Ss. 147 and 323.
(1912) 13 Cri L Jour 593 (593): 40 Cal 168, *Sita Ahir* v. *Emperor.* (Do).
(1922) 1922 Cal 573 (574): 50 Cal 94: 24 Cri L Jour 72, *Radha Nath Karmakar* v. *King-Emperor.* Ss. 147, 323 and 325.
(1928) 1928 Lah 185 (186): 29 Cri L Jour 34, *Babu Mal* v. *Ghasi.* Ss. 147 and 429.
(1887) 14 Cal 395 (396), *Queen Empress* v. *Chandi Singh.* Ss. 147 and 441.
(1882) 8 Cal 450 (454), *In the matter of Sreenath Kur.* Ss. 167 and 466.
(1933) 1933 Mad 434 (434): 34 Cri L Jour 1183, *Muthusamy Pillai* v. *Govt. Thasildar of Ramnad.* Ss. 170 and 175.

Sec. 233 Note 3

(1885) 10 Bom 124 (128), *Queen-Empress* v. *Ramji Sajabarao.* Ss. 182 and 193.
(1910) 11 Cri L Jour 325 (326): 37 Cal 604, *Ram Sewak Lal* v. *Maneshwar Singh.* Ss. 182 and 500.
(1909) 10 Cri L Jour 452 (453): 4 Ind Cas 1 (Cal), *Laskari* v. *The King-Emperor.* Ss. 183 and 323.
(1908) 8 Cri L Jour 497 (502, 504): 4 Low Bur Rul 294, *S. P. Chatterji* v. *King-Emperor.* Ss. 193 and 201.
(1897) Ratanlal 925 (926), *Queen-Empress* v. *Daulata Dhondi.* Ss. 193 and 211.
(1883) 1883 All W N 188 (188), *Empress* v. *Harnam.* Ss. 193 and 471.
(1918) 1918 Cal 237 (237): 19 Cri L Jour 868, *Emperor* v. *Rajendra Roy.* Ss. 210 and 403.
(1906) 4 Cri L Jour 389 (390): 3 Low Bur Rul 221, *Emperor* v. *Po Hla.* Ss. 224 and 379.
(1909) 9 Cri L Jour 147 (148): 1 Ind Cas 69 (Cal), *Tilakdhari Mahton* v. *Lali Singh.* Ss. 225 and 379.
(1888) 11 Mad 441 (442), *Queen-Empress* v. *Kutti.* Ss. 225 and 380.
(1904) 1 Cri L Jour 714 (716): 31 Cal 1007, *Prosunno Kumar Das* v. *Emperor.* Ss. 240 and 243.
(1882) 5 Mad 20 (21), *Pulisanki Reddi* v. *Queen.* Ss. 290 and 291.
(1913) 14 Cri L Jour 116 (117): 18 Ind Cas 676 (All), *Shankar* v. *Emperor.* Ss. 302 and 323.
(1901-1902) 1 Low Bur Rul 361 (362), *San Daik* v. *Crown.* Ss. 302 and 366.
(1892) 14 All 502 (503), *Queen-Empress* v. *Mullua.* Ss. 302 and 390.
(1927) 1927 Mad 243 (244): 27 Cri L Jour 1368, *In re Muniyan,* Ss. 302 and 392.
(1909) 10 Cri L Jour 291 (291): 3 Ind Cas 466 (All), *Nithuri* v. *Emperor.* Ss. 307 and 406.
(1919) 1919 Mad 954 (954, 955): 19 Cri L Jour 445, *Mantripragada Mathapalli Narasimha Rao, In re.* Ss. 323, 341 and 385.
(1922) 1922 Lah 144 (145): 22 Cri L Jour 505, *Ganda Singh* v. *Emperor.* Ss. 323 and 380.
(1904) 1 Cri L Jour 872 (873): (1904) Upp Bur Rul, 2nd Qr., Cr. P. C., 9, *Emperor* v. *Nga Tok Gyi.* (Do.)
(1903) 30 Cal 288 (289), *Yakub Ali* v. *Lethu.* Ss. 323 and 440.
(1913) 14 Cri L Jour 212 (213): 19 Ind Cas 308 (Cal), *Sital Chandra Maitra* v. *Emperor.* Ss. 324 and 352.
(1924) 1924 All 211 (211): 25 Cri L Jour 964, *Shafi* v. *Emperor.* Ss. 325 and 379.
(1912) 13 Cri L Jour 485 (486): 15 Ind Cas 485 (Rang), *Nga Tha Gyi* v. *Emperor.* Ss. 325 and 454.
(1919) 1919 Mad 487 (491): 20 Cri L Jour 354, *Kumaramuthu Pillai* v. *Emperor.* Ss. 330 and 348.
(1906) 4 Cri L Jour 496 (497) (Lah), *Abdul Sattar* v. *Emperor.* Ss. 341 and 379.
(1902) 26 Mad 454 (455, 456), *Chekutty* v. *Emperor.* Ss. 352 and 363.
(1910) 11 Cri L Jour 340 (340): 5 Ind Cas 974 (Mad), *Bommareddi Somireddi, In re.* Ss. 352 and 380.
(1906) 3 Cri L Jour 141 (142) (Cal), *Gul Muhammad Sircar* v. *Cheharu Mandal,* Ss. 352 and 384.
(1925) 1925 Mad 1065 (1066): 27 Cri L Jour 1618, *Krishnamurthy* v. *Narayanaswamy.* Ss. 352 and 504.
(1865) 2 Suth W R Cri L 6 (7). Ss. 361 and 362. (Do).
(1865) 2 Suth W R Cri L 13 (13), *Re Mt. Bhuggut.* (Do).
(1928) 29 Cri L Jour 248 (249): 107 Ind Cas 388, *Tek Singh* v. *Emperor.* Ss. 366 and 376.
(1928) 29 Cri L Jour 485 (486): 109 Ind Cas 213 (Lah), *Baga* v. *Emperor.* (Do).
(1926) 1926 All 261 (262): 48 All 236: 27 Cri L Jour 143, *Faujdar Mahto* v. *Emperor.* Ss. 366 and 420.
(1889) 12 Mad 273 (276), *Queen* v. *Ramanna.* Ss, 372 and 373.
(1894) 9 C P L R 23 (23), *Empress* v. *Amilal Perdhan.* Ss. 376 and 377.
(1927) 1927 Lah 737 (738): 28 Cri L Jour 459, *Emperor* v. *Faziuddin.* Ss. 379, 381, 411 and 414.
(1900) 1900 Pun Re No. 5 page 13 (14), *Jang* v. *Queen-Empress.* Ss. 379 and 411.
(1903) 1903 Pun Re No. 17, page 44 (46), *Singhara* v. *Emperor.* (Do).
(1905) 2 Cri L Jour 37 (38): 1905 Pun Re No. 3, *Emperor* v. *Sunder Singh* (Do).
(1923) 1923 Lah 394 (394): 25 Cri L Jour 274, *Sohem Singh* v. *Emperor.* (Do).
(1877) 1 Bom 610 (613), *Reg* v. *Hanumanta Madhoji* (Do).
(1888) Ratanlal 368 (368), *Queen-Empress* v. *Krishna* (Do).
(1865) 3 Suth W R Cri L 17 (17). (Do).
(1918) 1918 Cal 233 (234): 18 Cri L Jour 310, *Assarafulla Sarkar* v. *Emperor.* Ss. 380 and 403.
(1900) 5 Cal W N 294 (296), *Nikunja Behari Roy* v. *Queen-Empress.* Ss. 380 and 409.
(1896) 1 Cal W N 35 (36), *Bishnu Banwar* v. *Empress* Ss. 380 and 411.
(1905) 2 Cal L Jour 78n (78n), *Abdul Hakim* v. *Emperor* (Do).
(1916) 1916 Mad 571 (572): 16 Cri L Jour 298, *In re Mekalakati Subbadu.* Ss. 380 and 411.
(1904) 1 Cri L Jour 834 (834): 6 Bom L R 725 (725), *Emperor* v. *Wassanji.* Ss. 380 and 414.
(1922) 1922 All 244 (245): 23 Cri L Jour 671, *Bechai* v. *Emperor.* Ss. 380 and 420.

law[3] or under a Section of the Penal Code and a Section of a special or local law.[4]

(1902) 15 C P L R 53 (54), *Emperor* v. *Bishu Panka*. Ss. 380 and 454.
(1904) 1 Cri L Jour 537 (539) : (1904) Upp Bur Rul 1st Qr Cr. P. C., 2, *Emperor* v. *Asgar Ali*. Ss. 380 and 457.
(1932) 1932 Bom 277 (278) : 33 Cri L Jour 619, *Emperor* v. *Krishnaji Anant*. (Do).
(1900) 28 Cal 10 (11), *Karu Kalal* v. *Ram Charan Pal*. Ss. 381 and 411.
(1933) 1933 Lah 512 (512) : 34 Cri L Jour 402, *Ajaib Singh* v. *Emperor*. Ss. 393, 394 and 397.
(1882) 1882 All W N 178 (179), *Empress* v. *Lalji*. Ss. 395 and 400.
(1907) 6 Cri L Jour 215 (216) (All), *Emperor* v. *Ram Singha*. Ss. 397 and 494.
(1883) 1883 All W N 179 (179), *Empress* v. *Bhikari*. Ss. 401 and 411.
(1882) 1882 All W N 215 (215), *Empress* v. *Daya Ram*. Ss. 401 and 457.
(1931) 1931 Oudh 86 (87) : 6 Luck 441 : 32 Cri L Jour 540, *Dubri Misir* v. *Emperor*. Ss. 405 and 477-A.
(1917) 1917 Mad 612 (612) : 17 Cri L Jour 369, *T. S. Krishnamurthy Iyer* v. *Emperor*. (Do)
(1933) 1933 Mad W N 326 (328), *Rachamadugu Venkatasubbaya* v. *Emperor*. Ss. 406 and 474.
(1909) 10 Cri L Jour 476 (479) : 4 Ind Cas 28 (Cal), *Parmeshwar Lal* v. *Emperor*. Ss. 408 and 420.
(1910) 11 Cri L Jour 285 (285, 286) : 32 All 219, *Sheo Saran Lal* v. *Emperor*. Ss. 408 and 467.
(1902) 26 Mad 125 (126), *Krishnaswamy Pillai* v. *Emperor*. Ss. 408 and 477.
(1913) 14 Cri L Jour 428 (429) : 40 Cal 318, *Nitya Gopal Chukerbutty* v. *Jiban Krishna Bagchi*. Ss. 408 and 477-A.
(1922) 1922 All 214 (214) : 44 All 540 : 23 Cri L Jour 258, *Shuja Uddin Ahmad* v. *Emperor*, (Do).
(1915) 1915 Cal 296 (296, 297) : 41 Cal 722 : 15 Cri L Jour 153, *Raman Behary Das* v. *Emperor*. Ss. 409 and 477-A.
(1908) 8 Cri L Jour 4 (5) : 30 All 351, *Emperor* v. *Mata Prasad*. Ss. 409 and 467.
(1932) 1932 Cal 486 (486) : 33 Cri L Jour 265, *Nagendra Nath Sen* v. *Emperor*. (Do).
(1907) 5 Cri L Jour 341 (342) : 30 Mad 328, *Kasi Viswanathan* v. *Emperor*. (Do).
(1913) 13 Cri L Jour 21 (22) : 13 Ind Cas 213 (Mad), *Lakshminarainapuram Subramaniya Pattar Krishnier* v. *Emperor*. (Do).
(1915) 1915 All 462 (462) : 38 All 42 : 16 Cri L Jour 813, *Kalka Prasad* v. *Emperor*. (Do).
(1882) 8 Cal 634 (636), *In the matter of the petition of Uttam Koondoo*. Ss. 411 and 413.
(1922) 1922 Cal 401 (401): 49 Cal 555: 24 Cri L Jour 86, *Chetto Kalwar* v. *Emperor*. Ss. 411 and 414.
(1901) 28 Cal 104 (106), *Kumudini Kanta Guha* v. *Queen-Empress*. (Do).
(1905) 2 Cri L Jour 694 (695) : 1905 Pun Re No. 38, *Sahib Singh* v. *Emperor*. Ss. 411 and 454.
(1883) 1883 All W N 158 (158), *Empress* v. *Jurawan*. Ss. 411 and 457.
(1905) 2 Cri L Jour 30 (31) (Lah), *Gurditta* v. *Emperor*. (Do).
(1917) 1917 Lah 191 (192) : 18 Cri L Jour 112, *Muhammad* v. *Emperor*, (Do).
(1906) 3 Cri L Jour 76 (77) : 1905 Pun Re No. 51, *Jagga* v. *Emperor*. Ss. 411 and 458.
(1902) 29 Cal 387 (388), *Mohendra Nath Das Gupta* v. *Emperor*. Ss. 411 and 489.
(1905) 2 Cri L Jour 34 (35, 36) : 1905 Pun Re No. 2, *Bhagwati Dayal* v. *Emperor*. Ss. 420 and 467.
(1903) 30 Cal 822 (830), *Birendra Lal Bhaduri* v. *Emperor*. (Do).
(1906) 3 Cri L Jour 350 (350) : 3 Low Bur Rul 113, *Emperor* v. *Maung Gale* alias *Pan Zin*. Ss. 426 and 504.
(1864) 1 Suth W R Cri L 12 (12), *Re Puroshoola*. Ss. 443 and 446.
(1902) 4 Bom L R 440 (441), *Emperor* v. *Lallubhai*. Ss. 471 and 477-A.
(1865) Ratanlal 4 (4), *Reg* v. *Vithace*. Ss. 494 and 497.

3. *Excise Act XII of* 1896 :—
(1914) 1914 Lah 455 (456) : 1914 Pun Re Re No. 20 : 15 Cri L Jour 172, *Banwari Lal* v. *Emperor*. Ss. 48 and 53.
Bengal Excise Act V of 1909 :—
(1914) 1914 Cal 603 (606) : 41 Cal 694 : 15 Cri L Jour 173, *U. N. Biswas* v. *Emperor*. Ss. 13, 18 and 20.
Gambling Act III of 1867 :—
(1910) 11 Cri L Jour 211 (212) : 5 Ind Cas 720 (Lah), *Makhan* v. *Emperor*. Ss. 3 and 4.
Prevention of Adulteration Act (1912) :—
(1931) 1931 Cal 705 (705, 706) : 58 Cal 955 : 32 Cri L Jour 1235, *Bohra Raghubar Dayal* v. *Emperor*. Ss. 4 and 5.

4. (1933) 1933 Lah 231 (232) : 34 Cri L Jour 637, *Sukhdev Raj* v. *Emperor*. S. 120-B, Penal Code and Ss. 19 and 20, Arms Act.
(1910) 11 Cri L Jour 293 (294) : 6 Ind Cas 242 (Mad), *Musalappa* v. *Emperor*. S. 147, Penal Code and S. 21-A, Forest Act.
(1934) 1934 Oudh 457 (459) : 35 Cri L Jour 1417, *Onkar Singh* v. *Emperor*. S. 211, Penal Code and S. 19-A, Arms Act.

Sec. 233 Note 3

2. Offences *committed on different occasions* even though they may fall under the same Section.[5]

3. Offences *committed against different persons*.[6]

(1902) 29 Cal 385 (386), *Gobind Koeri* v. *Emperor*. S. 225, Penal Code and S. 128, Railways Act.
(1928) 1928 Lah 34 (35) : 29 Cri L Jour 521, *Muhammad Khan* v. *Emperor*. S. 307, Penal Code and S. 20, Arms Act.
(1918) 1918 Lah 148 (148) : 1917 Pun Re No. 44 : 19 Cri L Jour 100, *Jai Singh* v. *Emperor*. S. 395, Penal Code and S. 20, Arms Act.
(1903) 30 Cal 822 (830), *Birendra Lal* v. *Emperor*. S. 467, Penal Code and S. 82, Registration Act.

5. (1882) 1882 All W N 178 (178), *Empress* v. *Lekha*.
(1882) 1882 All W N 180 (180), *Empress* v. *S. Dalla*.
(1883) 1883 All W N 12 (12) *Empress* v. *Serha*.
(1883) 1883 All W N 107 (107), *Empress* v. *Dukhi*.
(1918) 1918 All 399 (400): 40 All 565 : 19 Cri L Jour 967, *Karimuddin* v. *Emperor*.
(1919) 1919 All 239 (239): 20 Cri L Jour 353, *Fauja* v. *Emperor*.
(1924) 1924 All 316 (317) : 46 All 54 : 25 Cri L Jour 466, *Puttoo Lal* v. *Emperor*.
(1905) 2 Cri L Jour 480 (483) : 29 Bom 449, *Emperor* v. *Jethialal Harlochand*.
(1919) 1919 Bom 111 (112, 114) : 20 Cri L Jour 657, *Ramnarain Amarchand* v. *Emperor*.
(1932) 1932 Bom 277 (278) : 33 Cr L Jour 619, *Krishnaji Anant Dange* v. *Emperor*.
(1865) 2 Suth W R Cri L 17 (17), *In re Moha*.
(1868) 9 Suth W R 14 (15), *Queen* v. *Feojdar Roy*
(1871) 15 Suth W R Cri Rul 5 (5), *C. A. Chetter*.
(1873) 20 Suth W R 70 (70), *Queen* v. *Sobrai Gowallah*.
(1904) 1 Cri L Jour 713 (714) : 31 Cal 1053, *Hira Lal Thakur* v. *Emperor*.
(1905) 2 Cri L Jour 393 (394) (Cal), *Emperor* v. *Esu Sheikh*.
(1905) 2 Cri L Jour 847 (851) (Cal), *Ram Sarup Benia* v. *Emperor*.
(1906) 3 Cri L Jour 111 (112) (Cal), *Johan Subarna* v. *Emperor*.
(1906) 3 Cri L Jour 126 (127, 128) : 33 Cal 292, *Budhai Sheikh* v. *Tarap Sheikh*,
(1907) 6 Cri L Jour 321 (323) (Cal), *Nanda Kumar Sircar* v. *Emperor*.
(1909) 9 Cri L Jour 277 (277) : 1 Ind Cas 335 (Cal), *Ali Muhammad* v. *Emperor*.
(1909) 10 Cri L Jour 469 (469) : 4 Ind Cas 16 (Cal), *Sirish Chunder Mookerjee* v. *Emperor*.
(1913) 14 Cri L Jour 449 (449) : 40 Cal 846, *Asgar Ali Biswas* v. *Emperor*.
(1926) 1926 Cal 320 (321) : 27 Cri L Jour 263, *Keramat Mandal* v. *Emperor*.
(1904) 1 Cri L Jour 971 (971) (Lah), *Bhagat Singh* v. *Emperor*.
(1906) 4 Cri L Jour 496 (497) (Lah), *Abdul Sattar* v. *Emperor*.
(1866) 1866 Pun Re No. 66 page 71 (71), *Mohur Banji* v. *Chunda*.
(1910) 11 Cri L Jour 597 (597) : 8 Ind Cas 229 (Lah), *Wasawa Singh* v. *King-Emperor*.
(1922) 1922 Lah 144 (145) : 22 Cri L Jour 505, *Ganda Singh* v. *Emperor*
(1928) 1928 Lah 637 (637) : 10 Lah 158 : 29 Cri L Jour 737, *Hayat* v. *Emperor*.
(1932) 1932 Lah 615 (615) : 34 Cri L Jour 458, *Jalal* v. *Emperor*.
(1889) 12 Mad 273 (275, 276), *Queen-Empress* v. *Ramanna*.
(1896) 2 Weir 299 (300), *Public Prosecutor* v. *Kali Vannan*.
(1910) 11 Cri L Jour 477 (477) : 7 Ind Cas 390 (Mad), *Shanmooga Thevan* v. *Emperor*.
(1911) 12 Cri L Jour 567 (567) : 12 Ind Cas 655 (Mad), *K. Raghavendra Rao* v. *Emperor*.
(1916) 1916 Mad 762 (763) : 16 Cri L Jour 717, *Gontla Krishnamma, In re*.
(1897) 11 C P L R 6 (7), *Empress* v. *Mt. Ganga*.
(1897) 1 Oudh Cas 4 (7), *Ram Adhin* v. *Queen-Empress*.
(1922) 1922 Oudh 250 (251) : 25 Oudh Cas 151 : 23 Cri L Jour 687, *Girja Dayal* v. *Emperor*.
(1921) 1921 Pat 291 (291) : 21 Cri L Jour 619, *Padmanabh Patnaik* v. *Emperor*.
(1933) 1933 Pat 488 (489) : 34 Cri L Jour 892, *Sachidanand Prasad* v. *Emperor*.
(1911) 12 Cri L Jour 72 (72) : 9 Ind Cas 421 (Sind), *Imperator* v. *Ali*.
(1926) 27 Cri L Jour 872 (873) 96 Ind Cas 120 (Sind), *Ghulamo* v. *Emperor*.
[See also (1906) 3 Cri L Jour 391 (393, 399) : 33 Cal 1256, *Abdul Majid* v. *Emperor*.]

6. (1904) 1 All L Jour 225 (225), *In re Nand Lal*. Receiving different sums of money as illegal gratification from different persons.
(1904) 1 Cri L Jour 364 (364) : 26 All 195, *Emperor* v. *Fattu*. Dacoity in several houses in the same night.
(1866) 6 Suth W R Cri Rul 83 (83), *Queen* v. *Itwaree Dome*. (Do).
(1868) 9 Suth W R Cri Rul 30 (30), *In the matter of Goolzar Khan*. Criminally intimidating three different persons.
(1907) 6 Cri L Jour 442 (444) (Cal), *Tilak-*

Offences of the same kind committed on *one* occasion though consisting of *parts* are not different offences but are to be treated as constituting only one offence.

Illustrations.

(a) The theft of several articles from one person or more at the same time.[7]

(b) The receiving of stolen property belonging to different owners or the results of different thefts but received at the same time.[8]

(c) The making of any number of false allegations in *one* statement.[9]

(d) The misappropriation of several sums of money on different occasions but in regard to *one* person[10] or of several books of account in respect of the same estate[11] or of several articles.[12]

(e) A *single* use of several forged documents as genuine, in a Court of law.[13]

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dhari Das v. *Emperor*. Criminal breach of trust with monies of different persons.
(1909) 9 Cri L Jour 277 (278): 1 Ind Cas 335 (Cal), *Ali Muhammad* v. *Emperor*. Receiving property stolen from different persons.
(1921) 1921 Pat 291 (291): 21 Cri L Jour 619, *Padmanaba Patnaik* v. *Emperor*. (Do).
(1925) 1925 Pat 20 (27, 28): 3 Pat 503: 25 Cri L Jour 738, *Emperor* v. *Bishun Singh*. (Do).
(1926) 27 Cri L Jour 872 (873) (Sind), *Ghulamo* v. *Emperor*. (Do).
(1909) 10 Cri L Jour 469 (469): 4 Ind Cas 16 (Cal), *Srish Chandra Mukerjee* v. *Emperor*. Cheating different persons.
(1922) 1922 Oudh 250 (251): 25 Oudh Cas 151: 23 Cri L Jour 687, *Girja Dayal* v. *Emperor*. (Do).
(1916) 1916 Cal 693 (699, 706): 16 Cri L Jour 641, *Ram Suhag Singh* v. *Emperor*. Causing hurt to different persons on one occasion.
(1866) 5 Suth W R Cri Letters 4 (4). (Do).
(1907) 11 Cal W N 274 (274) (Notes), *The King* v. *Henry Agustus Berney*. (Do).
(1906) 4 Cri L Jour 394 (395) (Cal), *Manik Lal Mullick* v. *The Corporation of Calcutta*.

7. (1881) 1881 All W N 154 (154), *Queen-Empress* v. *Raghu Raj*.
(1897) Ratanlal 927 (927), *Empress* v. *Krishna Shahaji*.
(1926) 1926 Nag 89 (90): 26 Cri L Jour 1495 *Bhura Alias Turab* v. *Emperor*.
(1872-1892) 1872-1892 Low Bur Rul 168 (168), *Empress* v. *Nga Po*.
(1872-1892) 1872-1892 Low Bur Rul 475 (475), *San Hla* v. *Empress*.
(1905) 2 Cri L Jour 708 (709): 1905 Pun Re No. 58, *Har Dayal* v. *Emperor*.
(1869) 11 Suth W R 38 (38), *The Queen* v. *Sheikh Moneeah*.
(1920) 1920 Cal 571 (573): 21 Cri L Jour 682, *Bijoy Krishna Mookerjee* v *Satish Chandra Mitra*,

8. (1893) 15 All 317 (318), *Empress* v. *Makhan*.
(1906) 3 Cri L Jour 207 (208): 28 All 313, *Emperor* v. *Mian Jan*.
(1923) 1923 All 547 (547, 548): 45 All 485: 24 Cri L Jour 632, *Sheo Charan* v. *Emperor*.
(1901-1902) 1 Low Bur Rul 39 (40, 41), *Nga Kywet* v. *Queen-Empress*.
(1888) 15 Cal 511 (513), *Ishan Muchi* v. *Empress*.
(1923) 1923 Cal 557 (558): 50 Cal 594: 24 Cri L Jour 707, *Ganeshi Sahu* v. *Emperor*.
(1889) 1889 Pun Re No. 26 page 85 (86) (F B), *Sant Singh* v. *Empress*.
(1910) 11 Cri L Jour 597 (597): 8 Ind Cas 229 (Lah), *Wasawa Singh* v. *Emperor*.
(1928) 1928 Lah 637 (637): 10 Lah 158: 29 Cri L Jour 737, *Hayat* v. *Emperor*,
(1932) 1932 Lah 615 (615): 34 Cri L Jour 458, *Jalal* v. *Emperor*.
(1934) 1934 Pat 483 (485): 13 Pat 161: 36 Cri L Jour 342, *Ramnath Rai* v. *Emperor*.

9. (1909) 10 Cri L Jour 150 (154): 36 Cal 808, *Rakhal Chandra Laha* v. *Emperor*.
(1886) 13 Cal 270 (271, 272), *Poonit Singh* v. *Madho Bhot*.
(1871) 6 Mad H C R App 27 (27), *High Court Proceedings No. 874 dated 1st May* 1871.

10. (1886) 14 Cal 128 (132), *In the matter of Lachiminarain*.

11. (1913) 14 Cri L Jour 219 (222): 19 Ind Cas 315 (Cal), *Promotha* v. *Emperor*.

12. (1921) 1921 Cal 114 (115): 22 Cri L Jour 666, *Kali Charan* v. *King-Emperor*.

13. (1893) 20 Cal 413 (417), *Queen-Empress* v. *Raghunath Das*.

Sec. 233 Notes 3—5

(f) Causing hurt to several persons on the same occasion.[14]
(g) Receiving *a* bribe partly on one day and partly on another.[15]
(h) The projection of *one* board attached to two different rooms, into the street, an offence under Section 11 of the Bombay District Municipalities Act[16] or,
(i) An alternative charge of perjury.[17]

4. Separate charges.

For every distinct offence of which any person is accused, a *separate* charge should be framed[1] and this rule applies even though the case is one in which the accused may be tried at *one* trial for all the offences under the provisions of Sections 234, 235, 236 and 239.[2]

5. Non-compliance with the Section.

In *Subramaniya Iyer* v. *King Emperor*[1] in which a person was tried on an indictment charging him with 41 acts extending over a period of 2 years it was held by their Lordships of the Privy Council that this was plainly in contravention of Section 234 of the Code and that the defect was one which could not be cured by Section 537. Their Lordships observed as follows:—

"Their Lordships are unable to regard the disobedience to an express provision *as to a mode of trial* as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than, by law, could have been joined together in one indictment. The illustration to the Section itself sufficiently shows what was meant.

The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that, when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, this contravention of the Code comes within the description of error, omission or irregularity."

The question has arisen as to how far this decision is applicable to a disobedience of the directions of this Section. The Section directs two things, namely:

1. that for every distinct offence of which any person is accused there shall be a *separate* charge and,
2. that every such charge shall be *tried separately* unless the case falls within the classes of cases mentioned in Sections 234, 235, 236 and 239.

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14. (1865) 3 Suth W R Cri L 15 (15), *In re Basisht.*
15. (1900-01) 5 Cal W N 332 (334), *Jagat Chandra* v. *Lal Chand.*
(1911) 12 Cri L Jour 217 (224) : 1911 Pun Re Cr No. 11, *Girdhari Lal* v. *Emperor.*
16. (1902) 4 Bom L R 942 (943), *Emperor* v. *Atmaram.*
17. (1884) 10 Cal 937 (945), *Habibullah* v. *Queen-Empress.*

Note 4.

1. (1871) 3 N W P H C R 314 (315), *The Queen* v. *Sheo Churun.*
[See also (1875) 7 N W P H C R 137 (144), *Queen* v. *Jamurha*;
(1865) 3 Suth W R Cri L 15 (15);
(1865) 4 Suth W R Cri L 9 (9);
(1866) 5 Suth W R Cri L 5 (5);
(1867) 7 Suth W R 8 (8), *Kalaram Singh*].
2. (1904) 1 Cri L Jour 364 (364) : 26 All 195, *Emperor* v. *Fattu.*
(1927) 1927 Cal 17 (20) : 54 Cal 227 : 28 Cri L Jour 99, *Azimoddy* v. *Emperor.* In the course of one transaction three murders were committed and only one charge was framed.
(1908) 7 Cri L Jour 178 (178) (Mysore), *In re Venkatigadu.*
(1913) 14 Cri L Jour 449 (449) : 40 Cal 846, *Asgar Ali Biswas* v. *Emperor.*

Note 5.

1. (1901) 25 Mad 61 (97) : 28 Ind App 257 (P C), *Subramaniya Iyer* v. *King-Emperor.*

Sec. 233 Note 5

Where a *single* charge is framed for several distinct offences and a *single* trial is held in respect of such charge and the case does not fall within Sections 234, 235, 236 or 239, there is a non-compliance both as regards the *framing* of the charge and as regards the *mode of trial*. Where *separate* charges are framed for the distinct offences but a single trial is held in respect of all such charges and the case is not governed by Sections 234, 235, 236 or 239, there is a non-compliance with the Section as to the *mode of trial*. Where a *single* charge is framed for several distinct offences and a single trial is held in respect of such charge *and the case falls within Sections* 234, 235, 236 or 239 there is a non-compliance as regards the *framing* of the charge, but *not* with regard to the *mode of trial*. It has been held that a non-compliance of the first kind is governed by the rule enunciated in *Subramaniya Iyer's* case and is an illegality not cured by Section 537;[2] so also is a non-compliance of the second kind.[2a] But a non-compliance of the third kind, which has reference

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2. (1915) 1915 All 462 (462) : 38 All 42 : 16 Cri L Jour 813 , *Kalka Prasad* v. *Emperor*.
(1919) 1919 All 239 (239) : 20 Cri L Jour 353, *Fauja* v. *Emperor*.
(1927) 1927 All 223 (224) : 49 All 312 : 28 Cri L Jour 171, *Raman Lal* v. *Emperor*.
(1904) 1 Cri L Jour 875 (876) (All), *Emperor* v. *Nand Lal*.
(1907) 5 Cri L Jour 341 (342): 30 Mad 328, *Kasi Viswanathan* v. *Emperor*.
(1916) 1916 Mad 110 (112, 113) (F B) : 39 Mad 527 : 16 Cri L Jour 593, *Public Prosecutor* v. *Kattaparambath Maliagakkal Kaya Haji*.
(1913) 14 Cri L Jour 116 (117) : 18 Ind Cas 676 (All), *Shankar* v. *Emperor*.
(1932) 1932 Bom 277 (278, 279): 33 Cri L Jour 619, *Emperor* v. *Krishnaji Anant*.
(1934) 1934 Bom 303 (305) : 35 Cri L Jour 1477, *Khimchand A. Mehta* v. *Emperor*,

2a. (1922) 1922 Lah 144 (145) : 22 Cri L Jour 505, *Ganda Singh* v. *Emperor*.
(1931) 1931 All 705 (706) : 32 Cri L Jour 1031, *Boha Raghubar Dayal* v. *Emperor*.
(1904) 4 Bom L R 440 (441), *Emperor* v. *Lallubhai Gokaldas*.
(1904) 1 Cri L Jour 834 (835) (Bom), *Emperor* v. *Wassanji Dayal*.
(1914) 1914 Cal 589 (589) : 15 Cri L Jour 472, *Shyambar Koyal* v. *Emperor*.
(1915) 1915 Cal 296 (297) : 41 Cal 722 : 15 Cri L Jour 153, *Raman Behari Das* v. *Emperor*.
(1903) 1903 Pun Re No. 17 page 44 (46), *Singhara* v. *Emperor*.
(1902) 26 Mad 125 (127) : *Krishnaswami Pillai* v. *Emperor*.
(1931) 1931 Oudh 86 (88) : 6 Luck 441 : 32 Cri L Jour 540, *Dubri Missir* v. *Emperor*.
(1901-02) 1 Low Bur Rul 361 (367), *Sadu Daik* v. *Crown*.
(1903-04) 2 Low Bur Rul 10 (11, 12), *Nga Lun Maung* v. *King-Emperor*.
(1904) 1 Cri L Jour 537 (539) : (1904) Upp Bur Rul 1st Qr., Cr. P. C., 2, *Emperor* v. *Asgar Ali*.
(1905) 2 Cri L Jour 480 (484, 485, 499, 500) : 29 Bom 449, *Emperor* v. *Jethlal Harlochand*.
(1909) 9 Cri L Jour 147 (148) : 1 Ind Cas 69 (Cal), *Tilakdhari Mahton* v. *Lal Singh*.
(1912) 13 Cri L Jour 485 (486): 15 Ind Cas 485 (Rang), *Nga Tha Gyi* v. *Emperor*.
(1916) 1916 Mad 550 (553) : 16 Cri L Jour 323, *Virupana Gowd* v. *Emperor*.
(1916) 1916 Cal 188 (195) : 42 Cal 957 : 16 Cri L Jour 497, *Amritlal Hazra* v. *Emperor*
(1921) 1921 Low Bur 51 (55): 11 Low Bur Rul 73: 23 Cri L Jour 49, *H. M. Yusoof* v. *Emperor*.
(1914) 1914 Low Bur 263 (264): 7 Low Bur Rul 272: 16 Cri L Jour 44, *Po Mya* v. *Emperor*.
(1904) 1 Cri L Jour 872 (873) : 1904 Upp Bur Rul 2nd Qr., Cr. P. C., 9, *Emperor* v. *Nga Tok Gyi*
(1934) 1934 Oudh 457 (459): 35 Cri L Jour 1417, *Onkar Singh* v. *Emperor*.
(1933) 1933 Nag 327 (328): 34 Cri L Jour 673, *Rameshwar Brijmohan* v. *Emperor*.
(1933) 1933 Mad W N 326 (328), *Rachamadugu Venkatasubbaya* v. *Emperor*.
(1912) 13 Cri L Jour 21 (22): 13 Ind Cas 213 (Mad), *Lakshiminarainapuram Subramanier Pattar Krishnaiyer* v. *Emperor*.
(1921) 1921 Lah 381 (382, 383) : 1 Lah 562 : 21 Cri L Jour 626, *Pahlad* v. *Emperor*.
(1914) 1914 Lah 455 (456): 1914 Pun Re No. 20: 15 Cri L Jour 172, *Banwari Lal* v. *Emperor*.
(1911) 12 Cri L Jour 266 : 10 Ind Cas 331 (Lah), *Mahbub Ali* v. *Emperor*.
(1908) 8 Cri L Jour 243 (248) (Lah), *Mangal*

Sec. 233 Notes 5—6

merely to the *frame of the charge* but not to the *mode of trial*, is not governed by the Privy Council decision, and is only a curable irregularity.[3]

An objection as to the legality as to non-compliance with the requirements of the Section as to the mode of trial can be taken for the first time even in appeal.[4]

6. Counter-cases.

The joint trial of two parties arrayed against each other in a riot at one and the same trial is altogether illegal and void under this Section.[1] It has

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Singh v. *Emperor*.
(1904) 1 Cri L Jour 971 (971) (Lah), *Bhagat Singh* v. *Emperor*.
(1900) 1900 Pun Re No. 5 page 13 (14), *Jang* v. *Empress*.
(1909) 9 Cri L Jour 277 (277): 1 Ind Cas 335 (Cal), *Ali Muhammad* v. *Emperor*.
(1907) 6 Cri L Jour 321 (323) (Cal), *Nanda Kumar Sirkar* v. *Emperor*.
(1904) 1 Cri L Jour 58 (62) (Cal), *Pran Krishna Saha* v. *Emperor*. Principles of Section applies to proceedings under S. 107 also.
(1902) 29 Cal 385 (386, 387), *Gobind Koeri* v. *Emperor*.
(1928) 1928 All 417 (417): 30 Cri L Jour 214, *Sewak* v. *Emperor*.
(1924) 1924 All 211 (211): 25 Cri L Jour 964, *Shafi* v. *Emperor*.
[See also (1908) 8 Cri L Jour 152 (153) (Mad), *In re Rangaswamy Chetty*.]

The following Cases most of which were decided before the date of the Privy Council decision in 25 *Mad* 61 *are no longer good law:—*

(1889) 12 Mad 273 (276), *Queen-Empress* v. *Ramanna*.
(1896) 9 C P L R 23 (23), *Empress* v. *Amilal Perdhan*.
(1901) 1901 Pun Re No. 7, page 21 (25), *Mammun* v. *Emperor*.
(1892) 14 All 502 (504), *Queen-Empress* v. *Mulua*.
(1907) 6 Cri L Jour 215 (216) (All), *Emperor* v. *Ram Singha*. Simply following 14 All 502 which was decided before the Privy Council decision in 25 Mad 61.

3. (1933) 1933 Cal 676 (677, 678): 60 Cal 1394: 34 Cri L Jour 1219, *Rajabuddin Mondal* v. *Emperor*.
(1916) 1916 Cal 693 (705): 16 Cri L Jour 641, *Ram Subhag Singh* v. *Emperor*. Dissenting from 3 Cri L Jour 141; 14 Cri L Jour 449; 3 Cri L Jour 111 and distinguishing 6 Cri L Jour 442.
(1934) 1934 Sind 57 (60, 62): 28 Sind L R 119: 35 Cri L Jour 1337, *Dur Mahomed* v. *Emperor*.
(1914) 1914 Cal 288 (288): 41 Cal 66: 15 Cri L Jour 224, *Musai Singh* v. *Emperor*.
(1927) 1927 Cal 330 (331, 332): 28 Cri L Jour 347, *Tamz Khan* v. *Rajjabali Mir*.
(1928) 1928 Cal 700 (702): 30 Cri L Jour 799, *Ajgar Shaikh* v. *Emperor*
(1932) 1932 Cal 390 (392): 59 Cal 1233: 33 Cri L Jour 685, *Superintendent and Remembrancer of Legal affairs, Bengal* v. *Daulatram Mudi*.
(1918) 1918 Lah 242 (243, 244): 1918 Pun Re No. 12: 19 Cri L Jour 510, *Emperor* v. *Mahomed Hussain*.
(1919) 1919 Mad 487 (490, 491): 20 Cri L Jour 354, *Kumaramuthu Pillai* v. *Emperor*. Mere omission to frame separate charges does not vitiate trial (p. 490) but misjoinder in *one trial* is illegal (p. 496).
(1921) 1921 Oudh 49 (51): 22 Cri L Jour 344, *Kallu* v. *Emperor*.
(1927) 1927 Oudh 235 (236): 2 Luck 430: 28 Cri L Jour 409, *Bachchu* v. *Piyara*.
(1933) 1933 Pat 488 (490): 34 Cri L Jour 892, *Sachidanand Prasad* v. *Emperor*.
(1921) 1921 Sind 47 (47, 48): 16 Sind L R 15: 23 Cri L Jour 320, *Emperor* v. *Meharali Bachai*.
(1906) 4 Cri L Jour 415 (417) (Cal), *Moharuddi Malita* v. *Jadu Nath Mandul*.
(1934) 1934 Sind 164 (166): 36 Cri L Jour 231, *Allahrakhio* v. *Emperor*.
[See also (1934) 1934 Cal 85 (86): 35 Cri L Jour 487, *Ramizullah* v. *Emperor*.]
(1930) 1930 Mad 857 (858): 53 Mad 937: 32 Cri L Jour 30, *Ramaraju Thevan* v. *Emperor*. In this case there was as a matter of fact no contravention of S. 233.
(1934) 1934 Oudh 244 (245): 35 Cri L Jour 935, *Mendi Lal* v. *Emperor*.
(1926) 1926 Rang 53 (58): 27 Cri L Jour 669, *V. M. Abdul Rahman* v. *King-Emperor*. Confirmed in 1927 P C 44 (P C). [But see (1930) 1930 Sind 62 (64): 30 Cri L Jour 1073, *Mahomed* v. *Emperor*. There was also prejudice in this case.]
(1904) 1 Cri L Jour 364 (365): 26 All 195, *Emperor* v. *Fattee*.

4. (1933) 1933 Mad W N 326 (328), *Venkatasubbayya* v. *Emperor*.

Note 6.

1. (1906) 4 Cri L Jour 75 (76): 1906 Pun Re No. 5, *Ala Dya* v. *Emperor*.
(1924) 1924 Lah 104 (104, 107): 4 Lah 376: 25 Cri L Jour 68, *Allu* v. *Emperor*.
(1925) 1925 Lah 149 (150): 25 Cri L Jour

been held that even committals in such cases should be made separately and not all together, though it is in the power of the Sessions Judge to try them separately in spite of the joint committal.[2]

A *simultaneous trial* of a case and a counter case is not a joint trial and is not prohibited by the Code.

A simultaneous trial in certain cases and in certain circumstances might be irregular and improper but that would not entitle the accused to have the whole trial set aside unless, the procedure adopted had prejudiced him in his defence.[3] The proper course to pursue is to give each party or faction a separate trial so as to enable its several members to be examined as witnesses in the case in which they are, the complainants.[4]

The question as to which case ought to be taken first, depends upon the circumstances of each case. For instance, the case against a person should be taken up first before the case in which he is the complainant, as it is not fair to force a person to throw himself open to cross-examination by the other side,[5] or again if one case looks on its face stronger than the other it can be heard first.[6] No hard and fast rule can be laid down as to the procedure to be followed. There is nothing irregular in the judge trying each case to its conclusion and then pronouncing judgment in both. But it is necessary that

(a) the trial should be separate and the judgments should be separately delivered;

(b) the conclusion in each case must be founded on and only on the evidence in that case and

(c) the judge must keep his hands free and not commit himself to a decision one way or another and must detach himself from extraneous considerations.[7]

551, *Muhammad* v. *Emperor*.

(1920) 1920 Low Bur 90 (90): 22 Cri L Jour 707, *Mamsa* v. *Emperor*.

(1903-04) 2 Low Bur R 106 (107), *Nga Tha Dun* v. *King-Emperor*.

(1869) 12 Suth W R 75 (76), *Queen* v. *Surroop Chunder Paul*.

(1883) 13 Cal L R 275 (278, 279), *In the matter of Chakowri Lall* v. *Moti Kurmi*.

(1901-02) 1 Low Bur R 56 (56, 57), *Queen-Empress* v. *Nga Aung Nyun*.

(1881) 1881 Pun Re No. 26, page 56 (57), *Nawab* v. *Empress*.

(1909) 5 Nag L R 65 (66): 9 Cri L Jour 560, *Ganapat* v. *Emperor*.

(1904) 1 Cri L Jour 58 (60) (Cal), *Pran Krishna Saha* v. *Emperor*.

2. (1881) 1881 Pun Re No. 22, page 47 (49), *Empress* v. *Haibat*.

(1867) 8 Suth W R 47 (52), *Queen* v. *Sheikh Bazu*.

(1868) 9 Suth W R 33 (35): *Queen* v. *Durzoolla*.

(1882) 1882 All W N 160 (161), *Empress* v. *Pulandar Singh*.

3. (1920) 1920 Pat 177 (179): 21 Cri L Jour 739, *Dhako Singh* v. *Emperor*.

(1904) 1 Cri L Jour 199 (203, 204) (Cal), *Sahadev Ahir* v. *Emperor*.

(1928) 1928 All 593 (593, 595): 50 All 457: 30 Cri L Jour 337, *Sukhai Ahir* v. *Emperor*.

(1925) 1925 Pat 152 (153): 25 Cri L Jour 1018, *Shafayat Khan* v. *Emperor*.

(1925) 1925 Pat 619 (621): 26 Cri L Jour 1179, *Ram Saran Singh* v. *Nikhad Narayan*.

[See also (1927) 1927 P C 26 (27): 8 Lah 193: 28 Cri L Jour 254 (P C): *Madat Khan* v. *King-Emperor*.]

4. (1881) 1881 All W N 28 (28), *Empress* v. *Bahadur Khan*.

5. (1925) 1925 Cal 1260 (1262): 26 Cri L Jour 1615, *Makhan Mapa* v. *Manindra Nath Bose*.

(1932) 1932 Mad W N 692 (710), *Jaggu Naidu* v. *Emperor*.

6. (1931) 1931 Mad W N 1316 (1317), *Satha Kuttia Pillai* v. *Pichai Cruz*.

7. (1933) 1933 Mad 367 (369): 56 Mad 159: 34 Cri L Jour 175 (F B), *M. Mounaguruswami Naicker* v. *Emperor*.

(1932) 1932 Mad W N 692 (710), *Jaggu Naidu* v. *Emperor*.

(1928) 29 Cri L Jour 1059 (1060): 112 Ind Cas 563 (Lah), *Emperor* v. *Krishan Murari Lal*.

(1930) 1930 Mad 190 (191): 31 Cri L Jour 461, *Krishna Pannadi* v. *Emperor*.

Sec. 233 Note 6

Again simultaneous trials of the two cases before two different Courts over one and the same occurrence is undesirable and both cases should be tried by one Magistrate or Judge one after the other.[8]

Sec. 234

234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three.

Three offences of same kind within year may be charged together.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same Section of the Indian Penal Code or of any special or local law:

Provided that, for the purpose of this Section, an offence punishable under Section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under Section 380 of the said Code, and that an offence punishable under any Section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

Synopsis.

	Note No.		Note No.
Legislative changes.	1	"More offences than one."	5
Section applies to trials and not to committals.	2	"Committed within the space of twelve months."	6
"Person" if includes "persons."	3	"Not exceeding three."	7
"Whether in respect of the same person or not."	4	Offences of the same kind—Sub-section 2.	8
		Proviso.	9

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* **(Code of 1882—***Section same as that of* 1898 *Code.)*

(Code of 1872—S. 453)

More offences than one of same kind may be charged within a year of each other.

453. When a person is accused of more offences than one of the same kind, committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three.

Explanation :—Offences are said to be of the same kind under this Section if they fall within the provisions of Section four hundred and fifty five.

(Code of 1861—*Nil***).**

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8. (1923) 1923 Cal 644 (645): 24 Cri L Jour 940, *Sheikh Samir* v. *Beni Madhab Gope.*

Other Topics.

Accounts—Falsification (S. 477-A). See Note 8; F-N. (1).
Distinct offences. See S. 233 Note 3.
Effect of violation of this Section. See Note 6 Pt. 1; Note 7, Pt. 1.
Forgery. See Note 5, Pt. 5.
Object of the Section. See S. 233, Note 1, Pt. 3.
Offences and not charges. See Note 5, Pt. 4.
Offences and not transactions. See Note 5, Pts. 1 and 5.
Offences not of the same kind. See Note 8, Pt. 1.
Offences under same Section. See Note 8.
Offences under S. 124-A and 153-A. See Note 5, Pt. 4.
Only one offence—Section inapplicable. See Note 5, Pt. 1.
Same series under different Sections. See Note 5, Pt. 4.
Single trial and not separate trials prohibited. See Note 5, Pts. 6 and 7.
Theft. See Note 9, Pt. 1, Note 8, F-N. (1).

1. Legislative Changes.

Changes made in the Code of 1882:—

The words "committed within the space of twelve months from the first to the last of such offences" were substituted for the words "committed within one year of each other" occurring in the Code of 1872.

Changes made in 1923:—

1. In Sub-Section 1 after the words "such offences" the words "whether in respect of the same person or not" have been added.

2. The proviso to Sub-Section 2 is new.

2. Section applies to trials and not to committals.

The Section refers to a *trial* and not to *commitment*. So where an accused is committed to trial on more than three charges, the commitment is not illegal, as the Sessions Judge can limit the *trial* to three charges only.[1]

3. "Person" if includes "Persons."

There is a difference of opinion as to whether the word "person" includes more than one accused person. It has been held in the undermentioned cases[1] that it does not. According to the High Court of Allahabad, the existence of Section 239 which specifically deals with the case of several accused and the arrangement of the Sections dealing with joinder of charges, constitutes such a repugnancy in the context as to prevent the reading of the words "a person" in the Section as including several persons.[2] According to the Madras

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Section 234—Note 2.

1. (1917) 1917 Mad 612 (612) : 17 Cri L Jour 369. *In re T. S. Krishnamurthy Iyer.*

Note 3.

1. (1906) 3 Cri L Jour 126 (127, 128) : 33 Cal 292, *Budhai Sheikh* v. *Tarap Sheikh.*
(1916) 1916 Cal 124 (124) : 17 Cri L Jour 224, *Rahiman Bibi* v. *Mobarak Mondal.*
(1911) 12 Cri L Jour 208 (209) : 10 Ind Cas 63 (Lah), *Karam Singh* v. *Emperor.*
(1911) 12 Cri L Jour 266 (268) : 10 Ind Cas 331 (Lah), *Mahbub Ali* v *Emperor.*
(1917) 1917 Lah 78 (79) : 1917 Pun Re No 17 : 18 Cri L Jour 282, *Tulsi* v. *Emperor.*
(1908) 8 Cri L Jour 11 (13) : 4 Nag L R 71, *Emperor* v. *Balwant Singh.*
(1918) 1918 Nag 139 (140) : 20 Cri L Jour 7 *Sayad Lal* v. *Emperor.*
(1920) 1920 Upp Bur 28 (28) : 3 Upp Bur Rul 187 : 21 Cri L Jour 794, *Nga San Pa* v. *Emperor.*
[See also (1907) 6 Cri L Jour 321 (323) (Cal), *Nanda Kumar Sarkar* v. *Emperor.*]
(1912) 13 Cri L Jour 506 (507) : 15 Ind Cas 650 (Cal), *Girwar Narain* v. *Emperor.*
(1927) 1927 Nag 22 (23) : 27 Cri L Jour 1099, *Emperor* v. *Dhaneshram.*
(1914) 1914 Low Bur 263 (264) : 7 Low Bur Rul 272 : 16 Cri L Jour 44, *Po Mya* v. *Emperor.*
2. (1921) 1921 All 246 (247) : 22 Cri L Jour 657, *Ram Prasad* v. *Emperor.*
[But see (1917) 1917 All 404 (404) : 38 All 457 : 18 Cri L Jour 47, *Emperor* v. *Beehan Pande.*]

Sec. 234 Notes 3—5

High Court, however, there is no such "repugnancy" as is stated in the above decision and that the words "a person" would include, if not several persons, at least "a set of persons" acting together.[3] The High Court of Patna has also held that the word "person" includes "persons" on the ground that the exceptions to Section 233 have all to be read together, that they are merely enabling Sections and that therefore the joint trial of several persons, is not illegal, if no prejudice is caused to any of the accused.[4]

4. "Whether in respect of the same person or not."

Before the amendment of 1923 there was a conflict of opinion as to whether the Section was applicable to cases of offences committed against *several* persons, one set of cases holding that it applied only when the offences were committed against the *same* person[1] and another set holding that there was no such restriction and that it applied in all cases whether the offences were committed against the same person or against different persons.[2] The addition of the words "whether in respect of the same person or not" has removed this conflict and a person could now be charged for offences of the same kind not exceeding three within a year, even if they were committed against several persons.[3]

5. "More offences than one."

The Section applies only where a person is accused of *more offences than one* of the same kind, and not where he is charged with only *one* offence. A trial for such offence is not barred even though such offence is based upon, various acts which by themselves, are offences, and which extend beyond a period of one year. In other words the word "offence" in the Section is not intended to include every act so connected with that offence as to form part of the same transaction.[1]

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3. (1919) 1919 Mad 487 (493) : 20 Cri L Jour 354, *Kumaramuthu Pillai* v. *Emperor.*
   (1923) 1923 Mad 181 (181) : 23 Cri L Jour 719, *Kovaganti alias Nallagonda Appiah* v. *Crown.*
4. (1918) 1918 Pat 168 (169, 170) : 3 Pat L Jour 124 : 19 Cri L Jour 673, *Kilash Prasad* v. *Emperor.*

Note 4.

1. (1881) 4 All 147 (148), *Empress of India* v. *Murari.*
   (1883) 1883 All W N 39 (39), *Empress* v. *Sheodin.*
   (1883) 1883 All W N 107 (107), *Empress* v. *Dukhi.*
   (1904) 1 Cri L Jour 489 (490) (*Kathiawar*), *Khavas Vasu Monji In re.*
2. (1883) 6 All 121 (124, 125), *Empress* v. *Ram Partab.*
   (1884) 7 All 174 (178), *Queen Empress* v. *Juala Prasad.*
   (1917) 1917 All 369 (369) : 38 All 458 : 18 Cri L Jour 41, *Emperor* v. *Jagar Deo.* [4 All 147 not followed].
   (1917) 1917 All 404 (404) : 38 All 457 : 18 Cri L Jour 47, *Emperor* v. *Bechan Pande.*
   (1919) 1919 All 26 (27, 28) : 42 All 12 : 20 Cri L Jour 642, *Babu Ram* v. *Emperor.*
   (1887) Ratanlal 331 (331), *Queen-Empress* v. *Dhondi.*
   (1883) 9 Cal 371 (373), *Manu Miya* v. *Empress.*
   (1909) 10 Cri L Jour 272 (272 to 274) : 3 Ind Cas 819 (Cal), *Sri Bhagwan Singh* v. *Emperor.*
   (1915) 1915 Cal 366 (367) : 43 Cal 13 : 16 Cri L Jour 332, *Chattaradhari Misser* v. *Emperor.*
   (1914) 1914 Cal 288 (288) : 41 Cal 66 : 15 Cri L Jour 224, *Musai Singh* v. *Emperor.*
   (1917) 1917 Mad 879 (880) : 17 Cri L Jour 479, *Raja Rao In re.*
   (1923) 1923 Mad 181 (181) : 23 Cri L Jour 719, *Kovaganti* v. *Crown.*
   (1918) 1918 Nag 147 (147) : 20 Cri L Jour 71, *Krishnayya* v. *Emperor.*
   (1923) 1923 Nag 156 (156) : 26 Cri L Jour 327, *Tukaram* v. *Ganpat.*
   (1917) 1917 Pat 656 (656) : 2 Pat L Jour 209 : 18 Cri L Jour 614, *Babu Lal* v. *Emperor.*
   (1921) 1921 Low Bur 36 (36, 37) : 23 Cri L Jour 740 : 11 Low Bur Rul 45, *Nga Po Kyin* v. *Emperor.*
3. (1926) 1926 Pat 347 (348) : 27 Cri L Jour 909, *Farzand Ali* v. *Emperor.*

Note 5.

1. (1934) 1934 Sind 57 (64) : 28 Sind L R 119:

Illustrations.

1. *A* is charged with an offence under Section 401, of the Penal Code. It is based on several offences of theft and various acts of association extending over more than one year. The trial is not bad under this Section. The reason is that the gist of the offence under Section 401 is association for the purpose of habitually committing theft or robbery and habit is to be proved by the aggregate of acts extending, it may be, over many years.[2]

2. *A* is charged with the offence of waging war under Section 121 of the Penal Code, based upon 17 separate incidents ranging over a period of 15 months. The trial is not bad inasmuch as the offence under Section 121 is a *single continuing* offence.[3]

The Section refers to "offences" and limits the trial to three *offences*. An "offence" is defined in Section 4 (o) *ante* as an *act* or *omission* made punishable by any law for the time being in force. A single act or omission will be only one offence though chargeable under several Sections of the Penal Code. Thus the printing of seditious article on a particular date is only *one* offence though the accused may be charged therefor under Sections 124-A and 153-A. The printing of another article of a similar nature on *another date* is another offence chargeable under the same two Sections and of the same nature as the first. The two offences can therefore be tried together at one trial under this Section.[4] The Section does not allow a single trial in respect of two *transactions* of the same kind, each of such transactions being made up of offences of different kinds. Thus when *A* was charged;

1. with abetting of forgery in respect of the service of summons alleged to have been served on 21—10—1914,
2. with swearing a false affidavit with regard to the service of such summons,
3. with abetment of forgery in respect of the service of summons alleged to have been served on 22—1—1915, and
4. with swearing a false affidavit as to the service of the latter summons,

it was held that Section 234 did not apply and that the trial was bad,[5] inasmuch as there were *four* offences not of the same kind, though there were *two transactions of the same kind* namely in respect of the two summonses.

The Section bars only a *single* trial of more than three offences of the same kind committed within the space of a year. It does not mean that if the accused had committed fifty offences in the course of 12 months, only *three* shall be tried and the rest abandoned. He may be tried in batches of three at *each trial* under separate charges.[6] Further, the Section merely *authorises* a combination of three offences in one trial. It does not bar a separate trial of the accused for each separate offence.[7] Moreover, the effect of the Section is not to

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35 Cri L Jour 1337, *Dur Mahommad* v. *Emperor*.

(1905) 2 Cri L Jour 34 (37) : 1905 Pun Re No. 2, *Bhagwati Dial* v. *Emperor*.

2. (1920) 1920 Cal 87 (88) : 47 Cal 154 : 21 Cri L Jour 386, *Kasem Ali* v. *Emperor*.

3. (1925) 1925 Mad 690 (695) : 49 Mad 74 : 26 Cri L Jour 1513, *In re Gammallu Dora*.

4. (1908) 8 Cri L Jour 272 (277, 280) : 33 Bom 77, *Emperor* v. *Tribhuvandas*.

5. (1917) 1917 Sind 40 (41) : 10 Sind L R 192 : 18 Cri L Jour 664, *Gerimal Hemanmal* v. *Emperor*.
[See also (1907) 5 Cri L Jour 341 (342) : 30 Mad 328, *Kasi Viswanathan* v. *Emperor*.]

6. (1918) 1918 Pat 343 (344) : 19 Cri L Jour 255, *Sital Prasad* v. *Emperor*.

7. (1910) 11 Cri L Jour 337 (337, 338) : 5 Ind

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make the three offences which are tried together under its provisions, one offence. The *offences* continue to be separate though there is only one trial for all of them.[8]

6. "Committed within the space of twelve months."

The Section provides for a single trial of offences committed within *the space of* 12 *months*. If the offences extend over a period longer than a year, a single trial therefore is illegal as contravening the provisions of this Section, and is not curable under Section 537.[1]

7. "Not exceeding three."

An accused can under the Section, be charged and tried at one trial for offences of the same kind not exceeding three. A trial for more than three offences committed during the year, is contrary to the provisions of this Section and is illegal and not merely an irregularity covered by Section 537.[1] Where

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Cas 970 (Bom), *Emperor* v. *Kashinath Bagaji Sali.*

(1878) 3 Cal 540, *Empress* v. *Dononjoy Baraj.*

8. (1934) 1934 Sind 185 (186) : 28 Sind L R 336 : 36 Cri L Jour 608, *Chetumal Rekumal* v. *Emperor.*

Note 6.

1. (1901) 25 Mad 61 (96): 28 Ind App 257 (PC), *Subramaniya Iyer* v. *Emperor.* On appeal from and overruling 10 M L J 147 (F B), and overruling 27 Cal 839.

(1910) 11 Cri L Jour 53 (54) : 32 All 57, *Sali Mulla Khan* v. *Emperor.*

(1927) 1927 All 223 (224) : 49 All 312 : 28 Cri L Jour 171, *Raman Lal* v. *Emperor.*

(1899) 26 Cal 560 (563), *Empress* v. *Moti Lal Lahiri.*

(1931) 1931 Cal 357 (357, 358) : 32 Cri L Jour 195, *Kalu Mian* v. *Emperor.*

(1905) 2 Cri L Jour 130 (131) : 1905 Pun Re No. 14, *Dhanjibhoy* v. *Kaini Khan.*

(1919) 1919 Lah 440 (441) : 19 Cri L Jour 187, *Emperor* v. *Jagat Ram.*

Note 7.

1. (1901) 25 Mad 61 (96): 28 Ind App 257 (P C), *Subramaniya Iyer* v. *Emperor.*

(1904) 1 Cri L Jour 875 (876) (All), *Emperor* v. *Nand Lal.*

(1908) 8 Cri L Jour 4 (5) : 30 All 351, *Emperor* v. *Mata Prasad.*

(1910) 11 Cri L Jour 51 (52) : 5 Ind Cas 178 (All), *Umed Singh* v. *Emperor.*

(1910) 11 Cri L Jour 285 (285, 286) : 32 All 219, *Sheo Saran Lal* v. *Emperor.*

(1918) 1918 All 351 (352) : 19 Cri L Jour 161, *Emperor* v. *Raghunath.*

(1919) 1919 All 239 (239) : 20 Cri L Jour 353, *King-Emperor* v. *Fauza.*

(1919) 1919 All 413 (414) : 20 Cri L Jour 784, *Avadh Behari Lal* v. *Emperor.*

(1923) 1923 All 483 (483, 484) : 25 Cri L Jour 220, *Ganga Prasad* v. *Emperor.*

(1885) Ratanlal 212 (212), *Queen-Empress* v. *Almedia.*

(1890) Ratanlal 509 (509), *Queen-Empress* v. *Jeeva Jetha.*

(1902) 4 Bom L R 433 (434), *Emperor* v. *Nathalal.*

(1926) 1926 Bom 110 (112) : 49 Bom 892 : 27 Cri L Jour 305, *Emperor* v. *Manant K. Mehta.*

(1934) 1934 Bom 303 (305) : 35 Cri L Jour 1477, *Khimchand A. Mehta* v. *Emperor.*

(1887) 14 Cal 128 (131) *In the matter of Luchmi Narain.*

(1898) 2 Cal W N 341 (346), *Ekram Aly* v. *Queen Empress.*

(1905) 2 Cri L Jour 847 (848, 850) (Cal), *Ram Sarup Benia* v. *Emperor.*

(1922) 1922 Cal 401 (401) : 49 Cal 555 : 24 Cri L Jour 86, *Chetto Kahuar* v. *Emperor.*

(1927) 1927 Cal 946 (946) : 28 Cri L Jour 291, *Krishna Lal Mitra* v. *Emperor.*

(1932) 1932 Cal 377 (379) : 33 Cri L Jour 357, *Surandera Nath Goswami* v. *Emperor.*

(1926) 1926 Lah 193 (194) : 27 Cri L Jour 793, *Fitzmaurice* v. *Emperor.*

(1902) 2 Weir 299 (299), *In re Venkata Laul.*

(1907) 5 Cri L Jour 94 (95, 96) : 29 Mad 569, *Manavala Chetty* v. *Emperor.*

(1912) 13 Cri L Jour 21 (22) : 13 Ind Cas 213 (Mad), *Lakshiminaranapuram Subramaniya Pattar Krishna Iyer* v. *Emperor.*

(1912) 13 Cri L Jour 124 (125) : 13 Ind Cas 780 (Mad), *Emperor* v. *Arumukhan Pillai.*

(1912) 13 Cri L Jour 125 (126) : 13 Ind Cas 781 (Mad), *Mandi Ghasi* v. *Emperor.*

(1917) 1917 Mad 612 (612) : 17 Cri L Jour 369, *Krishnamurthy Iyer In re.*

(1922) 1922 Mad 435 (435) : 24 Cri L Jour 462, *Shama Sastri* v. *Emperor.*

(1930) 1930 Mad 508 (509) : 31 Cri L Jour 1195, *Viraswamy Naidu* v. *Emperor.*

(1918) 1918 Nag 22 (27) : 19 Cri L Jour 657. *Jangilal* v. *Emperor.*

a person is charged with more than 3 offences at one trial, the judge can, *before the trial begins*, strike off a charge or charges so as to reduce the number of charges to be tried to three.[2] *After* the trial begins, however, the illegality cannot be cured by the striking out of the extra charges.[3]

This Section must be read subject to the special provisions of Sub-Section 2 of Section 222 *supra* with regard to the offences of criminal breach of trust and dishonest misappropriation of money as to which *see* Section 222 *supra* and the notes thereunder.

8. Offences of the same kind—Sub-section 2.

Sub-section 2 provides that in order that offences may be of the *same kind*, they should be punishable:—

1. under the same Section and,
2. with the *same amount* of punishment.

See the following cases[1] for example of offences which are not of the same kind.

See also Note 3 to Section 233 *supra* under the heading "Distinct offences."

(1927) 1927 Nag 22 (23) : 27 Cri L Jour 1099, *Emperor* v. *Daneshram.*

(1931) 1931 Oudh 86 (87) : 6 Luck 441 : 32 Cri L Jour 540, *Dubri Misir* v. *Emperor.*

(1934) 1934 Oudh 325 (326) : 35 Cri L Jour 1048, *Gunno* v. *Emperor.*

(1918) 1918 Pat 343 (344) : 19 Cri L Jour 255, *Sital Prasad* v. *Emperor.*

(1925) 1925 Pat 623 (624) : 4 Pat 503 : 27 Cri L Jour 359, *Jeobaran Singh* v. *Ramkishun Lal.*

(1908) 8 Cri L Jour 497 (502, 504) : 4 Low Bur R 294, *S. P. Chatterji* v. *Emperor.*

(1909) 9 Cri L Jour 15 (20, 21) : 4 Low Bur R 315, *Emperor* v. *Tha Byaw.*

(1933) 1933 Rang 325 (326) : 34 Cri L Jour 1179, *Nga San Mya* v. *Emperor.*

(1917) 1917 Sind 40 (41): 10 Sind L R 192: 18 Cri L Jour 664, *Gerimal* v. *Emperor.*

(1926) 1926 Sind 129 (129, 130): 20 Sind L R 3: 27 Cri L Jour 32, *Hyder* v. *Emperor.*

(1935) 1935 Oudh 273 (274, 275) : 36 Cri L Jour 518, *Piarey Lal* v. *Emperor.*

[See (1935) 1935 Bom 24 (25): 36 Cri L Jour 516, *Emperor* v. *Subman Abba.* Where it was held that the irregularity "cannot be regarded as one not material and not having prejudiced the accused at the trial."]

[See also (1928) 29 Cri L Jour 287 (288): 107 Ind Cas 826, (Pat), *Jamuna Prasad* v. *Emperor.*]

[But See (1908) 7 Cri L Jour 95 (97) : 35 Cal 161, *Bepin Chandra Pal* v. *Emperor.*]

2. (1908) 8 Cri L Jour 281 (341) (Bom), *Emperor* v. *Bal Gangadhar Tilak.*

3. (1907) 5 Cri L Jour 94 (95, 96) : 29 Mad 569, *Manavala Chetty* v. *Emperor.*

(1922) 1922 Cal 401 (401) : 49 Cal 555 : 24 Cri L Jour 86, *Chetoo Kalwar* v. *Emperor.*

(1926) 1926 Lah 193 (194) : 27 Cri L Jour 793, *Fitzmaurice* v. *Emperor.*

Note 8.

1. (1898) 21 All 127 (131, 132), v. *Queen Empress* v. *Mathura Prasad*, Ss. 161 and 409, I. P. C.

(1882) 8 Cal 450 (454), *Empress* v. *Srinath Kur*, Ss. 167 and 466, I. P. C.

(1917) 1917 Sind 40 (41) : 10 Sind L R 192 : 18 Cri L Jour 664, *Gerimal Hemanmal* v. *Emperor*, Ss. 193 and 467, I. P. C.

(1929) 1929 Mad W N 395 (397), *Collett* v. *Emperor*, Ss. 279 and 304, I. P. C.

(1913) 14 Cri L Jour 116 (116) : 18 Ind Cas 676 (All), *Shanker* v. *Emperor*, Ss. 302 and 323, I. P. C.

(1892) 14 All 502 (503, 504), *Queen-Empress* v. *Mulua*, Ss. 302 and 392, I. P. C.

(1924) 1924 All 316 (317) : 46 All 54 : 25 Cri L Jour 466, *Puttoo Lal* v. *Emperor*, Ss. 325 and 342, I. P. C.

(1924) 1924 All 454 (455) : 46 All 138 : 25 Cri L Jour 552, *Badlu Shah* v. *Emperor*, Ss. 366 and 368 I. P. C.

(1902) 15 C P L R Cri 53 (54), *Emperor* v. *Bishau Panka*, Ss. 380, 454 and 457, I. P. C.

(1932) 1932 Bom 277 (278) : 33 Cri L Jour 619, *Emperor* v. *Krishnaji Anant*, Ss. 380 and 457, I. P. C.

(1904) 1 Cri L Jour 537 (539) : 1904 Upp Bur R 1st Qr Cr. P. C. 2, *Emperor* v. *Asgar Ali.* (Do).

(1932) 1932 Sind 64 (65) : 26 Sind L R 191 : 33 Cri L Jour 650, *Emperor* v. *Attursing*, Ss. 408 and 477-A, I. P C.

(1926) 1926 Bom 110 (112) : 49 Bom 892 : 27 Cri L Jour 305, *Emperor* v. *Manant K. Mehta.* (Do).

Sec. 234 Note 9

9. Proviso.

The proviso lays down specifically that an attempt to commit an offence is of the same kind as the actual offence, when such attempt is itself an offence. It also provides that offences under Sections 379 and 380 of the Penal Code are of the same kind even though punishable under different Sections and with different punishments thus overruling the view held in the undermentioned cases[1] that they were not offences of the same kind.

Sec. 235

235.* (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

Trial for more than one offence

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

Offence falling within two definitions.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

Acts constituting one offence, but constituting when combined a different offence.

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* **(Code of 1882—***Section same as that of* **1898** *Code*).

(Code of 1872—S. 454).

454. I.—If in one set of facts, so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time.

I.—Trial of more than one offence.

II.—If a single act falls within two separate definitions of any law in force for the time being, by which offences are defined or punished the person who does it may be charged with each of the offences so committed, but he must not receive a more severe punishment than could be awarded, by the Court which tries him, for either.

II.—One offence falling within two definitions.

(1933) 1933 Nag 327 (327, 328) : 34 Cri L Jour 673, *Rameshwar Brijmohan* v. *Emperor*. (Do).

(1902) 4 Bom L R 433 (434), *Emperor* v. *Nathalal*, Ss. 409 and 477-A, I. P. C.

(1932) 1932 Cal 486 (486) : 33 Cri L Jour 265, *Nagendra Nath Sen Gupta* v. *Emperor*, Ss. 409 and 477-A, I. P. C.

(1907) 5 Cri L Jour 341 (342) : 30 Mad 328, *Kasi Viswanathan* v. *Emperor*, Ss. 409 and 477-A, I. P. C.

(1882) 8 Cal 634 (636), *Empress* v. *Uttom Koondoo*, Ss. 411 and 413, I. P C.

(1934) 1934 Pat 170 (172) : 35 Cri L Jour 814, *Janghi Mian* v. *Emperor*, Kidnapping and abduction, S. 366, I.P.C.

(1934) 1934 Bom 303 (305) : 35 Cri L Jour 1477, *Kinchand H. Mehta* v. *Emperor*. Cl. (a) (iii) and Cl. (b) (ii) of S. 103 of the Presidency Towns Insolvency Act.

Note 9.

1. (1916) 1916 Cal 124 (124) : 17 Cri L Jour 224, *Rahiman Bibi* v. *Mabarak Mondal*.

(1918) 1918 Nag 107 (108) : 20 Cri L Jour 751, *Hari Singh* v. *Emperor*.

(4) Nothing contained in this Section shall affect the Indian Penal Code, Section 71. **Sec. 235**

Illustrations.

To Sub-Section (1)—

(*a*) *A* rescues *B*, a person in lawful custody and in so doing causes grievous hurt to *C*, a constable in whose custody *B* was. *A* may be charged with and convicted of offences under Sections 225 and 333 of the Penal Code.

(*b*) *A* commits house-breaking by day with intent to commit adultery, and commits in the house so entered adultery with *B's* wife. *A* may be separately charged with, and convicted of, offences under Sections 454 and 497 of the Penal Code.

(*c*) *A* entices *B*, the wife of *C*, away from *C*, with intent to commit adultery with *B*, and then commits adultery with her. *A* may be separately charged with, and convicted of, offences under Sections 498 and 497 of the Penal Code.

(*d*) *A* has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under Section 466 of the Penal Code. *A* may be separately charged with, and convicted of, the possession of each seal under Section 473 of the Penal Code.

(*e*) With intent to cause injury to *B*, *A* institutes a criminal proceeding against him knowing that there is no just or lawful ground for such proceeding; and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charges. *A* may be separately charged with, and convicted of, two offences under Section 211 of the Penal Code.

(*f*) *A*, with intent to cause injury to *B*, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial *A* gives false evidence against *B*, intending thereby to cause *B* to be convicted of a capital offence. *A* may be separately charged with, and convicted of, offences under Sections 211 and 194 of the Penal Code.

III. — Acts severally constituting more than one offence, but collectively coming within one definition.

III.—If several acts, of which one or more than one would by itself constitute an offence, form, when combined, an offence under the provisions of any law in force for the time being, by which offences are defined or punished a person who does them may be charged with every offence which he may have committed, but he must not receive for such offences, collectively, a punishment more severe than that which might have been awarded, by the Court trying him, for any one of such offences, or for the offence formed by their combination.

Illustrations.

To Paragraph I—

(*a*) *A* rescues *B*, a person in lawful custody, and causes grievous hurt to *C*, a constable in whose custody *B* was. *A* may be separately charged with, convicted of, and punished for, offences under Ss. 225 and 333, I. P. C.

(*b*) *A* has in his possession several counterfeit seals with the intention of committing several forgeries. *A* may be separately charged with, convicted of, and punished for, the possession of each seal for a distinct forgery under S. 473, I. P. C.

(*c*) *A*, with intent to cause injury to *B*, institutes proceedings against him, knowing there is no just or lawful ground for such proceedings. *A* also falsely charges *B* with having committed an offence. *A* may be separately charged with, convicted of, and punished for, two offences under S. 211, I. P. C.

(*d*) *A*, with intent to injure *B*, brings a false charge against him of having committed an offence. On the trial, *A* gives false evidence against *B*. *A* may be separately charged with, convicted of, and punished for, offences under Ss. 211 and 194 or S. 195, I. P. C.

(*e*) *A*, knowing that *B*, a female minor, has been kidnapped, wrongfully confines her and detains her as a slave. *A* may be separately charged with, convicted of, and punished for, offences under Ss. 368 (read with S. 367) and 370, I. P. C.

(*f*) *A*, with six others, commits the offences of rioting, grievous hurt and of assaulting a public servant engaged in suppressing the riot. *A* may be separately charged with, convicted of, and punished for, offences under Ss. 147, 325 and 152, I. P. C.

Sec. 235

(*g*) *A*, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. *A* may be separately charged with, and convicted of, offences under Sections 147, 325 and 152 of the Penal Code.

(*h*) *A* threatens *B*, *C* and *D* at the same time with injury to their persons with intent to cause alarm to them. *A* may be separately charged with, and convicted of, each of the three offences under Section 506 of the Penal Code.

The separate charges referred to in Illustrations (*a*) to (*h*) respectively may be tried at the same time.

To Sub-Section (2)—

(*i*) *A* wrongfully strikes *B* with a cane. *A* may be separately charged with, and convicted of, offences under Sections 352 and 323 of the Penal Code.

(*j*) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property for the purpose of concealing them. *A* and *B* thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. *A* and *B* may be separately charged with, and convicted of, offences under Sections 411 and 414 of the Penal Code.

(*k*) *A* exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. *A* may be separately charged with, and convicted of, offences under Sections 317 and 304 of the Penal Code.

(*l*) *A* dishonestly uses a forged document as genuine evidence, in order to convict *B*, a public servant, of an offence under Section 167 of the Penal Code. *A* may be separately charged with, and convicted of, offences under Sections 471 (read with 466) and 196 of the same Code.

To Sub-Section (3)—

(*m*) *A* commits robbery on *B*, and in doing so voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under Sections 323, 392 and 394 of the Penal Code.

Synopsis.

(*g*) *A* criminally intimidates, *B*, *C* and *D* at the same time. *A* may be separately charged with, convicted of, and punished for, each of the three offences under S. 506, I. P. C.

(*h*) *A* intentionally causes the death of three persons by upsetting a boat. *A* may be separately charged with, convicted of and punished for, three offences under S. 302, I. P. C.

To Paragraph II.—

(*i*) *A* commits mischief by cutting down a tree in a Government forest. The tree overhangs the bank of a river and falls into the stream. *A* commits theft by having severed the tree and by floating it down the river to his village where he sells it. *A* may be separately charged with, and convicted of, offences under Ss. 426 and 379, I. P. C.; but the Court which tries him may not inflict a more severe sentence than if it had convicted under S. 379 only.

(*j*) *A* wrongfully strikes *B* with a cane. *A* may be separately charged with, and convicted of, offences under Ss. 352 and 323, I. P. C., but the Court which tries him may not inflict a more severe sentence than if it had convicted him under S. 323 only.

(*k*) *A* wrongfully kills a buffalo worth sixty rupees belonging to *B*, and then takes away the carcass in a manner amounting to theft. *A* may be separately charged with, and convicted of, offences under Ss. 429 and 379, I. P. C. ; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under S. 429 only.

(*l*) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property. *A* and *B* thereupon assist each other to conceal the sacks at the bottom of a grain pit. *A* and *B* may be separately charged with and convicted of, offences under Ss. 411 and 414

Other Topics.

cts include illegal omissions. See S. 3, Subsection (2) of General clauses Act.
Burden of proof on prosecution as to applicability of Ss. 234 to 239. See Note 1, Pt. 3.
Connected as cause and effect. See Note 2, Pt. 7.
Connected as principal and subsidiary Acts. See Note 2, Pt. 7.
Conspiracy and offence for which conspiracy formed. See Note 2, Pt. 21.
Desirability of avoiding embarrassment. See Note 5, Pt. 3.
Identity of purpose and continuity of action. See Note 2, Pts. 8 and 12.
Instances. See Note 2, Pts. 17 to 20 and 23 and 24.
Joint charges. See S. 233, Note 1.
Joint trial, some with jury and some with assessors. See S. 269, Sub-s. (3).
Offences for which complaint by or on behalf of Government is needed. See Note 5, Pt. 4.
Offences under different Sections or definitions. See S. 233, Note 3, Pts. 2 to 4.
Prejudice to accused. See Note 5, Pt. 3.
Proximity of time. See Note 2, Pts. 8 to 11a.
Question of same transaction is one of fact. See Note 2, Pt. 13.
Section permissive and not mandatory. See Note 5, Pt. 1.

1. Scope of the Section.

This Section is another exception to the rule in Section 233 that there should be a separate trial for every offence charged. Where the case falls within this Section a *single trial* for more offences than one is legal. The exception only extends, however, to the *trial* and not to the framing of *charges*. The general rule that every offence should be *charged separately* applies, though there may be *one* trial for all such offences under the provisions of the Section.[1] *See also* Notes to Section 233 *ante*.

I. P. C.; but the Court which tries them may not inflict a severer sentence than if it had convicted them under one of those Sections only.

(*m*) *A* uses a forged document in evidence, in order to convict *B*, a public servant, of an offence under S. 167. *A* may be separately charged with, and convicted of, offences under Ss. 471 (read with S. 466) and 196, I. P. C.; but the Court which tries him may not inflict a severer sentence than if it had convicted him under one of those Sections only.

To Paragraph III.—

(*n*) *A* commits house-breaking by day with intent to commit adultery and commits, in the house so entered, adultery with *B's* wife. *A* may be separately charged with, and convicted of, offences under Ss. 454 and 497, I. P. C.; but the Court which tries him may not inflict a severer sentence than if it had convicted him under S. 497 only.

(*o*) *A* robs *B*, and in doing so, voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under Ss. 323, 392 and 394, I. P. C.; but the Court which tries him may not inflict a severer sentence than if it had convicted him under S. 392 or S. 394 only.

(*p*) *A* entices *B*, the wife of *C* away, and then commits adultery with her. *A* may be separately charged with, and convicted of, offences under Ss. 498 and 497, I. P. C.; but the Court which tries him may not inflict a severer sentence than if it had convicted him under S. 497 only.

(Code of 1861—S. 240).

Charges in cases falling within two or more Sections of the Penal Code.

240. When it appears to the Magistrate that the facts which can be established in evidence show a case falling within two or more Sections of the Penal Code, the charge shall contain two or more heads, each of which shall be applicable to one of such Sections.

Section 235—Note 1.

1. (1904) 1 Cri L Jour 364 (364) : 26 All 195, *Emperor* v. *Fattu*.
(1927) 1927 Cal 17 (20) : 54 Cal 237 : 28 Cri L Jour 99, *Azimaddy* v. *Emperor*.

Sec. 235 Notes 1—2

Separate trial for different offences being the rule and joint trial the exception[2] the burden of proof is on the prosecution to show that the case falls within the exceptions to the general rule.[3]

2. "Same transaction"—Sub-Section 1.

Sub-Section 1 provides that an accused person may be charged with and tried at one trial for any number of offences which he is alleged to have committed in one series of acts so connected together as to form part of the "same transaction."[1] The expression "same transaction" has, however, not been defined in the Code. From its very nature the word "transaction" is incapable of exact definition and appears to have been purposely used because it has this quality.[2] It should be interpreted, not in any special or technical way, but in its ordinary etymological meaning[3] of "an affair" or "a carrying through."[4] The Court may also look for guidance to the illustrations to the Section, remembering, however, that those illustrations are not exhaustive.[5] In *Emperor* v. *Sharufalli*[6] it was observed that the real and substantial test for determining whether several offences are connected together so as to form one transaction "depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action." And this has been adopted generally by the

2. (1923) 1923 All 88 (88) : 24 Cri L Jour 155, *Ganesh Lal* v. *Emperor.*
3. (1915) 1915 All 380 (381) : 16 Cri L Jour 795, *Sohan Lal* v. *Emperor.*
(1923) 1923 All 88 (88) : 24 Cri L Jour 155, *Ganesh Lal* v. *Emperor.*
[See however (1916) 1916 All 329 (329) : 38 All 311 : 17 Cri L Jour 159, *Kamla Charan* v. *Sheo Shankar.* *(Obiter).*]

Note 2.

1. (1900) 1 Low Bur Rul 33, *Queen-Empress* v. *Aw Wa.*
(1915) 1915 All 380 (380) : 16 Cri L Jour 795 (796), *Sohanlal* v. *Emperor.* The burden is on the prosecution to show that the acts so form part of the same transaction.
2. (1908) 8 Cri L Jour 191 (195) : 1 Sind L R 73, *Emperor* v. *Ghulam.*
(1925) 1925 Sind 233 (235): 18 Sind L R 199: 27 Cri L Jour 257, *Frank Crossly Woodward* v. *Crown.*
(1921) 1921 All 19 (22): 22 Cri L Jour 641, *Sanuman* v. *Emperor.*
(1923) 1923 All 88 (88) : 24 Cri L Jour 155, *Ganeshi Lal* v. *Emperor.*
(1891) 15 Bom 491 (495), *Queen-Empress* v. *Fakirappa.*
(1927) 1927 Bom 177 (183) : 51 Bom 310 : 28 Cri L Jour 373, *Sejmal Punamchand* v. *Emperor.*
(1905) 2 Cri L Jour 578 (581) : 30 Bom 49, *Emperor* v. *Datto Hanmant.*
(1933) 1933 Bom 266 (267) : 57 Bom 400 : 34 Cri L Jour 870, *Mazarali Inayatali Kureshi* v. *Emperor.*
[See also (1920) 1920 Lah 265 (267) : 1 Lah 562 : 21 Cri L Jour 629, *Pahlad* v. *Emperor.*]
(1927) 1927 Lah 274 (275) : 28 Cri L Jour 357, *Muhammadi* v. *Emperor.*
(1925) 1925 Mad 690 (700) : 26 Cri L Jour 1513 : 49 Mad 74, *In re Gam Mallu.*
(1910). 11 Cri L Jour 258 (259) : 33 Mad 502, *Choragudi Venkatadri* v. *Emperor.* It is not necessary or advisable to attempt to define it.
3. (1925) 1925 Mad 690 (698) : 26 Cri L Jour 1513 : 49 Mad 74, *In re Gam Mallu.*
(1897-1901) 1 Upp Bur Rul 31 (40), *Nga Po Ke* v. *Queen-Empress.*
(1910) 11 Cri L Jour 293 (294) : 6 Ind Cas 242 (Mad), *Musalappa* v. *Emperor,*
[See also (1930) 1930 Mad 857 (858) : 53 Mad 937 : 32 Cri L Jour 30, *Ramaraju Thevan* v. *Emperor.*]
[See however (1918) 1918 Bom 117 (121): 43 Bom 147 : 20 Cri L Jour 71, *Madhav Laxman* v. *Emperor.* Wide meaning to be given.]
4. (1897-1901) 1 Upp Bur Rul 31 (42), *Nga Po Ke* v. *Queen-Empress.*
(1905) 2 Cri L Jour 578 (581) : 30 Bom 49, *Emperor* v. *Datto Hanmant.*
(1934) 1934 Pat 483 (484, 485) : 13 Pat 161 : 36 Cri L Jour 342, *Ramnath Rai* v. *Emperor.*
5. (1891) 15 Bom 491 (497, 504), *Queen-Empress* v. *Fakirappa.*
(1905) 2 Cri L Jour 578, (581) : 30 Bom 49, *Emperor* v *Datto Hanmant.*
(1923) 1923 All 88 (88) : 24 Cri L Jour 155, *Ganeshi Lal* v. *Emperor*
(1910) 11 Cri L Jour 293 (294) : 6 Ind Cas 242 (Mad), *Musalappa* v. *Emperor.*
(1908) 8 Cri L Jour 191 (195) : 1 Sind L R 73, *Emperor* v. *Ghulam,*
6. (1902) 27 Bom 135 (138, 139), *Emperor* v. *Sharufalli.*

Courts.[7] *Proximity of time* is not so essential as continuity of action and purpose.[8] On the other hand, the mere proximity of time between several acts

7. (1906) 4 Cri L Jour 420 (421, 422) : 2 Nag L R 147, *Empress* v. *Hari Raot.* Distinct interval of time—Not same transaction.
(1928) 1928 Oudh 401 (401) : 3 Luck 664 : 29 Cri L Jour 801, *Rasul* v. *Emperor.*
(1902) 27 Bom 135 (138), *Emperor* v. *Sharufalli.*
(1924) 1924 Cal 389 (391) : 50 Cal 1004 : 25 Cri L Jour 1082, *Kushai Mallik* v. *Emperor.* Abduction and concealment on different dates.
(1922) 1922 Lah 144 (145) : 22 Cri L Jour 505, *Ganda Singh* v. *Emperor.* Theft and assault committed on different occasions—Joinder of charges for, is bad and vitiates trial.
(1934) 1934 Mad 88 (94) : 57 Mad 545 : 35 Cri L Jour 631, *Patri Venkata Hanumantha Rao* v. *Emperor.*
(1917) 1917 Low Bur 5 (5) : 19 Cri L Jour 34, *Emperor* v. *Nga Lu Gale.*
(1925) 1925 Sind 233 (235) : 18 Sind L R 199 : 27 Cri L Jour 257, *Frank Crossly Woodward* v. *Emperor.*
(1926) 1926 Sind 151 (153) : 20 Sind L R 74 : 27 Cri L Jour 456, *Hussainbibi* v. *Emperor.*
(1921) 1921 All 19 (22) : 22 Cri L Jour 641, *Sanuman* v. *Emperor.*
(1912) 13 Cri L Jour 833 (840) : 17 Ind Cas 705 (Bom), *Emperor* v. *Ganesh Narain Dikshit.*
(1915) 1915 Cal 688 (689) : 16 Cri L Jour 3 (4), *Remembrancer of Legal Affairs, Bengal* v. *Manmohan Roy.*
(1910) 11 Cri L Jour 258 (261) : 33 Mad 502, *Choragudi Venkatadri* v. *Emperor.*
(1919) 1919 Mad 353 (353, 356) : 20 Cri L Jour 145, *Krishna Iyer* v. *Emperor.*
(1925) 1925 Mad 690 (692, 700) : 49 Mad 74 : 26 Cri L Jour 1513, *Ganmalla Dora, In re.* Reilly, J., contra.
(1914) 1914 Oudh 275 (278) : 17 Oudh Cas 276 : 15 Cri L Jour 643, *Abbas-Quli Khan* v. *King-Emperor.*
(1908) 8 Cri L Jour 191 (195) : 1 Sind L R 73, *Emperor* v. *Ghulam.*
(1929) 1929 Bom 296 (303) : 53 Bom 479 : 31 Cri L Jour 65, *Emperor* v. *C. E. Ring.*
(1920) 1920 Mad 201 (202) : 43 Mad 411 : 21 Cri L Jour 297, *W. H. Luckley* v. *Emperor.*
(1933) 1933 Cal 308 (309, 310) : 34 Cri L Jour 530, *Ali Hussain* v. *Emperor.*
(1920) 1920 Pat 230 (232) : 21 Cri L Jour 161, *Govinda Chandra Bharati* v. *Emperor.*
(1916) 1916 Mad 550 (551) : 16 Cri L Jour 323, *Virupanna Goud* v. *Emperor.*
(1920) 1920 Lah 265 (267) : 1 Lah 562 : 21 Cri L Jour 626, *Pahlad* v. *Emperor.*
(1935) 1935 Cal 312 (313) : 62 Cal 808, *Kashiram Jhunghunwalla* v. *Hurdut Rai-Gopal Rai.*
(1935) 1935 Nag 149 (154) : 36 Cri L Jour 1153 : 31 Nag L R 318. *R. S. Ruikar* v. *Emperor.*
(1910) 11 Cri L Jour 135 (136) : 5 Ind Cas 436 (Mad), *Krishna* v. *Emperor.* Defamatory resolutions and transmission of resolutions to a newspaper, are not part of the same transaction in the absence of concert.
[See also (1926) 1926 Oudh 161 (165) : 26 Cri L Jour 1602, *Bishambar Nath Tandon* v. *Emperor.*]
(1908) 8 Cri L Jour 11 (13) : 4 Nag L R 71, *Emperor* v. *Balwant Singh.*
(1932) 1932 Bom 545 (546) : 56 Bom 488 : 34 Cri L Jour 357, *Sanjiva Ratnappa* v. *Emperor.*
(1929) 1929 Bom 128 (130) : 53 Bom 344 : 30 Cri L Jour 588, *Gopal Raghunath* v. *Emperor.*
(1925) 1925 All 301 (303) : 26 Cri L Jour 734, *Tufail Ahmad* v. *Emperor.*
(1931) 1931 Mad W N 556 (557, 558), *Baliiah* v. *Emperor.* Where it was held that identity of purpose is not the only test.
(1932) 1932 Bom 277 (278) : 33 Cri L Jour 619, *Emperor* v. *Krishnaji Anant,* (Do).
(1917) 1917 Pat 287 (288) : 18 Cri L Jour 739, *Ghasi Ram* v. *Sukra Uraon.* Where it was held that the mere sameness of motive does not make distinct acts parts of same transaction.
(1918) 1918 Pat 343 (344) : 19 Cri L Jour 255, *Sital Prasad* v. *Emperor,* (Do).
(1927) 1927 Bom 177 (183) : 51 Bom 310 : 28 Cri L Jour 373, *Sejmal Punamchand* v. *Emperor.* Where it was held that even community of purpose is not necessary.
[But see (1926) 1926 All 334 (336, 337) : 48 All 325 : 27 Cri L Jour 445, *Rafiuzzaman Khan* v. *Chhotey Lal.* Where the expression "identity of purpose" is preferred to the expression "Community of purpose" and it was held that "identity of purpose" is enough].
8. (1905) 2 Cri L Jour 578 (581) : 30 Bom 49, *Emperor* v. *Datto Hanmant.*
(1906) 4 Cri L Jour 420 (421) : 2 Nag L R 147, *Emperor* v. *Hari Raot.*
(1931) 1931 Pat 52 (53) : 32 Cri L Jour 478, *Ganesh Pershad* v. *Emperor.*
(1929) 1929 Bom 128 (131) : 53 Bom 344 : 30 Cri L Jour 588, *Emperor* v. *Gopal Raghunath.*

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will not necessarily constitute the acts, parts of the same transaction;[9] on the other hand the mere fact that there are intervals of time between the various acts will not necessarily import want of continuity[10] though the length of the interval may be an important element in determining the question of connection between the several acts.[11] The transaction itself need not be a criminal transaction; offence can be committed in the course of a transaction the aim of which is perfectly legitimate.[11a] It has been held in the undermentioned cases[11b] however, that *proximity of time* is also *necessary* in order to constitute the acts, the same transaction.

Although according to the test mentioned above, *community of action and purpose* is necessary in order to constitute the several acts, parts of the same transaction, the mere existence of some *general* purpose or design, such as defrauding the public, is not sufficient. The purpose must be something particular and definite.[12]

(1924) 1924 Cal 389 (391): 50 Cal 1004: 25 Cri L Jour 1082, *Kushai Malik* v. *Emperor*.
(1925) 1925 Cal 580 (581): 26 Cri L Jour 369, *Patit Paran Ray* v. *Emperor*.
(1920) 1920 Lah 265 (267): 1 Lah 562: 21 Cri L Jour 629, *Pahlad* v. *Emperor*.
(1916) 1916 Nag 73 (77): 18 Cri L Jour 339, *Gunwant* v. *Emperor*.
(1917) 1917 Low Bur 5 (5): 19 Cri L Jour 34, *Emperor* v. *Nga Lu Gale*.
(1935) 1935 Nag 149 (154): 36 Cri L Jour 1153: 31 Nag L R 318, *R. S. Ruikar* v. *Emperor*.
[See also (1927) 1927 Lah 274 (275): 28 Cri L Jour 357, *Muhammadi* v. *Emperor*].
(1900) 1 Low Bur R 361 (362), *Queen-Empress* v. *Nga Sah Daik*
(1912) 13 Cri L Jour 485 (486): 15 Ind Cas 485 (Rang), *Nga Tha Gyi* v. *Emperor*.
(1917) 1917 Pat 287 (288): 18 Cri L Jour 739, *Ghasi Ram* v. *Emperor*.
(1931) 1931 Pat 102 (104): 32 Cri L Jour 211, *Abdur Rahim* v. *Emperor*.

9. (1912) 13 Cri L Jour 485 (486): 15 Ind Cas 485 (486) (Rang), *Nga Tha Gyi* v. *Emperor*.
(1902) 26 Mad 125 (127), *Krishnaswamy Pillai* v. *Emperor*.

10. (1902) 27 Bom 135 (138), *Emperor* v. *Sharufalli Allibhoy*.
(1902) 2 Low Bur R 19 (21), *Nga Ta Pu* v. *Emperor*.
(1906) 6 Cri L Jour 28 (29, 30): 1907 Upp Bur R 5, *Nga Nyo Gyi* v. *Emperor*.
[See also (1902) 26 Mad 125 (127): *Krishnaswamy Pillai* v. *Emperor*].
(1917) 1917 Pat 287 (288): 18 Cri L Jour 739, *Ghasi Ram* v. *Emperor*.

11. (1902) 27 Bom 135 (138), *Emperor* v. *Sharufalli Allibhoy*.
(1917) 1917 Sind 40 (41): 10 Sind L R 192: 18 Cri L Jour 664, *Gerimal* v. *Emperor*. The words "same transaction" in S. 235 are not applicable to cases in which the offences are separated by distinct intervals of time or place and require to be proved by distinct evidence.
(1935) 1935 Nag 149 (154): 36 Cri L Jour 1153: 31 Nag L R 318, *R. S. Ruikar* v. *Emperor*.

11a (1935) 1935 Nag 149 (154): 36 Cri L Jour 1153: 31 Nag L R 318, *R. S. Ruikar* v. *Emperor*.

11b (1919) 1919 Mad 487 (493): 20 Cri L Jour 354, *Kumaramuthu Pillai* v. *Emperor*.
(1916) 1916 Cal 188 (196): 16 Cri L Jour 497 (504): 42 Cal 957, *Amritlal Hazra* v. *Emperor*.
(1922) 1922 Cal 76 (77): 23 Cri L Jour 685, *Banga Chandra De* v. *Ananda Charan*.
(1918) 1918 Bom 117 (119): 43 Bom 147: 20 Cri L Jour 71, *Emperor* v. *Madhao Laxman*.
(1927) 1927 Cal 330 (332): 28 Cri L Jour 347, *Tamezkhan* v. *Rajaballi Mir*.
[See also (1905) 2 Cri L Jour 480 (497) 29 Bom 449, *Emperor* v. *Jethalal Harlochand*].
(1890) 15 Bom 491 (504), *Queen-Empress* v. *Fakirappa*.
(1891) 16 Bom 414 (424), *Queen-Empress* v. *Vajiram*.
(1927) 1927 Sind 39 (45): 21 Sind L R 107: 27 Cri L Jour 1233, *Emperor* v. *Lukman*.

12. (1931) 1931 Pat 102 (103, 104): 32 Cri L Jour 611, *Abdur Rahim* v. *Emperor*.
(1910) 11 Cri L Jour 258 (261): 33 Mad 502, *Choragudi Venkatadri* v. *Emperor*.
(1924) 1924 Lah 734 (737, 738): 25 Cri L Jour 1020, *Nanak Chand* v. *Crown*.
[See also (1915) 1915 Cal 719 (724): 16 Cri L Jour 9 (14); 42 Cal 1153, *Harsh Nath Chatterji* v. *Emperor*].
[See however (1926) 1926 Sind 171 (173): 27 Cri L Jour 243: 20 Sind L R 18, *Kishanchand* v. *Emperor*. Of-

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It will be clear from the above discussion that the question what does or does not form part of the same transaction is a question of fact[13] depending largely upon the circumstances of each case.[14] As pointed by Sadasiva Iyer, J., in *Komaramuthu* v. *Emperor*[15] "different judicial minds might, where the facts are complicated, arrive at different conclusions as to whether a particular complicated series of acts were committed in the same transaction or not and one can very well conceive many sets of facts which are on the border line." Thus the offence of hiring a person to take part in a riot is a separate and distinct offence from the riot itself and, ordinarily, the hiring and the riot would be separate transactions. There may, however, be circumstances which might justify the Court in holding that the alleged hiring or employing and the riot were parts of the same transaction.[16]

Where an offence is committed, the object of which is the *concealment* of another offence already committed or about to be committed, the two would ordinarily be considered to form parts of the same transaction.[17] Thus a

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fence of conspiracy to cheat the public].

13. (1927) 1927 Cal 330 (332) : 28 Cri L Jour 347, *Tamezkhan* v. *Rajabali Mir.*
(1923) 1923 All 277 (280) : 26 Cri L Jour 29, *Gayan Singh* v. *Emperor.*
(1918) 1918 Bom 117 (119) : 43 Bom 147 : 20 Cri L Jour 71, *Madhav Laxman* v. *Emperor.*
(1919) 1919 Bom 111 (112) : 20 Cri L Jour 657, *Ramnarayan Amarchand* v. *Emperor.*
(1927) 1927 Bom 177 (183) : 51 Bom 310 : 28 Cri L Jour 373, *Sejmal Punamchand* v. *Emperor.*
(1909) 10 Cri L Jour 463 (465) : 4 Ind Cas 13 (Cal), *Girwardharilal* v. *Emperor.*
(1925) 1925 Cal 580 (581) : 26 Cri L Jour 369, *Patit Paran Ray* v. *Emperor.*
(1925) 1925 Cal 903 (905) : 26 Cri L Jour 594, *Nayan Ullah* v. *Emperor.*
(1920) 1920 Lah 265 (267) : 1 Lah 562 : 21 Cri L Jour 621, *Pahlad* v. *Emperor.*
(1927) 1927 Lah 274 (274) : 28 Cri L Jour 357, *Muhammadi* v. *Emperor.*
(1910) 11 Cri L Jour 258 (259) : 33 Mad 502, *Choraguddi Venkatadri* v. *Emperor.*
(1916) 1916 Mad 550 (553) : 16 Cri L Jour 323, *Virupanna Goud* v. *Emperor.*
(1919) 1919 Mad 353 (355) : 20 Cri L Jour 145, *Krishna Iyer* v. *Emperor.*
(1919) 1919 Mad 487 (494, 496) : 20 Cri L Jour 354, *Kumaramuthu Pillai* v. *Emperor.*
(1925) 1925 Mad 690 (699, 700) : 49 Mad 74 : 26 Cri L Jour 1513, *Gam Mallu Dora In re.*
(1930) 1930 Mad 857 (858) : 53 Mad 937 : 32 Cri L Jour 30, *In re, Ramaraju Thevan.*
(1916) 1916 Nag 73 (77) : 13 Nag L R 35 : 18 Cri L Jour 339, *Gunwant* v. *Emperor.*
(1931) 1931 Oudh 86 (88) : 6 Luck 441 : 32 Cri L Jour 540, *Dubri Missir* v. *Emperor.*
(1931) 1931 Pat 102 (103) : 32 Cri L Jour 611, *Abdur Rahim* v. *Emperor.*

14. (1908) 8 Cri L Jour 191 (195, 200) : 1 Sind L R 73, *Emperor* v. *Ghulam.*
(1925) 1925 Sind 233 (235) : 18 Sind L R 199 : 27 Cri L Jour 257, *Frank Crossly Woodward* v. *Crown.*
(1919) 1919 Mad 487 (493) : 20 Cri L Jour 354 : *Kumaramuthu Pillai* v. *Emperor.*
(1933) 1933 Bom 266 (267) : 34 Cri L Jour 870 : 57 Bom 400, *Mazarali Inayatali Kureshi* v. *Emperor.*

15. (1919) 1919 Mad 487 (493) : 20 Cri L Jour 354, *Kumaramuthu Pillai* v. *Emperor.*

16, (1925) 1925 Cal 903 (905) : 26 Cri L Jour 594, *Nayan Ullah* v. *Emperor.*

17. (1919) 1919 Lah 440 (441) : 19 Cri L Jour 187, *Emperor* v. *Jagatram.*
(1924) 1924 All 211 (211) : 25 Cri L Jour 964, *Shafi* v. *Emperor.* Theft and then beating complainant to prevent him from making complaint.
(1929) 1929 Lah 843 (844) : 30 Cri L Jour 958, *Mangal Sen* v. *Emperor.* Criminal breach of trust and falsification of accounts to conceal it.
(1920) 1920 Pat 775 (776) : 22 Cri L Jour 230, *Gajadhar Lal* v. *Emperor.* Criminal breach of trust and falsification of accounts.
(1934) 1934 Mad 673 (674) : 35 Cri L Jour 1503 : 58 Mad 178, *Srirengachariar* v. *Emperor.* Theft of railway ticket and making forged entries thereon.
(1933) 1933 Nag 136 (140) : 34 Cri L Jour 505 : 29 Nag L R 251, *Mrs. M. F. Rego* v. *Emperor.* Charge under Ss. 302 and 201 of Penal Code.
[But see (1922) 1922 All 244 (245) : 23 Cri L Jour 671, *Bechai* v. *Emperor.* Cheating and then stealing

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criminal misappropriation or a criminal breach of trust and a falsification of accounts for the purpose of concealing the former offence, or a charge of murder and of causing evidence thereof to disappear, or causing grievous hurt with the object of extorting a confession from a person and after his death forging entries to conceal the cause of death or misappropriation of ornament by a Police Officer and subsequent alteration of entries in the police diaries to conceal the fact of misappropriation, will be considered to form parts of the same transaction.[18] Similarly where a gang of dacoits lay concealed waiting for nightfall in order to commit dacoity, but being seen by a woman, killed her fearing detection, and thereafter committed dacoity, the murder and the dacoity will form parts of the same transaction.[19] But an offence *A* and an offence *B* the object of which is to conceal offence *C* cannot be considered to be parts of the same transaction.[20]

Where there is a *conspiracy* having a definite object in view, and several offences are committed in pursuance of such conspiracy, the several offences will generally form parts of the same transaction.[21]

All offences committed in prosecution of the common object will generally be parts of the same transaction.[22] As to illustrative cases of acts forming parts of the same transaction, *see* the undermentioned cases.[23] *See also*

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articles to destroy evidence of cheating do not form part of the same transaction].

(1902) 26 Mad 125 (127), *Krishnaswamy Pillai* v. *Emperor*. Charges of falsification of accounts and destruction of account books—Falsification of accounts not for the purpose of destroying account books—Not same transaction.

(1912) 15 Ind Cas 485 (486) : 13 Cri L Jour 485 (Rang), *Nga Tha Gyi* v. *Emperor*. House trespass and assault on complainant while on his way to police station.

18. (1925) 1925 Sind 233 (235) : 18 Sind L R 199 : 27 Cri L Jour 257, *Frank Crossley Woodward* v. *Crown*.

19. (1902) 4 Bom L R 789 (791), *Emperor* v. *Punya*.

20. (1919) 1919 Lah 440 (441) 19 Cri L Jour 187, *Emperor* v. *Jagat Ram*.

21. (1932) 1932 Bom 406 (407) : 56 Bom 304 : 33 Cri L Jour 666, *Emperor* v. *Ramarao*.

(1922) 1922 Cal 107 (112) : 49 Cal 573 : 23 Cri L Jour 657, *Abdul Salim* v. *Emperor*.

(1934) 1934 Mad 88 (94) : 57 Mad 545 : 35 Cri L Jour 631, *Venkata Hanumantha Rao* v. *Emperor*.

(1933) 1933 Oudh 86 (89) : 8 Luck 286 : 34 Cri L Jour 124, *Kunwar Sen* v. *Emperor*. Conspiracy to start bogus bank and cheating and forgery in pursuance thereof.

(1924) 1924 Rang 98 (99) : 1 Rang 604 : 25 Cri L Jour 270 : *Emperor* v. *Nga Aung Gyaw*. Conspiracy to boycott.

(1926) 1926 Rang 53 (57) : 27 Cri L Jour 669, *Abdul Rahman* v. *Emperor*. 16 Cri L Jour 3 and 1924 Rang 98, followed.

[See also (1919) 1919 Cal 367 (368) : 46 Cal 712 : 20 Cri L Jour 122, *Kailash Chandra Pal* v. *Emperor*.]

22. (1926) 1926 Lah 367 (368) : 7 Lah 264 : 27 Cri L Jour 803, *Bahadur Singh* v. *Emperor*.

(1929) 1929 Lah 843 (844) : 30 Cri L Jour 958, *Mangal Sen* v. *Emperor*. Series of falsifications of accounts made to cover a single act of defalcation.

(1920) 1920 Mad 201 (202) : 43 Mad 411 : 21 Cri L Jour 297, *W. H. Lockley* v. *Emperor*.

(1928) 1928 Pat 634 (637) : 29 Cri L Jour 728, *Habib Khan* v. *Emperor*.

(1909) 9 Cri L Jour 367 (368) : 1 Ind Cas 682 (Mad), *Pedda Venkata Reddy* v. *Emperor*. Several acts done at different times to demonstrate the power of the accused.

(1912) 13 Cri L Jour 251 (251) : 14 Ind Cas 603 (Mad), *Ayyagiri Venkataramiah* v. *Emperor*.

23. (1923) 1923 All 88 (88) : 24 Cri L Jour 155, *Ganeshi Lal* v. *Emperor*, Offence of keeping gaming house and offence of using it.

(1923) 1923 All 137 (137) : 24 Cri L Jour 153, *Ram Prasad* v. *Emperor*. Gang of dacoits robbing several carts on road at short intervals.

(1932) 1932 Bom 545 (546) : 56 Bom 488 : 34 Cri L Jour 357, *Emperor* v. *Sanjiv Ratnappa*. Charges of causing hurt, wrongful confinement and forgery to cover up the other offences.

(1923) 1923 Cal 647 (648) : 25 Cri L Jour 343, *Bilas Chandra Banerjee* v. *King-Emperor*. Criminal misappropriation and criminal breach of trust by a public servant—Public servant framing incorrect record—Falsification of record.

(1904) 1 Cri L Jour 974 (977) : 1904 Pun Re No. 18 page 53 (55). *Harcharan Singh* v. *Emperor*. Intimidation to make and subsequent making of defamatory statements.

(1927) 1927 Oudh 369 (376) : 2 Luck 631 : 29 Cri L Jour 129, *Ram Prasad* v. *Emperor*. Joinder of charges under Ss. 121-A and 120-B, I. P. C., is not illegal.

(1903) 2 Low Bur R 23 (24), *King-Emperor* v. *Nga To*. Stealing cattle for the purpose of obtaining money for their restoration.

(1921) 1921 All 408 (409) : 22 Cri L Jour 397, *Ram Sahai* v. *Emperor*. Five different dacoities on different dates.

(1911) 12 Cri L Jour 346 (347) : 10 Ind Cas 946 (Cal), *Jagadish Kumar* v. *Atma Ram*. Personating a police officer and committing extortion and cheating on the strength thereof.

(1904) 1 Cri L Jour 552 (553) : 1904 Upp Bur R 1, *Emperor* v. *Nga San Dun*. It was however stated that it is not *desirable* that there should be a *conviction* for the smaller offences. This, it is submitted, is not correct.

(1884) 7 All 29 (33 to 35), *Queen Empress* v. *Dungar Singh*. Rioting and hurt.

(1925) 1925 All 299 (301) : 47 All 284 : 26 Cri L Jour 688, *Emperor* v. *Ram Sukh*. Affray and hurt.

(1866) 2 Bom H C R 392 (393), *Reg* v. *Narayan Krishna*. Mischief and theft.

(1886) Ratanlal 228 (228, 229), *In re Kashinath Mahader*. Offences under Ss. 457 and 380 of the Penal Code.

(1888) 1888 Pun. Re. No. 8, page 11 (12), *Empress* v. *Mohurrum*. Ss. 457 and 480.

(1885) 1885 Pun. Re. No. 32, page 70 (75, 76), *Jafir Khan* v. *Empress*. Rioting and hurt during such rioting.

(1934) 1934 Mad 673 (674) : 35 Cri L Jour 1503 : 58 Mad 178, *Srirengachariar* v. *Emperor*. Theft of railway ticket and committing forgery thereon.

(1892) 6 C P L R 36 (37), *Empress* v. *Padam Singh*. Theft from child and hurting it to prevent it from giving information to any one.

(1923) 1923 Nag 156 (156) : 26 Cri L Jour 327, *Tukaram* v. *Ganpat*. Several acts forming one transaction—Joint trial can be held.

(1932) 1932 Oudh 28 (29) : 33 Cri L Jour 275, *Emperor* v. *Zamin*. A Joint trial for offences under Ss. 366 and 368, Penal Code, is not illegal where the whole chain of events beginning with the kidnapping or abduction and ending with the discovery of the woman can fairly be regarded as forming one and the same transaction.

(1908) 7 Cri L Jour 76 (78) : 4 Low Bur R 104, *Emperor* v. *Mi Thin*. Owning of common gaming house and also taking part in gambling.

(1908) 7 Cri L Jour 464 (466): 4 Low Bur R 199, *Twet Pe* v. *Emperor*. Theft and taking gratification to restore stolen property.

(1910) 11 Cri L Jour 415 (416) : 3 Sind L R 224, *Imperator* v. *Baradi*. There is nothing improper in the accused being charged with and tried at one trial for the two offences under Ss. 147, 332 and 149, I. P. C.

(1912) 13 Cri L Jour 861 (862) : 35 All 63 *Badri Prasad* v. *Emperor*. Conviction at one trial of offences under Ss. 467 and 471 is legal.

(1917) 1917 All 11 (12) : 39 All 623 : 18 Cri L Jour 788, *Katwaru Rai* v. *Emperor*. Where the members of an unlawful assembly cause hurt to one person and by a separate act caused hurt to another the offences under Ss. 323 and 147 can be tried jointly.

(1912) 13 Cri L Jour 609 (610, 611) : 16 Ind Cas 257 (Cal), *Pulin Behari Das* v. *King Emperor*.

(1912) 13 Cri L Jour 501 (502) : 15 Ind Cas 645 (Bom), *Emperor* v. *Lalji Bhani*.

(1912) 13 Cri L Jour 137 (137) : 13 Ind Cas 825 (Bom), *Emperor* v. *Balwant*.

(1933) 1933 Pesh 99 (100), *Gopichand* v. *Emperor*.

(1928) 1928 Bom 177 (179) : 29 Cri L Jour 522, *Dagdi Dagdya* v. *Emperor*.

(1916) 1916 Cal 41 (41) : 42 Cal 760 : 16 Cri L Jour 120, *Deputy Superintendent and Remembrancer of Legal Affairs* v. *Kailash Chandra Ghosh*.

(1904) 1 Cri L Jour 974 : 1904 Pun Re No. 18, *Emperor* v. *Har Charan Singh*. Ss. 500 and 385, I. P. C.

(1933) 1933 Sind 255 (256, 257) : 35 Cri L Jour 256, *Jethand Murijmal* v. *Emperor*.

(1918) 1918 Mad 371 (372) : 41 Mad 727 : 19 Cri L Jour 613, *Raghavalu Naicker* v. *Singaram*.

(1919) 1919 All 26 (27) : 42 All 12 : 20 Cri L Jour 642, *Babu Ram* v. *Emperor*.

(1935) 1935 Oudh 190 (194), *Bishunath* v. *Emperor*. Rioting — Offences committed under Ss. 147, 333, 302 and 396—Joint trial legal.

Sec. 235 Note 2

the following cases[24] as to acts not forming parts of the same transaction.

(1915) 1915 Bom 203 (204) : 16 Cr L Jour 761 : 40 Bom 97, *Jivram Dankarji* v. *Emperor*.

(1934) 1934 Pat 483 (485) : 13 Pat 161 : 36 Cri L Jour 342, *Ramnath Rai* v. *Emperor*. Property stolen on different occasions -- Dishonest retention forms a single transaction.

(1935) 1935 Rang 357 (358, 359), *Maung Kaung Kywe* v. *Emperor*. On two consecutive nights offences under Ss. 447 and 448, I. P. C., were committed by accused in respect of property over which they asserted a right of possession, *Held* that as those two offences formed part of the same transaction, joint trial was valid under S. 235.

[See also (1927) 1927 Mad 396 (397) : 50 Mad 841 : 28 Cri L Jour 301, *Deenadayalu Naidu* v. *Ratna Padayachi*.]

(1918) 1918 Pat 250 (251) : 19 Cri L Jour 446, *Bali Sahu* v. *Emperor*.

(1907) 5 Cri L Jour 484 (487) (Cal), *Emperor* v. *Sri Narain Prasad*.

(1907) 6 Cri L Jour 446 (449) (Lah), *Gowardhan Das* v. *Emperor*.

(1917) 1917 Low Bur 5 (5) : 19 Cri L Jour 34, *Emperor* v. *Nga Lu Gale*. Possession of cocaine, and possession of opium punishable under the Excise Act and the Opium Act respectively.

(1902) 2 Low Bur Rul 19 (21), *Nga Ta Pu* v. *King-Emperor*. Theft and dishonestly receiving or disposing of stolen property.

(1912) 13 Cri L Jour 59 (60) : 13 Ind Cas 395 (Rang), *Nga Po Shat* v. *Emperor*. (Do.)

(1918) 1918 Lah 242 (243) : 1918 Pun Re No. 12 : 19 Cri L Jour 510, *Emperor* v. *Muhammad Hussain*. Preparing several false records for screening the offenders from punishment.

(1886) 10 Bom 493 (497), *Queen-Empress* v. *Sakharam Bhan*.

(1885) 7 All 29 (35, 36), *Queen-Empress* v. *Dungar Singh*.

24. (1919) 1919 All 239 (239) : 20 Cri L Jour 353, *Fauja* v. *Emperor*. One trial for two offences of trible and double murders is unjustifiable if the offences do not represent a series of acts forming the same transaction.

(1921) 1921 All 408 (409) : 22 Cri L Jour 397, *Ram Sahai* v. *Emperor*. Several offences committed by several groups of accused, some but not all being common—Joint trial improper.

(1919) 1919 Bom 111 (112, 114) : 20 Cri L Jour 657, *Ramnarayan Amarchand* v. *Emperor*. Preparation of balance sheets for the years 1912 and 1913 could not be regarded as forming the same transaction.

(1903) 30 Cal 822 (829, 830), *Birendra Lal Bahadur* v. *Emperor*.

(1918) 1918 Cal 237 (237) : 19 Cri L Jour 868, *Emperor* v. *Rajendra Roy*.

(1926) 1926 Lah 193 (195) : 27 Cri L Jour 793, *Fitz Maurice* v. *Emperor*. Four distinct acts on different dates relating to four different documents charged under S. 477-A.

(1933) 1933 Lah 512 (512, 513) : 34 Cri L Jour 402, *Ajaib Singh* v. *Emperor*. First charge related to an attempt to rob *G* near village *B* on a particular night— Robbery of *P* near village *X* with deadly weapons on the next night.

(1934) 1934 Lah 630 (631) : 36 Cri L Jour 676, *Dhan Singh* v. *Emperor*.

(1902) 26 Mad 454 (455, 456), *Chekutty* v. *Emperor*. Kidnapping of *X* and assault next day on *Y*.

(1929) 1929 Mad W N 266 (267), *Laxmana* v. *Kamala*. Defamation published by word of mouth of five different persons.

(1929) 1929 Mad W N 395 (397), *Collet* v. *Emperor*. Two separate and independent occurrences.

(1933) 1933 Mad W N 326 (328), *Venkata Sybbayya* v. *Emperor*. A joint trial of charges under Ss. 406 and 474, Penal Code is not legal, where the acts constituting the two offences could not be said to be so connected together as to form the same transaction.

(1900) 1 Low Bur Rul 361 (362), *Nga San Daik* v. *Queen-Empress*. Mere proximity in time between two acts does not necessarily constitute them parts of the same transaction.

(1905) 2 Cri L Jour 847 (848, 850) (Cal), *Ram Sarup Benia* v. *Emperor*. Dishonest receipt of stolen property which forms the proceeds of several thefts.

(1908) 8 Cri L Jour 281 (302) (Bom), *Emperor* v. *Bal Gangadhar Tilak*. Separate newspaper articles written week after week are not parts of the same transaction.

(1908) 8 Cri L Jour 497 (502, 503, 504) : 4 Low Bur Rul 294, *S. P. Chatterjee* v. *King-Emperor*. Screening murderer of *A* and screening murderer of *B*.

(1909) 10 Cri L Jour 291 (291) : 3 Ind Cas 466 (All), *Nithuri* v. *Emperor*, Taking of ornaments from *X* and pushing her into well—It is submitted that the latter act being to conceal the former, the acts form parts of the same transaction.

(1909) 10 Cri L Jour 452 (453) : 4 Ind Cas 1 (Cal), *Laskari* v. *Emperor*.

(1909) 10 Cri L Jour 476 (477, 478) : 4 Ind

3. "More offences than one."

The Section is not controlled by Section 234 *supra*. There is nothing in the Section to warrant the rule that not more than three offences can be combined even if those offences have been committed in the course of the same transaction.[1] Nor is a trial illegal by reason of containing more than three offences spread over a period longer than a year.[2] But a multitude of accusations which will result in bewildering the accused and prejudicing him in his defence ought not to be permitted.[3]

4. "Are committed by the same person."

The expression "*by the same person*" indicates that where there are more than one accused, this Section is inapplicable. To such cases Section 239 *infra* will apply. *See* Notes to Section 233 *supra*.

5. "May be tried at one trial."

The provisions of the Section are only enabling and not imperative[1] and therefore though they provide for a joint trial, yet a separate trial for each of the offences is not illegal.[2] As a matter of fact, if there is a risk of embarrassing the defence, a joinder of charges should not be resorted to.[3] Nor

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Cas 28 (Cal), *Parameshwar Lal* v. *Emperor*. Cheating *A* and criminal misappropriation against *B* on different occasions.

(1910) 11 Cri L Jour 293 (294) : 6 Ind Cas 242 (Mad), *Musalappa* v. *Emperor*. Permitting cattle to trespass in Reserve Forest, rioting and rescuing cattle after they were impounded.

(1911) 12 Cri L Jour 567 (567) : 12 Ind Cas 655 (Mad), *Raghavendra Rao* v. *Emperor*. Different Acts—Unconnected —Not one transaction.

(1913) 14 Cri L Jour 116 (117) : 18 Ind Cas 676 (All), *Shanker* v. *Emperor*.

(1932) 1932 Bom 277 (278) : 33 Cri L Jour 619, *Krishnaji Anant Dange* v. *Emperor*. Theft in same house on different dates.

(1902) 29 Cal 385 (388), *Gobind Koeri* v. *Emperor*. Offences under Ss. 411 and 489.

(1935) 1935 Nag 90 (98) : 36 Cri L Jour 744, *Sardar Diwan Singh* v. *Emperor*. Composing of article, editing and printing at one place and publishing it at different places at different times cannot be regarded as one set of acts forming the same transaction.

(1935) 1935 Rang 357 (358). *Maung Kaung Kywe* v. *Emperor*.

Note 3.

1. (1921) 1921 All 19 (22) : 22 Cri L Jour 641, *Sanuman* v. *Emperor*.

(1926) 1926 Oudh 161 (165) : 26 Cri L Jour 1602, *Bishambar Nath Tandon, Rai-Sahib* v. *King-Emperor*.

[But see (1884) 6 All 121 (124, 125), *Empress* v. *Ram Partab* (Obiter).]

2. (1925) 1925 Mad 690 (695) : 26 Cri L Jour 1513, *In re Gam Mallu Dora* alias *Malayya*.

(1910) 11 Cri L Jour 258 (260) : 33 Mad 502. *Choragudi Venkatadri* v. *Emperor*.

3. (1934) 1934 Sind 57 (60) : 28 Sind L R 119 : 35 Cr L Jour 1337. *Dur Muhammad* v. *Emperor*.

Note 5.

1. (1886) Ratanlal 307 (308), *Queen-Empress* v. *Ugra Virchand and Uji*.

(1915) 1915 Cal 688 (689) : 16 Cri L Jour 3, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Manmohan Roy*.

(1925) 1925 Cal 341 (345) : 52 Cal 253 : 26 Cri L Jour 487, *Alimuddi Naskar* v. *King-Emperor*.

(1929) 1929 Cal 160 (161) : 30 Cri L Jour 619, *Kali Kumar Das* v. *Nawabali Dhahi*.

(1927) 1927 Pat 13 (14) : 6 Pat 208 : 27 Cri L Jour 1100, *Abdul Hamid* v. *Emperor*.

(1872-1892) 1872-1892 Low Bur R 444 (446), *Nga San Dun* v. *Queen-Empress*.

(1928) 1928 Bom 231 (232) : 29 Cri L Jour 981, *Emperor* v. *Rama Deoji*.

(1882) 8 Cal 481 (483), *In re Ameruddin*.

2. (1916) 1916 Cal 188 (197) : 42 Cal 957 : 16 Cri L Jour 497, *Amritlal Hazra* v. *Emperor*.

(1915) 1915 Mad 1036 (1037) : 16 Cri L Jour 717, *In re Sennimalai Goundan*.

3. (1925) 1925 Cal 341 (345) : 52 Cal 253 : 26 Cri L Jour 487. *Alimuddi Naskar* v. *Emperor*.

(1921) 1921 All 19 (21) : 22 Cri L Jour 641, *Sanuman* v. *Emperor*.

(1890) 15 Bom 491 (497), *Queen-Empress* v. *Fakirappa*.

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is it necessary that the accused should be tried for all the offences committed by the same acts. Thus where the accused, by a speech abets an offence under Section 122 of the Penal Code and by the same speech also abets the offence of dacoity, he can be tried for each of the offences under this Section but as this Section is controlled as regards the offence against the State under Section 122, by the provisions of Section 196 of the Code, its operation in this case could be restricted to the offence of dacoity alone.[4] A joint trial of several offences in cases not authorised by the Code is an *illegality* and not merely an irregularity. (*See* notes under Section 233 *supra*).[5]

6. "Trial" includes conviction.

The word "trial" in this Section includes conviction.[1]

7. Sub-section 2.

Where the same facts will constitute different offences, this sub-section authorises a combined trial in respect of all of them.[1] Thus, where *X* a girl of 15 went out of her husband's hut at night and the accused seized her and took her away, the act will amount to an offence both under Sections 359 and 362 and under para. 2 can be tried at one trial.[2] But, under Section 71 of the Penal Code, the offender cannot be punished with a more severe punishment than can be awarded for any one of the offences constituted.[3]

8. "Constitute, when combined, a different offence"—Sub-section 3.

An offence of theft under Section 379 of the Penal Code and an offence of taking a gift to restore stolen property under Section 215 of the Penal Code cannot be said to form when combined a different offence.[1] An offence under Section 143 (unlawful assembly) and an offence under Section 353 (assault on a public servant) may when combined become an offence under Section 147.[2]

9. Sub-section 4.

See Notes to Section 35 *ante* and the undermentioned case.[1]

(1918) 1918 Bom 117 (121): 43 Bom 147: 20 Cri L Jour 71, *Emperor* v. *Madhav Laxman.*
(1925) 1925 Cal 413 (414): 26 Cri L Jour 467, *Surandera Lal Das* v. *Emperor.*
(1929) 1929 Cal 160 (161): 30 Cri L Jour 619, *Kali Kumar Das* v. *Nawabali Dhali.*
(1925) 1925 Mad 690 (697): 26 Cri L Jour 1513, *In re Gam Mulla Dora* alias *Malayya.*
(1928) 1928 Oudh 401 (401): 3 Luck 664 : 29 Cri L Jour 801, *Rasul* v. *Emperor.*
(1908) 8 Cri L Jour 191 (195): 1 Sind L R 73, *Emperor* v, *Ghulam.*
(1934) 1934 Sind 57 (60): 28 Sind L R 119: 35 Cri L Jour 1337, *Dur Muhammad* v. *Emperor.*
[See also (1922) 1922 Cal 573 (574): 50 Cal 94 : 36 Cri L Jour 149, *Radha Nath Kamakar* v. *Emperor.*]

4. (1901) 25 Bom 90 (98), *Queen-Empress* v. *Anant Puranick.*
5. (1935) 1935 Nag 90 (98) : 36 Cri L Jour 744, *Sardar Diwan Singh* v. *Emperor.*
(1935) 1935 Mad W N 1286 (1287), *Karuppa Goundan* v. *Emperor.*

Note 6.

1. (1910) 11 Cri L Jour 415 (416): 3 Sind L R 224, *Imperator* v. *Baradi.* Joint trial for two offences under Ss. 147, 332 and 149 is not illegal.

Note 7.

1. (1935) 156 Ind Cas 972 (972): 36 Cri L Jour 1037 (Sind), *Khimji Khetsi* v. *Emperor.*
2. (1933) 1933 Cal 676 (678): 60 Cal 1394; 34 Cri L Jour 1219, *Rajabuddin* v. *Emperor.*
3. (1935) 156 Ind Cas 972 (972) : 36 Cri L Jour 1037 (Sind), *Khimji Khetsi* v. *Emperor.*

Note 8.

1. (1893-1900) 1893-1900 Low Bur R 226 (228), *Queen-Empress* v. *Nga Tun Byu.*
2. (1885) 12 Cal 495 (498), *Chandra Kanta Chatterjee* v. *Queen-Empress.*

Note 9.

1. (1893-1900) 1893-1900 Low Bur R 226 (228 *Queen-Empress* v. *Nga Tun Byu.*

10. Illustration (J).—*See also* the following case.[1]

11. Sections 234, 235 and 236, if mutually exclusive.

A, *B* and *C* are offences of the *same kind* as for example, several acts of breach of trust. *D* is an offence which forms part of the *same transaction* as *A*, as for example falsification of accounts to conceal the offence *A*. Similarly *E* and *F* are parts of the same transaction as *B* and *C* respectively. Under Section 234 *A*, *B* and *C* could be tried in one trial as being offences of the *same kind*. Under Section 235, *A* and *D* could be tried together at one trial as forming part of the *same transaction*. So also *B* and *E* and *C* and *F*. But can *A*, *B*, *C*, *D*, *E*, and *F* be all tried together in the same trial by virtue of Sections 234 and 235 *read together*? It has been held in the undermentioned cases[1] that they cannot be so tried. The principle underlying this opinion was expressed in *Nga Lun Maung* v. *King Emperor*[2] as follows:—

> "The cases contemplated in Section 234 are those in which there may be a trial of three distinct and separate states of facts, but only one Section of law to be considered; whilst those contemplated under S. 235 are cases in which one state of facts, but possibly numerous Sections of law, may have to be dealt with. In each case there is no doubt a departure from the general rule as expressed in S. 233, but the limitations on the departure are in each case sufficient to guard against the policy of the rule being infringed, and against the mischief or abuse, against which the general rule is aimed, occurring. If, however, a combination of cases under S. 234 and S. 235 were permissible, then the door would be open to those very mischiefs and abuses, and the policy of the general rule would cease to have any effect, and the rule itself might just as well not have been stated."

The High Court of Patna has however taken a contrary view and has held that the Sections are not mutually exclusive and that a single trial for all the offences is justified under Sections 234 and 235 *read together*.[3] A recent decision of the Calcutta High Court also agrees with the view of the Patna

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Note 10.

1. (1926) 1926 Bom 71 (75) : 49 Bom 878 : 27 Cri L Jour 114, *Emperor* v. *Abdul Ghanni.*

Note 11.

1. (1933) 1933 Nag 327 (328) : 34 Cri L Jour 673, *Rameshwar Brijmohan* v. *Emperor*. 32 All 219 and 1922 Mad 435 followed.
(1926) 1926 Bom 110 (112, 113) : 49 Bom 892 : 27 Cri L Jour 305, *Emperor* v. *Mananur Mehta.*
(1926) 1926 Lah 193 (195) : 27 Cri L Jour 793, *Fitzmaurice* v. *Emperor.*
(1907) 5 Cri L Jour 341 (342) : 30 Mad 328, *Kasi Viswanathan* v. *Emperor.*
(1922) 1922 All 214 (214) : 44 All 540 : 23 Cri L Jour 258, *Shujauddin Ahmad* v. *Emperor.* Joinder of charges under S. 408, I. P. C., with one under S. 477-A.
(1931) 1931 Oudh 86 (88) : 6 Luck 441 : 32 Cri L Jour 540, *Dubri Missir* v. *Emperor.*
(1903-04) 2 Low Bur Rul 10 (11, 14), *Nga Lun Maung* v. *Emperor.*
(1932) 1932 Sind 64 (65) : 26 Sind L R 191 : 33 Cri L Jour 650, *Emperor* v. *Attur Singh.* Single trial for charges of criminal breach of trust and falsification of accounts in respect of three items on different dates within space of one year is not legal.
(1908) 8 Cri L Jour 4 (5) : 30 All 351, *Emperor* v. *Mata Prasad.* Misappropriation and forgery to cover up the former.
(1913) 14 Cri L Jour 428 (429) : 40 Cal 318, *Nithya Gopal Chakrabutty* v. *Jiban Krishna Bagchi.*
(1917) 1917 Sind 40 (41) : 10 Sind L R 192 : 18 Cri L Jour 664, *Gerimal* v. *Emperor.* Forgery of summons *A* and giving false affidavit in respect thereof—Forgery of summons *B* and false affidavit as to it.
(1915) 1915 Cal 296 (297) : 41 Cal 722 : 15 Cri L Jour 153, *Raman Behary Das* v. *Emperor.*
(1935) 1935 Nag 178 (180, 181) : 31 Nag L R 337 : 36 Cri L Jour 1216, *G. S. Ramseshan* v. *Emperor.*
(1927) 1927 Nag 22 (23) : 27 Cri L Jour 1099, *Emperor* v. *Dhaneshram.*
2. (1903-04) 2 Low Bur R 10 (13, 14), *Nga Lun Maung* v. *Emperor.*
3. (1934) 1934 Pat 232 (234) : 13 Pat 170 : 35 Cri L Jour 876, *Ram Kishoon Pershad* v. *Emperor.*

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High Court.[3a] Where a *single* offence of criminal breach of trust is charged under Section 222 sub-section 2, in respect of a gross sum and several acts of falsification of accounts are made for the purpose of concealing the former offence, thus forming parts of the same transaction, a joint trial for all the offences is not barred.[3b]

Where several charges have been rightly joined against the same person under this Section it has been held that it is not objectionable to one of such charges being in the *alternative* as provided by Section 236. Thus when X is charged with offences under Sections 419 and 411, or in the alternative, Section 403 of the Penal Code, the trial is not bad.[4] It has been held in the undermentioned case[5] that Sections 235 and 236 are mutually exclusive and that if a case is governed by Section 235 it cannot also be governed by Section 236 or 237. The observation was, however, unnecessary for the decision of the case.

12. Failure to charge under Sub-section 1—Subsequent trial therefor—S. 403—*See* Section 403 and Notes thereto.

13. Joint trial for several charges not forming part of same transaction—Effect.

A joint trial of several charges in respect of acts not forming parts of the same transaction is illegal and is not cured by Section 537.[1] *See* Notes to Sections 233 and 239.

Sec. 236

Where it is doubtful what offence has been committed.

236.* If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of

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* (**Codes of 1882** and **1872**—*Sections same as that of* 1898 *Code* ; *Ill.* (*b*) *was added in* 1898.)

(**Code of 1861—S. 242.**)

242. When it appears to the Magistrate that the facts which can be established in evidence show a case falling within some one of two or more Sections of the Indian Penal Code, but it is doubtful which of such sections will be applicable, or show the commission of one of two or more offences falling within the same Section of the said Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads, framed respectively under each of such Section or charging respectively each of such offences accordingly.

Cases of doubt as to the Section which is applicable, or the offence which may be proved.

3a. (1935) 1935 Cal 312 (315) : 62 Cal 808, *Kashiram* v *Hurdat Rai.*

3b. (1935) 1935 Cal 312 (314, 315) : 62 Cal 808, *Kashiram* v, *Hardat Rai.*
(1934) 1934 Pat 232 (234) : 35 Cri L Jour 876 : 13 Pat 170, *Ram Kishoon Pershad v. Emperor.*
(1929) 1929 Lah 843 (844) : 30 Cri L Jour 958, *Mangal Sen* v. *Emperor.*
(1931) 1931 Pat 349 (350) : 10 Pat 463 : 32 Cri L Jour 1026, *Michael John* v. *Emperor.*
[See also (1935) 1935 Cal 312 (314) : 62 Cal 808, *Kashiram* v. *Hurdat Rai.*]

4. (1932) 1932 All 25 (25) : 54 All 337 : 33 Cri L Jour 122, *Kashi Nath* v. *Emperor.*
(1931) 1931 All 49 (50) : 53 All 233 : 32 Cri L Jour 1007, *Shibcharan* v. *Emperor.*

5. (1934) 1934 Mad 673 (674) : 35 Cri L Jour 1503 : 58 Mad 178, *K. Srirengachariar* v. *Emperor.*

Note 13.

1. (1935) 1935 Nag 149 (150) : 36 Cri L Jour 1153 : 31 Nag L R 318. *R. S. Ruikar* v. *Emperor.*
(1914) 1914 Cal 589 (589) : 15 Cri L Jour 472, *Shyambar Koyal* v. *Emperor.*

such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Illustrations.

(*a*) *A* is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(*b*) *A* states on oath before the Magistrate that he saw *B* hit *C* with a club. Before the Sessions Court *A* states on oath that *B* never hit *C*. *A* may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

Synopsis.

Other Topics.

Alternative charge in respect of common object. See Note 1, F-N (6), (11), (14).
Alternative charges—Separate heads of charge. See Note 9, Pts. 2 & 3.
Alternative charges—When framed. See Note 1, Pt. 2a.
Appellate Court—Section applies. See Note 1, F. N. (3).
Charges — Penal Code and Special law. See Note 2, Pts. 2 & 3; Note 1, F. N. (6) & (8); Note 1, F-N (11).
Cognate offences. See Note 1, Pt. 17.
Contradictory statements—Both not offences—Effect. See Note 5, Pts. 4 to 7.
Contradictory statements — Falsity of either unknown. See Note 5, Pt. 3.
Contradictory statements—Same deposition or not on same occasion or different occasions. See Note 5, Pt. 2.
Doubt as to facts and doubt as to law. See Note 1, Pts. 15 to 16, 19; Note 2, Pt. 1; Note 7, Pt. 3; Note 3, F-N (1).
Effect of decision on subsequent trials. See Note 1, Pts. 7 & 8.
Falsity of contradictory statements. See Note 5, Pt. 3.
Form of charges. See Note 9, Pt. 1.
Joint trial. See Note 4.
Judgment on alternative charges. See Note 1, Pt. 4; Note 6, F-N (2).
Offences—Same or different kind. See Note 1, Pts. 17 & 18.
Punishment on alternative charges. See Note 1 and 10.
Rape and S. 366. See Note 1, F-N (6).
S. 182 or 211, I. P. C. See Note 2, Pt. 1; Notes 1, F-N (8).
Ss. 302, 304, 307, 394 or S. 326, I. P. C. See Note 1, F-N (6) & (11).
Ss. 235, 236, 237 and 239. See Note 4.
Ss. 366 and 376, I. P. C. See Note 1, F-N (11).
Statements under S. 161, Cr. P. C. See Note 5.

1. Scope of the Section.

This and the next Section form another exception to the general rule enacted in Section 233 *ante* that every charge shall be tried separately. They deal with a class of cases, which the language of Section 235 may fail to cover.[1] The stage at which this Section applies is *before the evidence is gone into* in the case, in other words *before the trial begins*. If at that stage the prosecution relies on certain facts, the proof of which is in its possession, and such facts give rise to an inference that the accused must have committed *some* one of several offences but it is not clear, in the absence of further facts,

Section 236—Note 1.

1. (1913) 14 Cri L Jour 135 (137) : 9 Nag L R 26, *Mahadeogir* v. *Emperor*.

Sec. 236 Note 1

which one of them it is, the case falls under this Section and the next.[2] To take an illustrative case: Suppose before the trial begins the prosecution relies on the following facts as those which can be proved in the case:—

1. that certain moveable property was stolen from the house of *X*
2. that the accused was in possession thereof, and
3. that the accused is unable to explain such possession.

These facts are not consistent with the innocence of the accused person, but give rise to an inference that he has committed some offence, and that it may either be theft punishable under Section 379 of the Penal Code or the offence of receiving stolen property punishable under Section 411 of the Penal Code. It is, however, doubtful without further facts, *which one* of the said two offences he has committed. This Section applies to such a case and the accused may be charged cumulatively with the offence of theft as well as of receiving stolen property or may be charged, in the alternative, with the offence of theft *or* of receiving stolen property.[2a]

Where a charge is framed under this Section, as in the above illustration, either cumulatively or in the alternative, and the *trial proceeds* and on the further facts disclosed in the evidence, the doubt which existed at the beginning of the trial, disappears, the accused should be convicted of the offence which has been *proved* to have been committed by him.[3]

Where on such a charge the trial proceeds and at the end thereof the Court is *still doubtful on the facts proved* which one of the offences charged has been committed by the accused though it is clear that one or other of them must have been committed, the Court should pass judgment *in the alternative* under the provisions of Section 367, sub-section 3.[4] The *punishment* in such a case is for the offence for which the lowest punishment is provided if the same punishment is not provided for all (Section 72 of the Penal Code). *See also* Note 10 below.

Where, in the above illustrative case, a charge is framed for *theft only*, but in the evidence in the trial it is proved that the accused is guilty only of receiving stolen property he may be *convicted* of the latter offence though not charged with it inasmuch as he could, on the facts relied upon at the beginning of the trial, have been charged under this Section.[5] (Section 237 *infra*). The undermentioned cases[6] have all been decided on this principle.

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2. (1931) 1931 Cal 414 (414, 415) : 59 Cal 8 : 32 Cri L Jour 892, *Mehar Sheikh* v. *Emperor*.

2a (1907) 5 Cri L Jour 479 (480) (Mad), *In re Kuppan Ambalam*.

3. (1931) 1931 Cal 414 (415) : 59 Cal 8 : 32 Cri L Jour 892, *Mehar Sheikh* v. *Emperor*.

(1913) 14 Cri L Jour 278 (280) : 1913 Pun Re No. 8, *Mohammad Shah* v. *Emperor*. Appellate Court can also do this.

[See (1929) 1929 Pat 660 (661) : 8 Pat 731 : 31 Cri L Jour 362, *Damodar Ram Mahuri* v. *Emperor*, Ss. 380 and 414, Penal Code.]

(1930) 1930 Cal 139 (140): 57 Cal 801: 31 Cri L Jour 610, *Bikram Ali Pramnaik* v. *Emperor*. Offence under Ss. 395 and 457.

4. (1931) 1931 Cal 414 (415) : 59 Cal 8 : 32 Cri L Jour 892, *Mehar Sheikh* v. *Emperor*.

[But see (1914) 1914 Lah 549 (550) : 14 Cri L Jour 664 (665): 1913 Pun Re No. 11, *Partapa* v. *Emperor*.

5. (1907) 5 Cri L Jour 479 (480) (Mad), *In re Kuppan Ambalam*.

(1915) 1915 Low Bur 39 (45) : 16 Cri L Jour 676 (683) : 8 Low Bur R 274, *S. P Ghosh* v. *Emperor*, Ss. 237 and 238 do not authorise the conviction of the accused upon facts which are not stated or indicated in the charge.

6. (1911) 12 Cri L Jour 374 (374): 6 Ind Cas 58 (All), *Chunno* v. *Emperor*. Charg for criminal breach of trust—Con

viction for theft can be given.

(1923) 1923 Cal 596 (597): 50 Cal 564 : 24 Cri L Jour 372, *Tulsi Tolini* v. *Emperor*. Offence under S. 379, I P C and S. 54-A of the Calcutta Municipal Act.

(1931) 1931 Mad W N 861 (864), *Sukkirappa Goundan* v. *Emperor*. Ss. 307 and 506.

(1932) 1932 All 580 (581): 34 Cri L Jour 100, *Abdul* v. *Emperor*. Accused charged under under S. 366, I. P. C., can be convicted of rape.

(1929) 1929 Cal 773 (773): 31 Cri L Jour 474, *Kuluchand Ghose* v. *Jatu*. Ss. 379 and 426 of the Penal Code.

(1935) 1935 All 458 (459): 36 Cri L Jour 1294, *Gulab Singh* v. *Emperor*. Ss. 395 and 458, I. P. C.

(1935) 1935 Oudh 4 (5): 36 Cri L Jour 112, *Mangal Prasad* v. *Emperor*. Sessions Judge can convert conviction from S. 405 to S. 403, Penal Code.

(1935) 36 Cri L Jour 244 (245, 246): 152 Ind Cas 1036 (Lah), *Emperor* v. *Narir Jain Singh*. Charge under S. 392—Conviction under S. 379.

(1928) 1928 Bom 130 (134): 52 Bom 385 : 29 Cri L Jour 403, *Emperor* v. *Ismail Khadirsab*. Murder and theft.

(1934) 1934 Mad 565 (565): 36 Cri L Jour 113, *Rama Boyan* v. *Emperor*. Person charged with S. 304 and S. 149 can be convicted under S. 304 with S. 34.

(1925) 1925 Mad 1 (6): 47 Mad 746: 25 Cri L Jour 1297. *Theethumalai Goundan, In re*. Charge has been framed under Ss. 326 and 149, I. P. C., conviction under S. 326, I. P. C., is not necessarily bad.

(1915) 1915 Mad 302 (303): 15 Cri L Jour 680 (680), *In re, D. Suriyanarayana Rao*.

(1914) 1914 Mad 425 (428): 13 Cri L Jour 739 (741): 37 Mad 236, *In re, Adabala Muthiyalu*. Charge under S. 397—Conviction for grievous hurt.

(1934) 1934 All 872 (873): 33 Cri L Jour 766, *Dipchand* v. *Emperor*.

(1932) 1932 Nag 173 (173, 174): 28 Nag L R 218: 34 Cri L Jour 66, *Deorao* v. *Emperor*. Charge under S. 457, Penal Code — Conviction can be under S. 411.

(1927) 1927 Oudh 196 (197): 2 Luck 444 : 28 Cri L Jour 460, *Mathura* v. *Emperor*. Facts allowing charge of offence under S. 395 or 457, conviction for latter is good.

(1932) 1932 Pat 302 (303): 34 Cri L Jour 83, *Emperor* v. *Rashbehari Lal*. Charge under S. 302/149, conviction can be for S. 302.

(1931) 1931 Lah 566 (568): 33 Cri L Jour 315, *Jogindar Singh* v. *Emperor*.

(1929) 1929 Pat 11 (14, 15): 7 Pat 758: 30 Cri L Jour 205, *Bhondu Das* v. *Emperor*. Charge under Ss. 326 and 149 of Penal Code — Conviction given under Ss. 326 and 34 not bad.

(1929) 1929 Cal 401 (402): 31 Cri L Jour 59, *Radha Krishna Gupta* v. *Jamnadas Fatepuria*.

(1922) 1922 Mad 110 (111, 112): 23 Cri L Jour 206, *Muthukanakku Pillai* v. *Emperor*.

(1918) 1918 Mad 150 (160) : 41 Mad 589: 19 Cri L Jour 177, *Ramasamy Iyer* v. *King Emperor*.

(1917) 1917 Mad 687 (688): 17 Cri L Jour 384 (385, 386), *Krishna Chetty* v. *Emperor*.

(1910) 11 Cri L Jour 154 (155): 4 Ind Cas 1039 (Mad), *The Public Prosecutor* v. *Thavaslaudi Thevan*.

(1935) 1935 Pesh 67 (68), *Suraj Bhan* v. *Emperor*. Offence under S. 324/114 can be altered to one under S. 324/34 where latter charge could have been based on the facts proved.

(1912) 13 Cri L Jour 252 (254): 14 Ind Cas 604 (Lah), *Lal Chand* v. *Emperor*.

(1875) 12 Bom H C R 1 (7), *Reg* v. *Ramajiravjibaji Raw*.

(1926) 1926 Rang 207 (207, 208): 27 Cri L Jour 1285, *Nga Pu* v. *Emperor*.

(1933) 1933 Pat 26 (27): 34 Cri L Jour 419, *Jagannath Misra* v. *Emperor*.

(1919) 1919 Pat 305 (305): 20 Cri L Jour 487, *Mahabir Singh* v. *Emperor*.

(1923) 1923 Oudh 4 (8): 26 Oudh Cas 44: 23 Cri L Jour 641, *Gaya Barhai* v. *Emperor*.

(1928) 1928 Bom 521 (521): 30 Cri L Jour 329, *Dwarkadas Haridas* v. *Emperor*.

(1924) 1924 Bom 450 (451): 26 Cri L Jour 211, *Emperor* v. *Charles John Walker*.

(1915) 1915 Bom 296 (298): 17 Bom L R 72 : 16 Cri L Jour 212, *Chunilal Manilal* v. *Emperor*.

(1933) 1933 Oudh 162 (163): 8 Luck 474 : 34 Cri L Jour 385, *Basdeo Prasad* v. *Emperor*. In so far as the Court adverts to the question of prejudice to the accused, it is submitted that it is not relevant and does not affect the decision. See Notes to S. 237.

(1927) 1927 Nag 163 (164) : 28 Cri L Jour 189, *Gulabchand* v. *Emperor*.

(1932) 1932 All 580 (581) : 34 Cri L Jour 100, *Emperor* v. *Abdul*.

(1920) 1920 Pat 512 (513) : 21 Cri L Jour 44, *Mt. Sheoratim* v. *Emperor*.

(1918) 1918 Pat 628 (629) : 19 Cri L Jour 202, *Bhowanath Singh* v. *Emperor*.

(1921) 1921 All 261 (262) : 22 Cri L Jour

Sec. 236 Note 1

Where, in the illustrative case, a charge is framed for *theft only* and the accused is, after trial, convicted or acquitted of it, he cannot under the provisions of Sub-Section 1 of Section 403, be subsequently tried on the same facts, for receiving stolen property inasmuch as he *might* have been tried under this Section, or convicted under Section 237 of this offence in the previous case itself.[7] The cases cited below[8] have all been decided on this principle.

It will be clear from the above decisions that the applicability of this Section or the next must depend upon the facts relied upon by the prosecution at the beginning of the trial; in other words the question in each case is "*what were the facts charged*?" Thus if the facts charged are simply that a girl *under* 16 years of age was forcibly taken away by the accused, there may be a doubt as to whether she was kidnapped or whether she was abducted. A charge might therefore be framed under this Section for both offences.[9] But if

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621, *Sabir Hussain* v. *Emperor*.
(1920) 1920 All 72 (74) : 21 Cri L Jour 410, *Jagdeo Parshad* v. *Emperor*.
(1919) 1919 Cal 85 (86) : 20 Cri L Jour 525, *Arshed Molla* v. *Emperor*.
(1929) 1929 Sind 147 (148) : 30 Cri L Jour 875, *Haroon* v. *Emperor*. Charge under S. 395, I. P. C.—Conviction under S. 403.
(1930) 1930 Oudh 353 (356) : 31 Cri L Jour 1210, *Hasari* v. *Emperor*. Charge for offence under S. 397, I. P. C.—Conviction for offence under S. 412 is legal.
(1915) 1915 Low Bur 39 (45) : 16 Cri L Jour 676 (683) : 8 Low Bur R 274, *S. P. Gosh* v. *Emperor*. Dacoity and abetment of robbery.
(1867) 1867 Pun Re No 50, page 88 (89), *Nuthcao* v. *Dewanna*.
(1875) 7 N W P H C R 196 (198), *Queen* v. *Dukaram*.
[See also (1884) 8 Bom 200 (212), *Queen-Empress* v. *Appa Subhana Mandre*.]
(1895) Ratanlal 761, *Queen-Empress* v. *Bala Bin Kakharam*.
(1931) 1931 Sind 9 (12) : 25 Sind L R 1 : 32 Cri L Jour 517, *Sabghatullah Shah* v. *Emperor*. Charge under S. 20 of the Arms Act—Conviction under S. 19 (f) not bad.
(1925) 1925 Cal 581 (582) : 26 Cri L Jour 356, *Abdul* v. *Emperor*.
(1925) 1925 Sind 105 (108) : 19 Sind L R 183 : 25 Cri L Jour 1057, *Faizullah* v. *Emperor*.

7. (1918) 1918 Cal 406 (407) : 45 Cal 727 : 19 Cri L Jour 198, *Manhari Chowdhury* v. *Emperor*.
(1924) 1924 Bom 448 (448) : 26 Cri L Jour 831, *Pundalik Chanker Gugar, In re*.

8. (1927) 1927 Bom 629 (629, 630) : 28 Cri L Jour 1032, *Kallasani* v. *Emperor*. Acquittal under S. 160, Penal Code, subsequent trial for offence under S. 61 (o), Police Act, barred.
(1933) 1933 Bom 447 (449) : 58 Bom 23 : 35 Cri L Jour 112, *Ochhavaial Bhikhabhai, In re*.
(1921) 1921 Sind 137 (139, 142) : 16 Sind L R 1 : 23 Cri L Jour 305, *Emperor* v. *Menghraj Devidas*.
(1871) 16 Suth W R 3 (3), *Kaptan* v. *G. M. Smith*. First trial for offence under S. 352—Second trial for hurt barred.
(1885) 8 Mad 296 (298, 299), *Queen-Empress* v. *Erramreddi*. Theft and mischief.
(1924) 1924 Mad 478 (479) : 25 Cri L Jour 244, *Chinnappa Naidu* v. *Emperor*. Ss. 147 and 427, Penal Code.
(1913) 14 Cri L Jour 214 : 36 Mad 308, *Ganapathi Batta* v. *Emperor*. Charge under S. 211—Acquittal is bar to subsequent trial under S. 182.
(1913) 14 Cri L Jour 135 (138) : 9 Nag L R 26. *Mahadeo Gir* v. *Emperor*. Prosecution under S. 203 withdrawn—Subsequent trial under S. 177 on same facts.
(1921) 1921 Pat 22 (22) : 22 Cri L Jour 63, *Maksuddan Histry* v. *Emperor*. Prosecution for offence under S. 338, I. P. C. — Acquittal — Subsequent prosecution under Motor Vehicles Act, S. 16—Prosecution on same facts—Second prosecution illegal.
(1915) 1915 Low Bur 60 (61) : 16 Cri L Jour 267 (267, 268), *Nga Shwe Yi* v. *Emperor*, Offences under S. 31 of the Rangoon Police Act and under S. 457 of the Penal Code could on the facts have been charged together.
(1910) 11 Cri L Jour 731 (733) : 4 Sind L R 174, *Emperor* v. *Bawa Manghindas*.
(1934) 1934 All 982 (982) : 36 Cri L Jour 266, *Nathu Ram* v. *Emperor*.
(1933) 1933 All 627 (630) : 55 All 681 : 35 Cri L Jour 573, *Yashpal* v. *Emperor*.

9. (1934) 1934 Cal 85 (86) : 35 Cri L Jour 487, *Ramizulla* v. *Emperor*.
(1930) 1930 Cal 209 (210) : 57 Cal 1074 : 31

the facts charged are that a girl *over* 16 years of age was forcibly taken away by the accused, the only offence for which the accused could be charged is abduction and not kidnapping.[10] There being no doubt as to which offence was committed, this Section does not apply.

It follows from the principle set forth above that this Section, and consequently Section 237 or Sub-Section 1 of Section 403 have no application in the following cases:—

1. Where, on the facts relied upon at the beginning of the trial, it appears that the accused has committed *more than one* offence i .e. when he has committed *distinct* offences.[11]

Cri L Jour 903, *Prafulla Kumar Bose* v. *Emperor*.

(1920) 1920 Cal 568 (569) : 21 Cri L Jour 689, *Kala Nath Barman* v. *Emperor*. Forcibly carrying away girl under 16 —Charges might be framed both for kidnapping and abduction.
[See however (1933) 1933 Cal 676 (677) : 60 Cal 1394 : 34 Cri L Jour 1219, *Rajabuddin Mondal* v. *Emperor*. The reason given for saying that S. 236 does not apply to the case is not clear or correct. The facts alleged were that a girl under 16 was forcibly taken away — Why S. 236 should not apply on these facts is not stated].

10. (1930) 1930 Cal 209 (210) : 57 Cal 1074 : 31 Cri L Jour 903, *Prafulla Kumar Bose* v. *Emperor*.

11. (1895) 23 Cal 174 (177), *Queen-Empress* v. *Croft*.
(1887) 1887 Pun Re No. 11, Page 19 (22), *Khan Muhammad* v. *Empress*.
(1911) 12 Cri L Jour 224 (226) : 5 Sind L R 16, *Ganesh Krishna* v. *Emperor*.
(1906) 3 Cri L Jour 240 (242) (Bom), *Emperor* v. *Sakharam Ganu*. Ss. 376 and 366, I. P. C.
(1899) 1 Bom L R 15 (18), *Queen-Empress* v. *Subedar Krishnappa*. Offences under S. 400 and under S. 395.
(1933) 1933 Lah 959 (959, 960) : 35 Cri L Jour 291, *Maya Shah* v. *Emperor*. Stamp Act (1899), Ss. 62-B and 64-A —Complaint brought under S. 64-A —Before accused can be convicted under S. 62-B his attention must be drawn to such fact.
(1915) 1915 Cal 181 (182) : 16 Cri L Jour 42 (43), *Harnarain Sardar* v. *Emperor*.
(1888) Ratanlal 386 (386), *Queen-Empress* v. *Sarwel*. S. 302—S. 318.
(1901) 1901 All W N 120 (121), *King-Emperor* v. *Lajja*. S. 365 and S. 498, I. P. C.
(1888) 1888 All W N 95 (95), *Queen-Empress* v. *Narotam*. Murder and theft.
(1925) 1925 Nag 294 (294) : 26 Cri L Jour 1358, *Akbar Hussain* v. *Emperor*. S. 468 and S. 471, I. P. C.
(1928) 1928 Oudh 373 (374) : 29 Cri L Jour 763, *Rameshwar* v. *Emperor*. Ss. 392 and 325, I. P. C.
(1932) 1932 Mad W N 247 (248), *Nachiappa Goundan* v. *Emperor*. S. 392 — S. 183—Doubtful.
(1901) 6 Cal W N 202 (203), *In the matter of Akbar Momin*. Charge for assaulting *A*— Conviction for assaulting *B*.
(1901) 5 Cal W N 567 (568), *In the matter of Chinibas Pal*. Ss. 290 and 447.
(1875) 23 Suth W R 59 (59), *Queen* v. *Salamut Ali*. Ss. 148, 395 and 452.
(1901) 29 Cal 481 (482), *Hossein Sardar* v. *Kalu Sardar*. Ss. 143 and 379.
(1897) 20 All 107 (108), *Queen-Empress* v. *Yusuf*. S. 302 and S. 404 or 411.
(1927) 1927 All 75 (75) : 27 Cri L Jour 1351, *Achhut Rai* v. *Emperor*. Ss. 302 and 194.
(1870) Ratanlal 34 (34), *Reg* v. *Gopala Pursoo*. Ss. 412 and 395.
(1897) Ratanlal 921, *Queen-Empress* v. *Punya Sakharam*. Ss. 395 and 398.
(1922) 1922 Bom 97 (98, 99) : 46 Bom 657 : 23 Cri L Jour 259, *Matubhai, M. Shah* v. *Emperor*.
(1933) 1933 Sind 225 (225, 226) : 35 Cri L Jour 582, *Parsram* v. *Emperor*. Charge on one set of facts—Conviction on another set of facts.
(1927) 1927 Rang 32 (32) : 4 Rang 355 : 27 Cri L Jour 1360. *Emperor* v. *Nga Shwe Zon*. S. 452, I. P. C. and S. 19 (e), Arms Act.
(1925) 1925 Rang 230 (231) : 3 Rang 68 : 26 Cri L Jour 1119, *G. C. Sircar* v. *Emperor*. Ss. 376 and 366.
(1932) 1932 Pat 241 (242) : 11 Pat 392 : 33 Cri L Jour 709, *Bageshwari Ahir* v. *Emperor*. Ss. 215 and 417 or 420.
(1920) 1920 Pat 590 (590, 591) : 21 Cri L Jour 496, *Raghu Singh* v. *Emperor*. Ss. 457 and 456.
(1869) 6 Bom H C R Cri 43 (44) : *Reg* v. *Gangaram Malji*. Ss. 471 and 467.
(1900) 13 C P L R 167 (168), *Empress* v. *Dongria Gaoli*. Ss. 302 and 404.
(1933) 1933 Mad 843 (843, 844) : 35 Cri L Jour 76, *Baluchami Pillai* v. *Emperor*. Ss. 325 and 160.
(1925) 1925 Mad 706 (706) : 26 Cri L Jour

Sec. 236 Note 1

2. Where there is no *doubt* as to which offence or offences, the facts

1036, *Thiruppal Kadlanatha Pillai, In re.* Ss. 159 (1) and 163, Madras Local Boards Act.

(1924) 1924 Mad 375 (376): 47 Mad 61: 25 Cri L Jour 554, *Mahankalu Sree Ramulu, In re.* Charge under Ss. 147 and 323, I. P. C., cannot be altered into one under S. 160, I. P. C.

(1914) 1914 Mad 144 (144): 15 Cri L Jour 568, *In re, Authoor Valappil Syed Ahmed Musaliyar.* Ss. 469 and 471.

(1914) 1914 Mad 61 (61): 15 Cri L Jour 440, *Thoppulan* v. *Sankaranarayana Iyer.* S. 379 and S. 403 or 424.

(1910) 11 Cri L Jour 340 (340): 5 Ind Cas 974 (Mad), *In re, Bommareddi Somireddi.* Ss. 447, 352 and 379, I. P. C.

(1910) 11 Cri L Jour 30 (34): 4 Ind Cas 700 (Mad), *In re, Lokanatha Iyer.* Charge under S. 141, I. P. C., conviction for common object different from that set out in the charge.

(1909) 9 Cri L Jour 406 (406): 1 Ind Cas 867 (Mad), *In re, Subramaniya Iyer.* Ss. 406 and 420.

(1908) 8 Cri L Jour 421 (421) (Mad), *Manikkam Pillai, In re.*

(1926) 1926 Lah 691 (691): 7 Lah 561: 27 Cri L Jour 1004, *Ghanus* v. *Emperor.*

(1924) 1924 Lah 109 (110): 4 Lah 373: 25 Cri L Jour 385, *Wallu* v. *Emperor.* Charge of murder cannot be converted into one of robbery.

(1923) 1923 Lah 260 (261): 3 Lah 440: 23 Cri L Jour 709, *Arjan Mal* v. *Emperor.*

(1889) 1889 Pun Re No. 18, page 67 (69), *Crown* v. *Umashankar.* Ss. 500 and 501.

(1901) 1901 Pun Re Cri No. 31, page 92 (92), *Mangal Singh* v. *Empress.* Ss. 457, 379 and 497.

(1911) 12 Cri L Jour 169 (170): 32 Cal 293, *Lal Mohan Mandal* v. *Kali Kishore Bhuymali.* Ss. 147 and 323.

(1912) 13 Cri L Jour 502 (503): 15 Ind Cas 646 (Cal), *Reazuddi* v. *Emperor.* Person charged under Ss. 149 and 325, I. P. C., cannot be convicted under S. 325.

(1914) 1914 Cal 473 (475): 41 Cal 537: 15 Cri L Jour 4, *Kalicharan Mukherjee* v. *Emperor.*

(1914) 1914 Cal 631 (632): 15 Cri L Jour 188, *Ariff Munsif* v. *Emperor,* Ss. 146 and 447.

(1915) 1915 Cal 292 (294): 41 Cal 662: 15 Cri L Jour 155, *Emperor* v. *Madan Mondal.*

(1890) Ratanlal 529, *Queen-Empress* v. *Nathoo Lalji.*

(1903) 30 Cal 288 (290), *Yakub Ali* v. *Lethu Thakur.*

(1900) 27 Cal 660 (661, 662), *Jatu Singh* v. *Mahabir Singh.*

(1899) 3 Cal W N 367 (368), *Manoranjan Chowdhury* v. *Queen-Empress.*

(1926) 1926 Cal 581 (582): 53 Cal 466: 27 Cri L Jour 606, *Harun Rashid* v. *Emperor.* Abetment of forgery and user of forged document.

(1934) 1934 Oudh 457 (459): 35 Cri L Jour 1417, *Onkar Singh* v. *Emperor.*

(1927) 1927 Rang 303 (304): 28 Cri L Jour 908, *Me Tok* v. *Emperor.*

(1931) 1931 Sind 116 (117): 25 Sind L R 9: 33 Cri L Jour 41, *Mohammad Rafiq* v. *Emperor.*

(1911) 12 Cri L Jour 224 (226): 5 Sind L R 16, *Ganesh Krishna* v. *Emperor.*

(1876) 7 N W P H C R 137 (143), *Queen* v. *Jamurha.*

(1882) 9 Cal 371 (373), *Manu Miya* v. *Empress.*

(1931) 1931 Sind 116 (117): 25 Sind L R 9: 33 Cri L Jour 41, *Mahamod Rafiq* v. *Emperor.*

(1887) 1887 Pun Re No. 43 page 106, *Sher Singh* v. *Empress.*

(1933) 1933 Oudh 315 (321): 8 Luck 518: 35 Cri L Jour 10, *Daulat Ram* v. *Emperor.* Murder and receiving stolen property.

(1915) 1915 Cal 219 (219): 15 Cri L Jour 704 (705): *Genu Manjhi* v. *Emperor.* S. 237 does not apply.

(1926) 1926 Cal 581 (582): 53 Cal 466: 27 Cri L Jour 606, *Harun Rashid* v. *Emperor.* (Do).

(1912) 13 Cri L Jour 593 (594): 40 Cal 168 *Sita Ahir* v. *Emperor.* (Do).

(1912) 13 Cri L Jour 597 (597): 16 Ind Cas 165 (Cal), *Amanullah* v. *Emperor.* (Do).

(1932) 1932 Cal 545 (546): 34 Cri L Jour 39, *Ali Ahmad* v. *Emperor.* S. 403, subs. 1 does not apply.

(1902) 4 Bom L R 575 (577), *Municipality of Bombay* v. *Javer Jagjivan.* (Do).

(1918) 1918 Nag 107 (108): 20 Cri L Jour 751, *Hari Singh* v. *Emperor.* (Do).

(1927) 1927 Rang 303 (304): 28 Cri L Jour 908, *Me Tok* v. *Emperor.* Cheating by false personation — Subsequent false personation in registration office for registration of deed—Distinct offences.

(1934) 1934 Cal 409 (410): 61 Cal 537: 35 Cri L Jour 937, *Akhoy Chand Begwani* v. *Emperor.* Charge under S. 69 (a), Prov. Insol. Act—Conviction cannot be passed under S. 69 (b). [See also (1888) 1888 All W N 116 (117), *Empress* v. *Karim Buksh.* S. 411—S. 380].

relied upon at the beginning of the trial amounts to.[12]

3. Where the facts relied upon are not inconsistent with the innocence of the accused i. e. where such facts do not *amount to an offence* at all.[13]

4. Where the prosecution is itself not clear as to *what facts it will rely upon*.[14] Thus where the accused, five in number, are alleged to have assaulted *either* with one object *or* with another, the facts relied upon to establish an offence are themselves in doubt, and this Section does not apply.[14a] Similarly where the prosecu-

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12. (1915) 1915 Bom 203 (204) : 40 Bom 97 : 16 Cri L Jour 761, *Jivram Dankarji* v. *Emperor*.
(1930) 1930 All 481 (482) : 31 Cri L Jour 716, *Emperor* v. *Kanhaiya*.
(1926) 1926 All 227 (228) : 27 Cri L Jour 152, *Raghunath Kandu* v. *Emperor*.
(1933) 1933 All 30 (31) : 34 Cri L Jour 445, *Qabal* v. *Emperor*.
(1931) 1931 Cal 414 (415) : 59 Cal 8 : 32 Cri L Jour 892, *Meher Sheikh* v. *Emperor*. S. 237 also will not apply to such cases.
(1902) 1 Low Bur Rul 221 (222), *Nga Po Yan* v. *Crown*.
(1898) 2 Weir 301 (302), *In re Perumal Nadan*.
(1928) 1928 All 139 (140) : 29 Cri L Jour 232, *Har Prasad* v. *Emperor*. The offences in this case were however distinct.
(1914) 1914 Cal 309 (310) : 15 Cri L Jour 41, *Akram Ali* v. *Emperor*.
(1918) 1918 Pat 165 (166) : 19 Cri L Jour 121, *Hayat Khan* v. *Emperor*.
(1918) 1918 Lah 49 (50) : 1918 Pun Re No. 23 : 19 Cri L Jour 931, *Rai Bahadur* v. *Emperor*.
(1907) 5 Cri L Jour 427 (431) : 34 Cal 698, *Jatindra Nath* v. *Emperor*. On the facts there could be no doubt as to what the offence was.
(1920) 1920 Pat 216 (218, 219) : 21 Cri L Jour 439, *Pertap Rai* v. *Emperor*. Offence charged Ss. 149 read with 325 offence merely under S. 325 also cannot be charged.
(1912) 13 Cri L Jour 593 (594) : 40 Cal 168, *Sita Ahir* v. *Emperor*. *X* was charged with causing hurt to *A*—He cannot be convicted for causing hurt to *B* which fact is disclosed in evidence. The reason is that the facts charged did not create any doubt to the offence committed by *X*.
(1910) 11 Cri L Jour 325 (325) : 37 Cal 604, *Ram Sewak Lal* v. *Maneshwar Singh*. False statement to a public servant in which defamatory statements were made against *X*—Here the act is one, but constitutes 2 offences—There is no "doubt" within the meaning of the Section. The case was however decided on the ground that they are *distinct offences*. This is not correct.
[See also (1915) 1915 Cal 219 (219) : 15 Cri L Jour 704, *Genu Manji* v. *Emperor*.]
(1910) 11 Cri L Jour 420 (421) : 1910 Pun Re No. 20, *Thakur Singh* v. *Chatter Pal*. Facts alleged amounting to both an offence under S. 182, Penal Code as well as under S. 211—S. 236 does not apply—The decision however proceeds on the view that they were distinct offences. This does not seem to be correct.
(1930) 1930 Pat 26 (27) : 9 Pat 585 : 30 Cri L Jour 806, *Babu Lal Mahton* v. *Ram Saran Singh*.
[See also (1930) 1930 Mad 631 (632) : 31 Cri L Jour 1197, *Vonti Kommu Rami Reddi* v. *Emperor*].
[But see (1929) 1929 Pat 712 (714) : 30 Cri L Jour 891 : 9 Pat 642, *Mallu Gope* v. *Emperor*. Facts were that *A* stabbed *B*—It was held that *A* could be convicted for an offence under S. 304 read with S. 149 — The case purports to follow 1925 P. C. 130 in which however the facts were different.]

13. (1931) 1931 Cal 528 (528) : 59 Cal 92 : 32 Cri L Jour 1167, *Paul De Flonder* v. *Emperor*.
(1920) 1920 Pat 512 (513) : 21 Cri L Jour 44 : *Mt. Sheoratni* v. *Emperor*. Charge of kidnapping—Facts alleged not amounting to kidnapping—Conviction for abetment of kidnapping under S. 237 is wrong.

14. (1931) 1931 Cal 414 (415) : 59 Cal 8 : 32 Cri L Jour 892 : *Meher Sheikh* v. *Emperor*.
(1931) 1931 Cal 528 (528) : 59 Cal 92 : 32 Cri L Jour 1167, *Paul De Flonder* v. *Emperor*.
(1894) 21 Cal 955 (973), *Wafadar Khan* v. *Queen-Empress*. Facts alleged clear that the five accused assembled but there was a doubt as to the object of the assembly.

14a (1894) 21 Cal 955 (973), *Wafadar Khan* v. *Queen-Empress*.
[See also (1923) 71 Ind Cas 247 (247) : 24 Cri L Jour 119 (Cal), *Hajari Sonar* v. *Emperor*.]

Sec. 236 Notes 1—2

tion alleges that *A* either committed theft in *X*'s house on a certain day *or* committed theft in *Y's* house on another day, this Section has no application.[14b]

It has been held in the undermentioned cases[15] that the "doubt" in this Section does not mean doubt as to *facts* but means '*doubt*' as to questions of *law* such as which Section of the penal law applies. It is submitted that this view is not correct. The illustrations to the Section, themselves, show that the doubt in those cases are not doubts as to questions of law, but only as to questions of fact.[15a] To this extent, however, the proposition would be correct that the Section has no application where the *facts relied upon by the prosecution are themselves in doubt.*[16]

It has also been held in another class of cases that the several offences which the facts may constitute should be *cognate* offences[17] or offences which differ in degree by reason of the difference in intention or by reason of subsidiary aggravating circumstances.[18] This also, it is submitted, is not correct and is not authorised by the Section.

It was also observed in the undermentioned cases[19] that the Section applies only where from the evidence *led by the prosecution* it is doubtful which of several offences have been committed by the accused. It is submitted that this view is not correct. Such a case is really covered by Section 367 sub-section 3.

2. "**Which of several offences.**"

This Section applies even where the doubt is whether the accused committed one offence only or both that offence and another. Where *A* gives false information of theft in house and states that he suspects *B* of the offence

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14b (1887) 1887 Pun Re No. 43, page 105 (106), *Empress* v. *Sher Shah.*

15. (1925) 1925 Cal 903 (904): 26 Cri L Jour 594, *Nayan Ullah* v. *Emperor.*
(1875) 7 N W P H C R 137 (143), *Queen-Empress* v. *Jamurha.*
(1929) 1929 Rang 209 (210): 7 Rang 96: 30 Cri L Jour 750, *Emperor* v. *Po Thin Gyi.*
(1927) 1927 Rang 254 (255): 28 Cri L Jour 759, *Emperor* v. *Nga Po Wun.*
(1901) 1 Low Bur Rul 101 (104), *Grown* v. *Mi Zan.*
(1887) 1887 Pun Re No. 11, page 19 (21, 22), *Khan Muhammad* v. *Empress.*
(1918) 1918 Pat 628 (629): 19 Cri L Jour 202, *Bhowanath Singh* v. *Emperor.* Following 1887 Pun Re Cr. No. 11; 21 Cal 955 and 23 Cal 174.
[But see (1930) 1930 All 481 (482): 31 Cri L Jour 716, *Emperor* v. *Kanhaiya* (*Quaere*)].

15a (1933) 1933 Rang 236 (237, 238): 11 Rang 354: 35 Cri L Jour 41, *Nga Po Kyone* v. *Emperor.*
(1928) 1928 All 139 (140): 29 Cri L Jour 232, *Har Prasad* v. *Emperor.* Doubt contemplated is doubt owing to absence of proof of some of the facts or doubt on a question of law.
(1931) 1931 Cal 414 (415): 59 Cal 8: 32 Cri L Jour 892, *Meher Sheikh* v. *Emperor.*
(1911) 12 Cri L Jour 224 (228): 5 Sind L R 16, *Ganesh Krishna* v. *Emperor.*

16. [See cases cited in foot-notes (14 and 15) above].

17. (1924) 1924 Rang 106 (108): 1 Rang 690: 25 Cri L Jour 553, *Mustan* v. *Emperor.*
(1929) 1929 Pat 660 (661): 8 Pat 731, *Damodar Ram Mahuri* v. *Emperor.*
(1927) 1927 Nag 163 (164): 28 Cri L Jour 189, *Gulabchand* v. *Emperor.*
(1888) 1888 All W N 95 (95), *Queen-Empress* v. *Narotam.*
(1888) 1888 All W N 116 (117), *Queen Empress* v. *Karim Buksh.*
(1927) 1927 Nag 296 (298): 23 Nag L R 94, *Ramachandra* v. *Rupchand.*
(1932) 1932 Oudh 103 (106): 7 Luck 543: 33 Cri L Jour 926, *Chandranath* v. *Emperor.* Conviction under S. 398, Penal Code can be altered to one under S. 392.
(1905) 2 Cri L Jour 590 (594) (*Kathiawar*), *In re Rabari Bhura Dewit.* Contradictory statements must be of the same kind.

18. (1911) 12 Cri L Jour 224 (226): 5 Sind L R 16, *Ganesh Krishna* v. *Emperor.* (Per Pratt, J. C.)

19. (1923) 1923 Pat 121 (122): 23 Cri L Jour 30 and 270, *Govind Mahtan* v. *Emperor.*
(1920) 1920 Pat 512 (513): 21 Cri L Jour 44, *Mt. Sheoratni* v. *Emperor.*

it is clear that he commits an offence under Section 182 of the Penal Code, but it is doubtful if the information will amount to the making of a false charge against *B* punishable under Section 211 of the Penal Code. It has been held that this Section will apply even to such cases.[1]

Under the Code of 1861 a charge under the Section corresponding to this Section could be framed only in respect of offences under the Indian Penal Code.[2] Under the present Code this is no longer necessary.[3]

3. Theft and taking illegal gratification for the return of stolen property.

Where the facts relied upon by the prosecution are;

1. That certain property was stolen.
2. That *A* took gratification for its restoration and
3. That he took no steps for its restoration or to cause the offender to be apprehended.

The only inference possible is that *A* committed an offence under Section 215 of the Penal Code. It cannot be an inference that, because *A* asked for a gratification for its return, he is the thief. There being therefore no "doubt" such as is contemplated by the Section, *A* cannot be charged for theft along with the offence under Section 215 of the Penal Code.[1] If however, in the above case there is the additional fact that he restored the property but did not take steps to cause the offender to be apprehended, there will be a doubt as to whether he was not the thief seeing that he was in possession of the stolen property. In such a case an alternative charge for theft or for an offence under Section 215 may be framed.[2]

The question whether the thief himself can be convicted also under Section 215 of the Penal Code is not a question arising under this Section.[3]

4. Sections 236 and 239, if mutually exclusive.

A, *B* and *C* are accused under Section 401 Penal Code for belonging to a gang of dacoits. It is doubtful on the facts which can be proved in the case whether *A* has committed an offence under Section 413 Penal Code (habitually receiving stolen property). Can *A* in the same trial be charged cumulatively or alternatively for an offence under Section 236? According to the High Court of

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Note 2.

1. (1913) 14 Cri L Jour 214 (216, 217) : 36 Mad 308, *Ganapathy Bhatta* v. *Emperor*.
2. (1871) 8 Bom H C R 115 (117), *Reg* v. *Ajam Dulla*.
3. (1923) 1923 Cal 596 (597) : 50 Cal 564 : 24 Cri L Jour 372, *Tulsi Telini* v. *Emperor*. S. 379, Penal Code and S. 54-A, Calcutta Municipal Act.
   (1915) 1915 Low Bur 60 (61) : 16 Cri L Jour 267 (267, 268), *Nga Shwe Yi* v. *Emperor*. S. 457, Penal Code and S. 31, Rangoon Police Act.
   (1921) 1921 Pat 22 (22) ; 22 Cri L Jour 63, *Maksudan Mistry* v. *Emperor*. Joint trial under S. 338, I. P. C.—Second trial under S. 16, Motor Vehicles Act barred.
   (1927) 1927 Bom 629 (629) : 28 Cri L Jour 1032, *Emperor* v. *Kallasani*. S. 160, Penal Code and S. 61 (o), Bombay District Police Act.
   (1918) 1918 Pat 628 (629) : 19 Cri L Jour 202, *Bhowanath Singh* v. *Emperor*. (Assumed).

Note 3.

1. (1927) 1927 Rang 254 (255) : 28 Cri L Jour 759, *Emperor* v. *Nga Po Wun*. The ground of the decision namely that the "doubt" must not be one of fact but of law is incorrect. See Note 1 *ante*.
   (1929) 1929 Rang 209 (210) : 7 Rang 96 : 30 Cri L Jour 750, *Emperor* v. *Po Thin Gyi*. (Do).
2. (1908) 7 Cri L Jour 464 (469) : 4 Low Bur R 199, *Twet Pe alias Shan Gale* v. *Emperor*.
3. (1914) 1914 Mad 121 (121) 15 : Cri L Jour 471, *In re Nalli Veera Thevan*.

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Calcutta[1] and the Judicial Commissioner's Court of Sind[2] he can. The High Court of Lahore has taken a contrary view.[3] The reason being that Section 236 is subject to Section 239 that under this Section a charge against *A* under Section 413 cannot be joined with a charge against *B* under Section 401, and that therefore a charge under Section 401 against *A*, *B*, *C* cannot be joined with a charge under Section 413 against *A*.

As to whether this Section and Section 235 are mutually exclusive *see* Notes to Section 235 *ante* and the undermentioned case.[4]

5. Contradictory statements—Illustration (b).

Illustration (b) was added in the present Code in order to give effect to the view that existed before that a person could be charged with giving false evidence on the basis of two contradictory statements.[1] It applies not only where the statements are made on two distinct occasions but also where they are made on the same occasion as for example in the same deposition.[2]

An alternative charge in respect of two contradictory statements can be framed under this Section only when the prosecution is unable to prove which of the two statements is false.[3]

Note 4.

1. (1929) 1929 Cal 298 (299) : 56 Cal 1106 : 30 Cri L Jour 1015, *Tota Meah Chowdhury* v. *Emperor*.
   (1925) 1925 Cal 903 (904) : 26 Cri L Jour 594, *Nayan Ullah* v. *Emperor*.
   (1910) 11 Cri L Jour 244 (245) : 5 Ind Cas 769 (Cal), *Janki* v. *Emperor*.
2. (1908) 8 Cri L Jour 191 (198) : 1 Sind L R 73, *Emperor* v. *Ghulam*.
3. (1925) 1925 Lah 537 (538) : 26 Cri L Jour 1097, *Chhajju* v. *Emperor*.
4. (1934) 1934 Mad 673 (674) : 35 Cri L Jour 1503 : 58 Mad 178, *Srirengachariar* v. *Emperor*.

Note 5.

1. (1899) 1899 All W N 39 (39), *Queen-Empress* v. *Puran*.
   (1899) 22 All 115 (117), *Queen-Empress* v. *Khem*.
   (1904) 28 Bom 533 (553, 554), *Emperor* v. *Banatram*.
   (1921) 1921 Bom 3 (10) : 45 Bom 834 : 22 Cri L Jour 241 (F B), *Emperor* v. *Purshotam*. Overruling 18 Bom 377.
   (1903) 1903 Pun L R No. 60 page 245 (246), *Sobha Singh* v. *King-Emperor*.
   (1925) 1925 Oudh 660 (661) : 26 Cri L Jour 1457, *Patraji* v *Emperor*.
   (1910) 11 Cri L Jour 734 (735) : 8 Ind Cas 947 (Rang), *Maung Thaw Na* v. *Emperor*.
   (1908) 7 Cri L Jour 302 (303) (All), *Emperor* v. *Tasadduk Husain*.
   (1909) 9 Cri L Jour 304 (305) : 1 Ind Cas 547 (Mad), *Fakir Mohideen* v. *Hartnett*.

   The following decisions were decided prior to the present Code :—

   (1874) 21 Suth W R 72 (76, 85, 86): 13 Beng L R 324, *Muhammad Humayoon Shah* v. *Emperor*. Overruling 8 Suth W R 6 : 12 Suth W R 11 : 12 Suth W R 31, 69 : 9 Suth W R 25, 54.
   (1885) 7 All 44 (63, 66, 67), *Queen-Empress* v. *Ghulet*. Overruling 5 All 17.
   (1866) 6 Suth W R 65 (68, 69), *Queen* v. *Mt. Zumeerun*.
   (1874) 1 Weir 165 (165).
   (1893) 15 All 392 (393), *Queen-Empress* v. *Matabadal*.
   (1864) 1 Suth W R 15 (15), *Queen* v. *Narain Doss*.
   (1883) 1883 Pun Re No. 20, page 43 (44 to 46), *Mir Afzal* v. *Empress*.
   (1888) 1888 Pun Re No. 32, page 65 (67), *Sohan Singh* v. *Empress*.
   (1869) 4 Mad H C R 51 (53, 54), *Queen* v. *Palany Chetty*.
   (1871) 6 Mad H C R 342 (344), *Queen* v. *Ross*.
   (1880) 1 Weir 165 (165).
   (1896) 2 Weir 300 (300), *The Public Prosecutor* v. *Muthu Vannan*.
   (1924) 1924 Sind 1 (3) : 16 Sind L R 285 : 25 Cri L Jour 1195, *Saleh Shah* v. *Emperor*.
   [See also (1867) 8 Suth W R Cri 79 (1) (79), *Queen* v. *Oottur Narain Singh*.
   (1868) 9 Suth W R 52 (53), *Queen* v. *Denonath*.]
   (1869) 12 Suth W R 23 (23), *Queen* v. *Kala Khan*.
   (1884) 10 Cal 405 (406, 407), *Nathu Sheikh* v. *Queen-Empress*.
2. (1902) 26 Mad 55 (60, 64, 65), *In re Palani Palagan*.
   (1884) 10 Cal 937 (940, 941, 946), *Queen-Empress* v. *Habibullah*.
3. (1890) 1890 Pun Re No. 27, page 90 (93), *Harnam Singh* v. *Empress*.
   (1888) 1888 Pun Re No. 32, page 68 (69), *Queen-Empress* v. *Sohan Singh*.
   (1896) 2 Weir 300 (300), *Public Prosecutor* v. *Muthu Vannan*.

No charge in the alternative can be made, when one of the statements has been made in circumstances in which the person making it is not bound by law to state the truth as for example.

1. When the statement is made in a petition.[4]
2. When it is made in an examination by a Magistrate for the purpose of obtaining information, not liable to be on oath.[5]
3. When it is made to the police under Section 161 of the Code as to which, *see* Note 9 to Section 161 *supra*.
4. Where an amin reports to a civil Court executing a decree complaining of obstruction[6] or
5. When it is inadmissible in evidence as being one made under improper influence such as police threat and ill treatment.[7]

Where an accused person entered, in a sale-deed executed by him, the consideration as Rs. 1475 and in a subsequent suit for pre-emption stated in evidence that the consideration was only Rs. 900, it was held that the Court could charge accused under Section 193 or Section 423 of the Penal Code.[3]

6. Murder and concealment of body to screen offender.

In *Begu* v. *King Emperor*[1] where the facts relied upon by the prosecution, against the accused were that a murder had been committed and that the accused made away with the evidence of murder by removing the body for the purpose of screening the offender, it was held by their Lordships of the Privy Council that though the charge against the accused was only under Section 302 of the Penal Code, he could be convicted under Section 201 of the Penal Code, if the evidence established that offence. Their Lordships observed:

"A man may be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge *that might have been made*. That is what happened here. The three men who were sentenced to rigorous imprisonment, were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under S. 237."

The same view has been held in the undermentioned cases.[2]

[See also (1874) 22 Suth W R 2 (3), *Queen* v. *Gonowri.*]

4. (1902) 2 Weir 169 (169), *Chennamma In re.*
5. (1900) 27 Cal 455 (457), *Hari Charan Singh v. Queen-Empress.*
6. (1895) 17 All 436 (436), *Queen-Empress* v. *Ajudhia Prasad.*
7. (1865) 3 Suth W R 6 (8), *Queen* v. *Nagana Ourut.*
8. (1903) 1903 Pun L R No. 60 page 245 (246), *Sobha Singh* v. *Emperor.*

Note 6.

1. (1925) 1925 P C 130 (131) : 6 Lah 226 : 52 Ind App 191 : 26 Cri L Jour 1059 (P C), *Begu* v. *King-Emperor.*
2. (1932) 1932 All 71 (72) : 33 Cri L Jour 283, *Emperor* v. *Sawanta.*
   (1923) 1923 Bom 262 (263) : 25 Cri L Jour 1349, *Emperor* v. *Hanumappa Rudrappa.*
   (1933) 1933 Rang 70 (72) : 11 Rang 162 : 34 Cri L Jour 1040 (Rang), *Electric Tramway & Supply Co., Ltd.* v. *Emperor.* Alternative convictions could not be given.
   (1926) 1926 Lah 88 (90) : 7 Lah 84 : 27 Cri L Jour 709, *Rannun* v. *King-Emperor.*
   (1932) 1932 Cal 297 (298) : 59 Cal 1040 : 33 Cri L Jour 546, *Durlav Namasudra* v. *Emperor.*
   (1931) 1931 Pat 172 (174) : 10 Pat 140 : 32 Cri L Jour 975, *Rup Narain Kurmi* v. *Emperor.*
   (1895) 22 Cal 638 (639, 640), *Torap Ali* v. *Queen-Empress.*
   (1916) 1916 Cal 919 (920) : 17 Cri L Jour 4 : *Sumanta Dhupi* v. *Emperor.*
   (1933) 1933 All 178 (179) : 54 All 792 : 34 Cri L Jour 107, *Sohan* v. *Emperor.*
   (1928) 1928 Lah 906 (908) : 10 Lah 213 : 29 Cri L J 746, *Ditta* v. *Emperor.*
   (1932) 1932 Mad 748 (757) : 56 Mad 63 : 33 Cri L Jour 814, *Public Prosecutor* v.

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7. Murder and culpable homicide not amounting to murder.

Where the facts relied upon give rise to an inference of murder or culpable homicide not amounting to murder, a charge may be framed under the Section either cumulatively[1] or alternatively[2] for murder and culpable homicide not amounting to murder. In the undermentioned case[3] however, it was held that this could not be done. The decision proceeded upon the view that Section 236 did not apply to a 'doubt' as to *facts*. In *Ganesh Krishna* v. *Emperor*[4] Pratt, J. C. held that though a charge might under this Section be framed *cumulatively*, it cannot be framed *alternatively* in respect of two offences. It is submitted that the view in the last two cases is not correct.

8. Principal offence and the abetment thereof.

The question whether an offence and its abetment could both be charged under the provisions of this Section depends, as has been seen in Note 1 *ante*, on the facts relied upon by the prosecution at the beginning of the trial and on which charges are invited to be framed. A person may be convicted of abetment of an offence, even if he is charged with the substantive offence and *vice versa*, if the facts relied upon could have supported a charge for that offence.[1]

Mitta Venkatamma.

(1930) 1930 Mad 870 (872) : 54 Mad 68 : 32 Cri L Jour 263, *China Gangappa* v. *Emperor.*

(1930) 1930 Oudh 113 (121) : 5 Luck 255 : 31 Cri L Jour 575, *Mata Din* v. *Emperor.*

(1927) 1927 Sind 241 (244) : 21 Sind L R 206 : 28 Cri L Jour 674, *Tajan* v. *Emperor.*

(1925) 1925 Sind 306 (307) : 18 Sind L R 185 : 26 Cri L J 909, *Audal Shah* v. *Emperor.*

(1908) 8 Cri L Jour 191 (193) : 1 Sind L R 73, *Emperor* v. *Ghulam.*

(1910) 11 Cri L Jour 731 (733) : 4 Sind L R 174, *Emperor* v. *Bawa Manghnidas.*

(1928) 29 Cri L Jour 457 (458) : 108 Ind Cas 905 (Lah), *Dal Singh* v. *Emperor.*

(1925) 1925 P C 130 (131) : 6 Lah 226 : 26 Cri L Jour 1059 : 52 Ind App 191, (PC) *Bego* v. *King-Emperor.*

(1926) 27 Cri L Jour 1011 (1012) : 96 Ind Cas 867 (Cal), *Umed Sheikh* v. *Emperor.* [See also (1930) 1930 Lah 460 (461) : 32 Cri L Jour 461, *Emperor* v. *Faizul Hassan.* Charge under S. 52 of the Post Offices Act and S. 201, Penal Code.]

(1902) 1902 Pun Re No. 6 page. 17 (18), *Nazru* v. *Emperor.*

Note 7.

1. (1915) 1915 Bom 296 (298) : 16 Cri L Jour 212, *Chunilal Mani Lal* v. *Emperor.*

(1924) 1924 Bom 450 (451) : 26 Cri L Jour 211, *Emperor* v. *Charles John Walker.* Following 41 Cal 621. [See (1894) 21 Cal 955 (957). *Wafadar Khan* v. *Queen-Empress.*]

2. (1872-1892) 1872-1892 Low Bur R 300 (301), *Mi Ni* v. *Queen-Empress.* Murder or in the alternative culpable homicide not amounting to murder.

3. (1887) 1887 Pun Re No. 11 (19, 20), *Khan Muhammad* v. *Empress.*

4. (1911) 12 Cri L Jour 224 (226) : 5 Sind L R 16, *Ganesh Krishna* v. *Emperor.*

Note 8.

1. (1930) 1930 Nag 145 (148) : 30 Cri L Jour 224, *Punamchand Amarchand* v. *Emperor.* A person may be convicted of abetment of an offence, even if he is charged only with the substantive offence if, on the facts stated in the charge, the accused could have been charged with abetment.

(1931) 1931 Oudh 274 (276) : 7 Luck 102 : 32 Cri L Jour 905, *Khuman* v. *Emperor.* Charge for principal offence —Conviction for abetment can be given.

(1929) 1929 Cal 807 (808) : 57 Cal 807 : 31 Cri L Jour 570, *Jananada Charan Ghattak* v. *Emperor.*

(1934) 1934 Pat 561 (563) : 13 Pat 729 : 36 Cri L Jour 17, *Bhikhari Singh* v. *Emperor.*

(1920) 1920 Lah 15 (18) : 22 Cri L Jour 161, *Kehr Singh* v. *Emperor.* On facts that *B* could have been charged not only with the commission of the principal offence but also with the abetment, and therefore by virtue of S. 237, Criminal P. C., he could be convicted of the offence of abetment though not separately charged with it.

(1925) 1925 Rang 122 (128) : 3 Rang 11 : 26 Cri L Jour 492, *A. V. Joseph* v. *King Emperor.*

(1928) 1928 Pat 146 (153) : 6 Pat 768 : 29 Cri L Jour 301, *Emperor* v. *Ghulam*

The view taken in the undermentioned cases[2] that an offence of abetment and the principal offence cannot come within this Section is, it is submitted, not correct.

9. Alternative charges.

Alternative charges should be framed as in form given in Schedule V No. 28 sub-head II.[1] As to whether they could be combined under *one head*

Nabi.

(1916) 1916 Cal 524 (525) : 16 Cri L Jour 576, *Emperor* v. *Nagendra Nath Sen Gupta.*

(1916) 1916 Cal 431 (445) : 42 Cal 1094 : 17 Cri L Jour 113, *Indarchand* v. *Emperor.*

(1920) 1920 Lah 15 (18) : 22 Cri L Jour 161, *Kehr Singh* v. *Emperor.*

(1924) 1924 Bom 502 (507) : 49 Bom 84 : 26 Cri L Jour 1000, *Emperor* v. *Ranchod Sursang.*

(1932) 1932 Cal 455 (456) : 59 Cal 1192 : 33 Cri L Jour 720, *Debi Proshad Kalwar* v. *Emperor.* Accused charged with substantive offence—Conviction for abetment is not necessarily illegal —Each case must be considered upon its own merits.

(1928) 1928 Cal 466 (468) : 29 Cri L Jour 1093, *Kadira* v. *Emperor.* Assumed that conviction for abetment can be given where the charge was for the main offence, if the case falls within S. 236 and the evidence established the offence as one of abetment.

(1934) 1934 Sind 89 (92) : 28 Sind L R 12 : 36 Cri L Jour 53, *Mitho* v. *Emperor.* Charge under S. 326, I. P. C., read with S. 149 — Conviction for S. 326 read with S. 34 is permissible.

(1931) 1931 Mad 225 (227) : 32 Cri L Jour 753, *Sambasiva Mudali* v. *Emperor.* Charge for abetment — Conviction for principal offence can be given.

(1931) 1931 Cal 625 (626) : 58 Cal 822 : 32 Cri L Jour 1004, *Emperor* v. *Dastarali.* Charge for offences under Ss. 193 and 467 read with S. 34, I. P. C.—Acquittal of some accused —Conviction of rest under Ss. 193 and 467 may be given.

(1912) 13 Cri L Jour 453 (454, 455) : 15 Ind Cas 85 (Mad), *Yethitha Subbayya* v. *Emperor.*

(1935) 1935 All 935 (937) : 158 Ind Cas 811, *Samuel Jhon* v. *Emperor.* Charge framed for offence of rape — Conviction under abetment of rape — Amendment of charge unnecessary— *Note* : The decision proceeds on the ground that abetment is a minor offence in relation to the substantive offence and that S. 238 applies to such a case.

(1935) 1935 Pesh 67 (68), *Suraj Bhan* v. *Emperor.* This power is not conferred by S. 238 and is not based on the principle that abetment is minor offence but is conferred by Ss. 236 and 237 and depends in every case upon the facts proved.
[See also (1932) 1932 Mad W N 1216 (1217), *Ratna Reddi* v. *Emperor.*]

(1912) 13 Cri L Jour 203 (203) : 14 Ind Cas 203 (Mad), *Singaravelu Pillai* v. *Emperor.* Charge for principal offence — Conviction cannot be for abetment.

2. (1912) 13 Cri L Jour 223 (223) : 14 Ind Cas 319 (Mad), *In re, Varayal Krishnan Nair.*

(1904) 1 Cri L Jour 113 (118) : 1904 Pun Re No. 1, *Buoha* v. *Emperor.*

(1922) 1922 Mad 110 (111) : 23 Cri L Jour 206, *Muthukanakku Pillai* v. *Emperor.*

(1924) 1924 Bom 432 (432) : 25 Cri L Jour 1135, *Emperor* v. *Raghya Naghya.*

(1929) 1929 Nag 325 (328) : 30 Cr L Jour 944 : 21 Nag L R 43, *Kisandas* v. *Emperor.*

(1921) 60 Ind Cas 999 (1000) : 22 Cri L Jour 311 (Pat), *Darbari Chowdhury* v. *Emperor.*

(1927) 1927 Cal 63 (64) : 28 Cri L Jour 2, *Hulaschand* v. *Emperor.* S. 237 was not referred to but the case proceeded on S. 238.

(1920) 1920 Cal 834 (834) : 22 Cri L Jour 448, *Rajah Khan* v. *Emperor.*

(1923) 1923 Cal 453 (455) : 50 Cal 41 : 24 Cri L Jour 763, *Emperor* v. *Profulla Kumar Muzumdar.*

(1910) 11 Cri L Jour 49 (49) : 33 Mad 264, *Padmanabha Panji Kanniah* v. *Emperor.*

(1932) 1932 Cal 545 (546) : 34 Cri L Jour 39, *Ali Ahmed* v. *Emperor.* Charge of abetment of forgery cannot be framed along with charge of using as genuine a forged document.
[See also (1928) 1928 Lah 382 (390) : 30 Cri L Jour 18, *M. L. Pritchard* v. *Emperor.* Unfair to convict of abetment.]
[See also (1929) 1929 Nag 325 (328) : 30 Cri L Jour 944, *Kisan Das* v. *Emperor.* In the absence of a definite charge of abetment of murder the accused cannot be convicted for abetment of murder.]

Note 9.

1. (1872-1892) 1872-1892 Low Bur Rul 136 (137), *Queen-Empress* v. *Nga On Gaing.*

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of charge there is a difference of opinion, one set of cases[2] holding that a charge "you committed either kidnapping or abduction" in one head of charge is not legal, while another set of cases[3] holding that such a charge is not illegal, though it may be *desirable* to frame seperate charges.

See also Note 7 *ante*.

10. Sentence.

Where an accused is convicted of two offences alternatively the sentence should be considered from the point of view of the maximum sentence provided for the lesser of the two alternative offences.[1] This is so even where a person is charged under two parts of the same Section, one carrying a higher and the other a lighter punishment.[2]

11. "Series of acts"—Meaning of.

It has been held in the undermentioned case[1] that a statement made in the evidence in a civil suit and a statement made in the evidence in a criminal case cannot be considered to be a "series of acts" within the meaning of the Section and that the person making such statement could not therefore be prosecuted under this Section for false evidence on the basis of such contradictory statements. It is submitted that this view cannot be accepted as correct. If as the decision concedes, a statement before the police and a subsequent statement before the Magistrate could form a "series of acts" it is difficult to see how a statement in a civil Court and that in a criminal Court are not a "series of acts".

Sec. 237

When a person is charged with one offence he can be convicted of another.

237.* (1) If, in the case mentioned in Section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that Section, he may be convicted

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*** (Codes of 1882 and 1872)**

Same as that of Sub-section 1 of 1898 Code; Sub-section 2 was newly added in 1898.

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2. (1927) 1927 Cal 644 (646) : 28 Cri L Jour 805, *Mafizaddi* v. *Emperor*.
(1929) 1929 Rang 209 (210) : 7 Rang 96 : 30 Cri L Jour 750, *Po Thin Gyi* v. *Emperor*.

3. (1930) 1930 Cal 209 (210, 211) : 57 Cal 1074 : 31 Cri L Jour 903, *Prafulla Kumar Bose* v. *Emperor*. Dissenting from 1927 Cal 200.
(1934) 1934 Cal 85 (86) : 35 Cri L Jour 487, *Ramizulla* v. *Emperor*. It is however desirable to frame distinct charges to avoid prejudice to accused.
(1933) 1933 Cal 676 (677) : 60 Cal 1394 : 34 Cri L Jour 1219, *Rajabuddin Mondal* v. *Emperor*.
[See also (1934) 1934 Sind 164 (171) : 36 Cri L Jour 231].

Note 10.

1. (1917) 1917 All 29 (30) : 18 Cri L Jour 790 (791) *Hira Nand* v. *Emperor*.
(1920) 1920 All 110 (111) : 42 Cal 302 : 21 Cri L Jour 783, *Ram Singh* v. *Emperor*.
(1912) 13 Cri L Jour 449 (451) : 15 Ind Cas 81 (Cal), *Mobarak Ali* v. *Emperor*.
(1888) 1888 Pun Re No. 32, page 65 (70), *Sohan Singh* v. *Empress*.
(1903) 1903 Pun L R No. 60, page 245 (246, 247), *Sobha Singh* v. *Emperor*.
(1930) 1930 Mad 870 (873) : 54 Mad 68 : 32 Cri L Jour 263, *China Gangappa* v. *Emperor*.
[See also (1872-1892) 1872-1892 Low Bur R 324 (325), *Maung Po Thin* v. *Queen-Empress*.]

2. (1890) 1890 Pun Re No. 27 page 90 (93), *Harnam Singh* v. *Empress*.
(1899) 1899 Pun Re No. 3 page 7 (8), *Shanta Singh* v. *Empress*.

Note 11.

1. (1924) 1924 Sind 1 (3, 4) : 16 Sind L R 285 : 25 Cri L Jour 1195, *Saleh Shah* v. *Emperor*.

of the offence which he is shown to have committed, although he was not charged with it. Sec. 237

(2) When the accused is charged with an offence, he may be convicted of having attempted to commit that offence, although the attempt is not separately charged.

(2) (*Omitted.*)

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence.

Synopsis.

Other Topics.

Abetment and principal offences. See S. 236, Note 8.
Cognate offences. See S. 236, Note 1, Pt. 17.
Common object—S. 141. See S. 236, Note 1, F-N. (11).
Conviction for offences not charged. See Note 2.
Different offence—Conviction for. See Note 2.
Distinct offences. See Note 2, Pt. 2.
Kidnapping and Abduction. See S. 236, Note 1, Pts. 9 and 10 and F-N. (9).
Rape and S. 360, I. P. C. See S. 236, Note 1, F-N. (6).
Sections 376 and 366, I. P. C. See S. 236, Note 1, F-N. (11).
Sections 302 and 194. See S. 236, Note 1, F-N. (11).
Sections 302 and 149. See S. 236, Note 1, F-N. (6).
Sections 302 and 392. See S. 236, Note 1, F-N. (11).
To be taken with S. 236. See Note 2, Pts. 1 to 3.

(Code of 1861—Ss. 56 to 59.)

56. If upon the trial of any person charged with the offence of criminal breach of trust under S. 405, I. P. C., or of criminal breach of trust as a carrier, wharfinger or warehouse keeper under S. 407 of the said Code, it shall be proved that such person took the property in question in any such manner as to amount to the offence of theft under S. 378 of the said Code, he shall not be entitled to be acquitted, but the Court, or the jury in a case tried by jury, shall be at liberty to find that such person is not guilty of the offence charged, but is guilty of the said offence under the said S. 378, and thereupon such person shall be liable to be punished in the same manner as if he had been found guilty upon a charge under the said S. 378.

A person charged with criminal breach of trust may be found guilty of theft.

57. If upon the trial of any person charged with the offence of criminal breach of trust as a clerk or servant under S. 408, I. P. C., it shall be proved that such person took the property in question in any such manner as to amount to the offence of theft under S. 378 of the said Code, or of the offence of theft as a clerk or servant of property in possession of his master under S. 381 of the said Code, he shall not be entitled to be acquitted, but the Court, or the Jury in a case tried by Jury, shall be at liberty to find that such person is not guilty of the offence charged, but is guilty of the said offence under the said S. 378, or S. 381, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been found guilty upon a charge under such Section.

A person charged with criminal breach of trust as a servant may be found guilty of theft, or of theft as a servant.

Sec. 237 Notes 1—2

1. Legislative Changes.

(a) *Changes made in the Code of* 1898:—

Sub-Section 2 was newly added.

(b) *Changes made in* 1923:—

Sub-Section 2 was omitted and inserted as Sub-Section 2-A to Section 238 *infra*.

2. Scope of the Section.

The general rule is that an accused person cannot be convicted of an offence of which he was not charged, and of which consequently, he has had no notice. This Section, however, enables the Court to convict a person of an offence which is disclosed in the evidence and for which he *might have been charged under the provisions of Section* 236, although he was *not charged* with it. The reason of the rule is that the facts relied upon by the prosecution at the beginning of the trial, of which he has notice, are sufficient notice of all offences which such facts will constitute.

The Section will apply, therefore, only in cases falling within Section 236. For cases in which a conviction has been given under this Section without framing a charge therefor, *see* Note 1 to Section 236.[1] In cases where Section 236 has no application as, for instance, where the offence disclosed in evidence is *distinct* from the offence charged,[2] or where there is no *doubt* on the facts which can be proved as to which of several offences, the facts will constitute,[3] this Section has no application, and a conviction without a charge is not legal. The Court may in such cases, frame a new charge under the provisions of Section 227 *ante* and proceed further, in accordance with the provisions of Sec-

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58. If upon the trial of any person charged with the offence of theft under S. 378, I. P. C., or the offence of theft in a building, tent or vessel under S. 380 of the said Code, it shall be proved that he took the property in question in any such manner as to amount to the offence of dishonest misappropriation of property under S. 403 of the said Code, or the offence of criminal breach of trust, under S. 405 of the said Code, he shall not be entitled to be acquitted, but the Court, or the Jury in a case tried by the Jury, shall be at liberty to find that such person is not guilty of the offence charged, but is guilty of the said offence under the said S. 403, or S. 405, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been found guilty upon a charge under such Section.

A person charged with theft may be found guilty of misappropriation or breach of trust.

59. If upon the trial of any person charged with the offence of theft as a clerk or servant of property in the possession of his master, under S. 381, I. P. C., it shall be proved that he took the property in question in any such manner as to amount to the offence of dishonest misappropriation of property under S. 403 of the said Code, or the offence of dishonest misappropriation of property possessed by a deceased person at the time of his death under S. 404 of the said Code, or of such dishonest misappropriation under the said S. 404 the offender being at the time of the person's decease employed by him as a clerk or servant, or the offence of criminal breach of trust under S. 405 of the said Code, or the offence of criminal breach of trust as a clerk or servant under S. 408 of the said Code, he shall not be entitled to be acquitted, but the Court, or the Jury in a case tried by Jury, shall be at liberty to find that such person is not guilty of the offence charged, but is guilty of the offence under the said S. 403, S. 404, S. 405 or S. 408, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been found guilty upon a charge under such Section.

A person charged with theft as a servant may be found guilty of misappropriation.

Section 237—Note 2.

1. For cases in which conviction can be given, see Foot-Notes (5), (6), (7) and (8) of Note 1 to S. 236.
2. See Foot-Note (11) of Note 1 to S. 236.
3. See Note 1 Foot-Note (12).

tions, 228 and 229. But where, in such cases, the Court, without framing a charge as it ought to have done, convicts the accused, the conviction is not *ipso facto* void on that ground only unless, in the opinion of the Court of appeal or revision, a *failure of justice*, has, in fact, been occasioned thereby. *See* Section 535 *infra*.[3a]

The question of prejudice or failure of justice will arise therefore only in cases *not* falling within Section 237 inasmuch as in cases falling under it the Court is *entitled* to convict the accused of an offence disclosed in the evidence, although he was not charged with it. The High Court of Calcutta has, however, in the undermentioned case[4] held, that though a conviction may be legal under Section 237, it may be set aside under Section 535 *if it has prejudiced the accused*. It is submitted that this view is not correct. Section 237 clearly shows that a charge *need not be framed* before a conviction is given, and what need not be done in law, cannot prejudice the accused. The High Court of Allahabad also, has, in two cases[5] held that Sections 227 and 237 necessarily go together, and that it is not the intention of the Legislature, even in cases coming under Section 237, to empower a Court to convict a person of an offence of which he has not been told anything. The reasoning of these decisions also is not correct and is against the express wording of the Section that a conviction can be given "although he was not charged with it." The actual decisions both of the Calcutta High Court and of the Allahabad High Court, can be supported, however, on the ground that Section 237 did not apply to those cases, and that a conviction without a charge in cases not falling within Section 237, is governed by Section 535 and the question of prejudice thus becomes relevant. In the Calcutta case the offence charged and the offence of which the accused was convicted were *distinct offences* to which Sections 236 and 237 could not apply. In the Allahabad cases, there could be no *doubt* on the facts charged as to which of several offences such facts would constitute. *See also* the undermentioned case.[6]

Where a Court finds it necessary to make use of the Section to convict an accused person of an offence with which he has not been charged it should be particularly careful to formulate in its own mind the charge upon which,

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3a [See (1925) 1925 Cal 581 (582) : 26 Cri L Jour 356, *Sheikh Abdul* v. *Emperor*.]

(1925) 1925 Nag 294 (294) : 26 Cri L Jour 1358, *Akbar Hussain* v. *King-Emperor*. Distinct offences.

(1933) 1933 Mad 843 (844) : 35 Cri L Jour 76, *Baluchami Pillai* v. *Emperor*. S. 237 held not to apply.

4. (1927) 1927 Cal 520 (521) : 54 Cal 476 : 28 Cri L Jour 404, *Dibakar* v. *Saktidhar Kabiraj*. Charge under S. 379 Penal Code—Conviction under Section 143, I. P. C. That these are distinct offences to which S. 237 does not apply is borne out by 27 Cal 660 and 30 Cal 288 cited in the above case.

5. (1925) 1925 All 448 (448) : 26 Cri L Jour 1057, *Dhum Singh* v. *Emperor*. Charge under S. 34 of the Police Act—Conviction in the one case under S. 279 and in the other case under S. 290 of the Penal Code. In both these cases the facts charged did not amount to an offence under S. 34 of the Police Act. There could be no "doubt" therefore as to "which of several offences" the facts charged would constitute.

(1926) 1926 All 227 (228) : 27 Cri L Jour 152, *Raghunath Kandu* v. *Emperor*.

6. (1933) 1933 All 30 (31) : 34 Cri L Jour 445. *Qabul* v. *Emperor*. Charge for murder — Conviction for S. 194, Penal Code, not illegal as it falls under S. 237, but the accused should nevertheless be asked to plead to the charge.

Sec. 237 Notes 2—4

had it been duly framed, it would be prepared to convict.[7]

3. Conviction for offence requiring sanction.

Where a person is charged with offence *A* on facts on which he might have been charged also with offence *B* under Section 236, but the latter offence is one which could not be taken cognizance of by the Court in the absence of a complaint by the aggrieved person, it has been held that he could not be convicted of offence *B* under this Section in the absence of such complaint.[1]

See also Note 6 to Section 199 *ante*.

4. Powers of an Appellate Court.

See Section 423 *infra* and the Notes thereto.

Sec. 238

238.* (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

When offence proved included in offence charged.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

237 (1) * * * *

(2) When the accused is charged with an offence, he may be convicted of having attempted to commit that offence, although the attempt is not separately charged.

(2-A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(3) Nothing in this Section shall be deemed to authorize a conviction of any offence referred to in S. 198 or S. 199 when no complaint has been made as required by that Section.

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*(Code of 1882—Section same as that of 1898 Code.)

(Code of 1872,—S. 457).

457. When a person is charged with an offence and part of the charge is not proved, but the part which is proved amounts to a different offence, he may be convicted of the offence which he is proved to have committed, though he was not charged with it.

When offence proved included in offence charged.

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7. (1916) 1916 All 294 (294) : 17 Cri L Jour 64 (64), *Abdul Rab* v. *Emperor*.

Note 3.

1. (1918) 1918 Lah 385 (386) : 1918 Pun Re No. 2 : 19 Cri L Jour 300, *Roda Singh* v. *Emperor*.
(1926) 1926 Rang 169 (171) : 4 Rang 131 : 27 Cri L Jour 1075, *U Nyan Neinda* v. *Emperor*.

Illustrations.

(a) *A* is charged, under Section 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under Section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under Section 406.

(b) *A* is charged, under Section 325 of the Indian Penal Code, with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under Section 335 of that Code.

Synopsis.

Other Topics.

Converse of the Section i. e. Conviction for major offence not charged. See Note 1, Pt. 8.
Evidence insufficient for major offence. See Note 1, Pt. 1.
Grievous hurt and rioting. See Note 2, Pt. 5, Note 2, F-N (10).
Illustrations of major and minor offences. See Note 2, Pt. 2.
Major and minor offences — Examples of offences not coming under the category. See Note 2, Pt. 3.
Offences included in offences charged. See Note 1, Pt. 1.
Prejudice. See Note 1 Pts. 5 and 6, Note 2, Pt. 10.
Sections 302 and 363. See Note 2, F-N (3).
Sections 201 and 202. See Note 2, F-N (3).
Sections 324, 434, 392 and 397, I. P. C. See Note 2, F-N (2).
Sections 411 and 412 I. P. C. See Note 1, F-N (10); Note 2, F-N (2).
Sections 392 and 458, I. P. C. See Note 1, F-N (8).
Sections 302 and 396. See Note 2, F-N (3).
Sections 365, 366 and 376. See Note 5, F-N (2); Note 2, F-N (2).
Sections 379 and 395. See Note 1, F-N (10); Note 2, F-N (2).
Sections 352 and 147. See Note 2, F-N (2) and F-N (10).
Sections 304 and 326. See Note 1, Pt. 12.
Sections 147 and 323. See Note 2, F-N (3).
Trial with assessors. See Note 1, Pt. 11.
Trial with jury. See Note 1, Pt. 9a and 10.

1. Scope and principle of the Section.

The Section contemplates a conviction of a minor offence included in the offence charged in either of two cases. The first is where the offence charged consists of several particulars, a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved. The second is where facts are proved which reduce the offence charged to a minor offence.[1] Illustration (a) to the Section is an example of the first class of cases and Illustration (b) of the second.[2]

Illustrations.

(*a*) *A* is charged, under S. 407, I. P. C., with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under S. 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under S. 406.

(*b*) *A* is charged with murder. He may be convicted of culpable homicide, or of causing death by negligence.

(Code of 1861—*Nil*).

Section 238—Note 1.

1. (1893) 7 C P L R 17 (18), *Empress* v. *Sheodayal.*
2. (1893) 7 C P L R 17 (18), *Empress* v. *Sheodayal.*

Sec. 238 Note 1

The principle on which the Section proceeds is that where an offence consists of several particulars, a combination of some only of which constitutes a complete minor offence, the graver charge gives notice to the accused of all the circumstances going to constitute the minor offence of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when the circumstances constituting the major charge do not necessarily and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter.[3]

The Section is an exception to the rule that a person cannot be convicted of an offence with which he is not charged.[4] Therefore though under this Section an accused person, can be convicted of a different offence, from that he was accused of, it should be done only in cases where the accused is not prejudiced in any way by the conviction on the new charge.[5] Thus where the accused is charged under Section 457 Penal Code for criminal trespass with intent to commit theft and where he denies the trespass, he cannot be convicted of criminal trespass with intent to commit adultery under Section 456 Penal Code because upon the case for prosecution and on the line of defence adopted by the accused, the latter cannot be said to have any knowledge of the charge of which he is convicted and would therefore be prejudiced in his defence.[6] But where in such a case the accused himself admits trespass but states that it was with the intention of committing adultery and not theft, he cannot be held to be, in any way, prejudiced, inasmuch as, in order to sustain a conviction under Section 456 it is not necessary to *specify* any criminal intention. It is sufficient if a guilty intention is proved such as is contemplated in Section 441 of the Penal Code.[7]

Though the Section enables a Court to convict a person of a minor offence, when charged with a major offence, there is no provision of law which allows the converse case *viz.*, the conviction for a major offence on a charge of a minor one.[8]

The powers given by this Section are not controlled by the Sections of the Code which prescribe the procedure to be followed in trying the offence

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3. (1874) 11 Bom H C R 240 (241), *Reg* v. *Chand Nur.*
   (1893) 7 C P L R 17 (18), *Empress* v. *Sheodayal.*
   (1900) 13 C P L R 167 (168), *Empress* v. *Dongria Gaoli.*
   (1924) 1924 Bom 502 (504): 49 Bom 84: 26 Cri L Jour 1000, *King-Emperor* v. *Ranchhod Sursang.*
4. (1925) 1925 Cal 903 (904): 26 Cri L Jour 594: *Nayan Ullah* v. *Emperor.*
5. (1922) 1922 Pat 5 (7): 23 Cri L Jour 114, *Balkesar Singh* v. *Emperor.*
   (1917) 1917 Cal 824 (825): 44 Cal 358: 17 Cri L Jour 424, *Karali Prasad Garu* v. *Emperor.*
   (1921) 1921 Pat 217 (218), *Jadav Mahton* v. *Emperor.*
   (1913) 14 Cri L Jour 212 (213): 19 Ind Cas 308 (Cal), *Sital Chandra Maitra* v. *Emperor.* Charge under S. 324, I. P. C.—Conviction under S. 352—Accused held prejudiced in the circumstances of the case and conviction set aside and retrial ordered.
6. (1922) 1922 Pat 5 (7): 23 Cri L Jour 114, *Balkesar Singh* v. *Emperor.*
   (1914) 1914 Cal 663 (663): 41 Cal 743: 15 Cri L Jour 190, *Mahomed Hossein* v. *Emperor.*
7. (1917) 1917 Cal 824 (825): 44 Cal 358: 17 Cri L Jour 424, *Karali Prasad Garu* v. *Emperor.*
8. (1899) 1 Bom L R 513 (514), *Queen-Empress* v. *Durgya.* Under S. 398, I. P. C. on a charge under S. 325, I. P. C.
   (1912) 13 Cri L Jour 429 (430): 1911 Upp Bur Rul 98, *Nga Kaung Nyein* v. *Emperor.* Under S. 458 on a charge under S. 392.
   (1921) 1921 Low Bur 36 (37): 11 Low Bur Rul 45, *Nga Po Kyin* v. *Emperor.* Under S. 468 on a charge under S. 465.

charged and have nothing to do with the form of the trial nor with the convicting authority.[9] Thus the Section invests a jury empanelled to try an offence triable by a jury to find as an incident that the facts proved amount to a minor offence and return a verdict of guilty or not guilty of such offence[9a] though such offence may not be triable by jury but is triable only by assessors.[10] In the same way it empowers a Court trying an accused person for an offence with the aid of assessors to convict him for a minor offence triable by jury; care should, however, be taken to frame a charge for the minor offence, where the facts indicate a reasonable possibility of the minor offence being made out, so that from the beginning the trial may proceed according to the provisions of the Code and the parties concerned may have an opportunity to object to the trial if so advised.[11] But the Section has no application to cases where there is no *conviction* by the jury, of the minor offence. Thus where on a charge under Section 304 Penal Code the jury returned a verdict of not guilty, but returned a verdict of "guilty but not voluntarily" under Section 326 the verdict amounts to only a verdict of "not guilty" under Section 326 and this Section has no application to such a case.[12]

2. "Minor offence."

The words "minor offence" are not defined anywhere in the Code and ought to be taken in their ordinary sense and not in any technical sense.[1] *See* the undermentioned cases[2] for illustrations of major and minor offences. As

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9. (1921) 1921 Bom 59 (60, 61): 45 Bom 619: 22 Cri L Jour 51, *Changouda Porgouda* v. *Emperor*.
   (1926) 1926 Bom 134 (135): 27 Cri L Jour 650, *Emperor* v. *Amanat Kadar*.

9a. (1865) 3 Suth W R 41 (41), *Queen* v. *Satoo Sheikh*.

10. (1902) 26 Mad 243 (246, 247, 248, 249), *Pattikadan Ummaru* v. *Emperor*. Verdict under S. 325, I. P. C., on a charge under Ss. 392, 397.
   (1895) 25 Bom 215 (217, 218), *Queen-Empress* v. *Devji Govindaji*. Verdict under S. 304 on a charge under S. 302.
   (1901) 25 Bom 680 (689, 693, 694), *King Emperor* v. *Parbhu Shankar*. Verdict under S. 325 on charge under Ss. 302 and 304.
   (1926) 1926 Bom 134 (135): 27 Cri L Jour 650, *Emperor* v. *Gulabchand*. Verdict under S. 411 on a charge under S. 412.
   (1865) 2 Suth W R 13 (13), *Queen* v. *Sakhant Sheikh*. Verdict under S. 379 on charge under S. 395.
   (1928) 1928 Mad 275 (275): 29 Cri L Jour 351, *Arumuga Kone* v. *Emperor*. Verdict under S. 325 on a charge under Ss. 434, 392 and 397.
   (1914) 1914 Mad 425 (428): 37 Mad 236: 13 Cri L Jour 739, *In re Adabala Muthiyalu*. Verdict under S. 326 on a charge under S. 397.
   (1928) 1928 Mad 275 (275, 276): 29 Cri L Jour 351, *Arumuga Kone* v. *Emperor*. Verdict under S. 324 on a charge under Ss. 434, 392, 397.
   (1929) 1929 Nag 295 (296): 31 Cri L Jour 557, *Narayan Singh Chhatri* v. *Emperor*. Verdict under S. 325 on a charge under S. 307.
   (1910) 11 Cri L Jour 630 (630): 13 Oudh Cas 295, *Shubrati* v. *Emperor*. Verdict under Ss. 376 and 109—Attempt on a charge under S. 376.
   (1915) 1915 Low Bur 39 (45): 16 Cri L Jour 676 (682, 683): 8 L B R 274, *S. P. Gosh* v. *Emperor*. Verdict under Ss. 392 and 109 on a charge under S. 392.

11. (1921) 1921 Bom 59 (60, 61): 45 Bom 619: 22 Cri L Jour 51, *Changouda Pirgouda* v. *Emperor*. Conviction under S. 326 on a charge under S. 302.

12. (1908) 7 Cri L Jour 362 (366, 367) (Cal), *Emperor* v. *Khudiram Das*.

Note 2.

1. (1895) 22 Cal 1006 (1010), *Queen-Empress* v. *Sita Nath Mandal*.

2. *In the following cases the first is a minor offence, the second offence charged being the major one :—*
   (1932) 1932 Mad 501 (501): 33 Cri L Jour 598, *Kuppusamy Mudali* v. *Emperor*. S. 143, Penal Code—S. 147, Penal Code.
   (1868) 4 Mad H C App 18 (19).
   (1880) 5 Cal 184 (187), *Bhokteram* v. *Heera Kolita*—S. 182, Penal Code—S. 211, Penal Code.
   (1914) 1914 Sind 66 (66, 67): 8 Sind L R 179:

Sec. 238 Note 2

to what are not major and minor offences, *see* the cases cited below.[3]

16 Cri L Jour 104, *Emperor* v. *Khubomal*. (Do).
(1924) 1924 Bom 502 (504, 507): 49 Bom 84: 26 Cri L Jour 1000, *King Emperor* v. *Ranchhod Sursang*. S. 307, Penal Code—S. 304 Penal Code.
(1922) 1922 All 114 (114), *Hanuman* v. *King Emperor*. S. 323. Penal Code—S. 147, Penal Code.
(1923) 1923 Lah 326 (327): 26 Cri L Jour 598, *Indar Singh* v. *Emperor*. S. 323, Penal Code—S. 148, Penal Code.
(1931) 1931 Lah 566 (568): 33 Cri L Jour 315, *Jogindar Singh* v. *Emperor*. S. 323, Penal Code—Ss. 302 and 149 Penal Code.
(1912) 13 Cri L Jour 750 (751): 6 Sind L R 116, *Emperor* v. *Chagan Rajaram*, S. 323 Penal Code—S. 304 Penal Code.
(1907) 5 Cri L Jour 424 (426): 34 Cal 325, *Dasarath Mandal* v. *Emperor*. S. 323, Penal Code—S. 304 or S. 325.
(1912) 13 Cri L Jour 481 (482): 39 Cal 896, *Kunja Bhuniya* v. *Emperor*. S. 323 Penal Code—S. 325, Penal Code.
(1928) 1928 Mad 275 (275): 29 Cri L Jour 351, *Arumuga Kone* v. *Emperor*. S. 324, Penal Code—Ss. 434, 392, 397.
(1934) 1934 Oudh 251 (253): 35 Cri L Jour 943, *Mohammad Nabi Khan* v. *Emperor*, S. 325, Penal Code—S. 304, Penal Code.
(1929) 1929 Nag 295 (296): 31 Cri L Jour 557, *Narayan Singh* v. *Emperor*. S. 325, Penal Code—S. 307, Penal Code.
(1926) 1926 Cal 895 (896): 27 Cri L Jour 926, *Emperor* v. *G. C. Wilson*, Ss. 325, 326, 334, Penal Code—S. 304, Penal Code.
(1914) 1914 Mad 425 (428): 37 Mad 236: 13 Cri L Jour 739, *In re Adabalamuthiyalu*. S. 326, Penal Code—S. 397, Penal Code.
(1875) 23 Suth W R Cri Rul 61 (62), *Queen* v. *Lukhinarain Agoori*. S. 335, Penal Code—S. 395, Penal Code.
(1926) 1926 Cal 1059 (1060): 53 Cal 599: 27 Cri L Jour 1314, *Tarap Ali* v. *Emperor*, Ss. 341, 352, I. P. C.—S. 366, I. P. C.
(1884) 7 Mad 454 (456, 457), *Queen Empress* v. *Papadu*. S. 352, I. P. C.—S. 147, I. P. C.
(1922) 1922 Mad 110 (111, 112): 23 Cri L Jour 206, *Muthukanakku Pillai* v. *Emperor*. (Do).
(1895) 22 Cal 1006 (1008, 1009), *Queen Empress* v. *Sitanath Mandal*. S. 365, I. P. C.—Ss. 366, 376, I. P. C.
(1893) 17 Bom 369 (372), *Queen Empress* v. *Khoda Uma*. S. 379, I. P. C.—S. 395, I. P. C.
(1864) 1 Suth W R Cri L 13 (13). (Do).
(1895) Ratanlal 797 (797), *Queen Empress* v. *Bhavjya*. S. 392, I. P. C.—S. 398, I. P. C.
(1929) 1929 Sind 147 (148): 30 Cri L Jour 875, *Haroon* v. *Emperor*. S. 403, I. P. C.—S. 395, I. P. C.
(1898) 21 All 127 (128), *Queen Empress* v. *Mathura Prasad*. S. 408, I. P. C.—S. 409, I. P. C.
(1926) 1926 Bom 134 (135): 27 Cri L Jour 650, *Emperor* v. *Gulabchand Dosoji*. S. 411, I. P. C.—S. 412, I. P. C.
(1867) 7 Suth W R 73 (74), *Queen* v. *Jogeshur Bagdee*. (Do).
(1928) 1928 All 139 (140): 29 Cri L Jour 232, *Har Prasad* v. *King Emperor*. S. 411, I. P. C.—S. 413, I. P. C.
(1886) Ratanlal 293 (294), *Queen Empress* v. *Balu*. S. 414, I. P. C.—S. 457, I. P. C.
(1925) 1925 Pat 389 (389): 26 Cri L Jour 682, *Banamali Kumar* v. *Emperor*. S. 426, I. P. C.—S. 430, I. P. C.
(1887) 1887 Pun Re No. 9, page 14 (16), *Alla Bakhsh* v. *Empress*. S. 447, I. P. C.—S. 457, I. P. C.
(1913) 14 Cri L Jour 424 (425): 28 Ind Cas 408 (All), *Rup Deb* v. *King Emperor*. S. 447, I. P. C.—S. 32 of the Forest Act.
(1917) 1917 Cal 824 (826): 17 Cri L Jour 424 (426): 44 Cal 358, *Karali Prasad Guru* v. *Emperor*. S. 456, I. P. C.—S. 457, I. P. C.
(1921) 1921 Pat 217 (218), *Jadab Mahton* v. *Emperor*. (Do).
(1914) 1914 Cal 649 (655): 41 Cal 545: 15 Cri L Jour 35: *C. H. Booth* v. *Emperor*. Bengal Excise Act 5 of 1909 Ss. 61 and 46 (a)—S. 46.
(1935) 1935 Pat 129 (130): 36 Cri L Jour 829, *Nihora Kahar* v. *Emperor*. S. 454, I. P. C.—S. 447, I. P. C.
(1928) 1928 Oudh 402 (403): 3 Luck 680: 29 Cri L Jour 893, *Emperor* v. *Shiva Datta*. S. 290, I. P. C.—S. 278, I. P. C.

3. (1924) 1924 Mad 375 (376): 47 Mad 61: 25 Cri L Jour 554, *In re, Sreeramalu*. S. 160, I. P. C.—Ss. 147 and 323, I. P. C.
(1912) 13 Cri L Jour 18 (18): 5 Sind L R 123, *Imperator* v. *Rino*. S. 202—S. 201.
(1933) 1933 Cal 294 (295) (S B): 34 Cri L Jour 524, *Madhusingh Kaiharta* v. *Emperor*. S. 302—S. 396, I. P. C.
(1925) 1925 Cal 903 (904): 26 Cri L Jour 594, *Nayan Ullah* v. *Emperor*. Ss. 304 and 149—S. 304, I. P. C.
(1929) 1929 Mad W N 185 (185), *In re, Ponniah Rowther*. S. 323—S. 397.
(1894) 7 C P L R 17 (19), *Empress* v. *Sheodayal*. S. 330—S. 302.
(1926) 1926 Cal 895 (896): 27 Cri L Jour 926, *Emperor* v. *G. C. Wilson*.

Sec. 238 Note 2

Abetment:—Abetment is not a minor offence having regard to the manner in which Sub-Section 2-*A* expressly makes mention of an attempt to commit an offence and is silent as to abetment of an offence. It therefore cannot come under this Section.[4]. As to whether a person charged with a substantive offence can be convicted of the abetment thereof without framing a charge, *see* Notes to Section 236 *ante*.

Rioting and unlawful assembly:—A charge of rioting under Section 147 or of being a member of an unlawful assembly under Section 149, does not by itself or by being charged together with a charge of hurt, include as a minor offence an act of violence by an individual accused so as to authorise under this Section a conviction for grievous hurt under Section 323[5] or Section 325[6] or Section 326[7] or for assault under Section 352[8] or for criminal trespass.[9] The High Court of Madras has however held that a conviction on the substantive charge only on a charge coupled with Section 149, Penal Code is not necessarily bad, the legality of the conviction depending on whether the accused has or has not been materially prejudiced by the form of the charge.[10]

S. 334—S. 352, I. P. C.
(1894) 2 Weir 302, (302), *Savari Ayee, In re*. S. 363—S. 302.
(1906) 3 Cri L Jour 240 (242) (Bom), *Emperor* v. *Sakharam Ganu*. S. 366—S. 376.
(1930) 1930 Lah 544 (544): 32 Cri L Jour 301, *Mangloo* v. *Emperor*. S. 369—S. 392.
(1885) Ratanlal 211 (212): *Queen Empress* v. *Dala Tala*. Ss. 380, 457—S. 395.
(1912) 13 Cri L Jour 597 (597): 16 Ind Cas 165 (Cal), *Amanallah* v. *Emperor*, S. 384—S. 379.
(1924) 1924 Lah 109 (110): 4 Lah 373: 25 Cri L Jour 385, *Wallu* v. *Emperor*. S. 397—S. 302.
(1900) 13 C P L R 167 (168): *Empress* v. *Dongria Gaoli*. S. 404—S. 302.
(1926) 1926 Lah 691 (691): 7 Lah 561: 27 Cri L Jour 1004, *Ghauns* v. *Emperor*. S. 412—S. 302.
(1926) 1926 Lah 132 (134): 26 Cri L Jour 1361, *Achpal* v. *Emperor*. S. 412—S. 396, I. P. C.
(1925) 1925 Oudh 89 (89): 25 Cri L Jour 1087, *Munnay Mirza* v. *Emperor*. S. 426—S. 452.
(1930) 1930 Rang 158 (159): 8 Rang 13: 31 Cri L Jour 799, *U Ka Deo* v. *Emperor*. S. 427 I. P. C.—S. 409.
(1931) 1931 Cal 414 (414): 59 Cal 8: 32 Cri L Jour 892, *Mehar Sheikh* v. *Emperor*. Ss. 448, 323—S. 395 I.P.C.
(1922) 1922 Bom 97 (98): 46 Bom 657: 23 Cri L Jour 259, *Mutubhai M. Shah* v. *Emperor*. Ss. 96 and 155 Bombay District Municipal Act.
(1934) 1934 All 872 (873): 36 Cri L Jour 766, *Dipchand* v. *Emperor*. S. 353, I.P.C. —S. 323. Opinion tentatively expressed.

4. (1927) 1927 Cal 63 (64): 28 Cri L Jour 2, *Hulas Chand Baid* v. *Emperor*.
(1927) 1927 All 35 (36): 49 All 120: 27 Cri L Jour 1118, *Mahabir Prasad* v. *Emperor*.
(1924) 1924 Bom 432 (432): 25 Cri L Jour 1135, *Emperor* v. *Raghya Nagya*.

5. (1907) 5 Cri L Jour 424 (426): 34 Cal 325, *Dasarath Mandal* v. *Emperor*.
(1918) 1918 Mad 496 (496, 497): 18 Cri L Jour 860, *In re Mongalu Aorodhono Hathi*. (Napier, J., *contra*).

6. (1907) 5 Cri L Jour 427 (432): 34 Cal 698, *Jatindra Nath Chatterji* v. *Emperor*.
(1912) 13 Cri L Jour 502 (503): 15 Ind Cas 646 (Cal), *Reazuddi* v. *Emperor*.
(1920) 1920 Pat 216 (218, 219): 21 Cri L Jour 439, *Pertab Rai* v. *Emperor*.
(1880) 5 Cal 871 (873), *Queen-Empress* v. *Mahaddi*.

7. (1915) 1915 Cal 292 (294): 41 Cal 662: 15 Cri L Jour 155, *Emperor* v. *Madan Mondal*.
(1901) 6 Cal W N 98 (101), *Ram Sarup Rai* v. *Emperor*.

8. (1929) 1929 Pat 712 (713): 9 Pat 642: 30 Cri L Jour 891, *Mallu Gope* v. *Emperor*.
(1911) 12 Cri L Jour 82 (82): 9 Ind Cas 455 (Cal), *Kanta Neya* v. *Emperor*.

9. (1875) 23 Suth W R 59 (59), *Queen* v. *Salamat Ali*.
(1914) 1914 Cal 631 (632): 15 Cri L Jour 188, *Ariff Munshi* v. *Emperor*.
(1918) 1918 Mad 496 (496): 18 Cri L Jour 860, *In re Mangalu Aorodhono Hathi*.

10. (1925) 1925 Mad 1 (6): 47 Mad 746: 25 Cri L Jour 1297 (F B), *Theethumalai Goundan In re*. Ss. 149 and 326—Conviction under S. 326.
(1922) 1922 Mad 110 (111): 23 Cri L Jour 206, *Muthukanakku Pillai* v. *Emperor*. S. 147 — Conviction under S. 352.

Sec. 238 Notes 3—4

3. Attempt—Sub-Section 2-A.

Under the Amendment Act of 1923, Sub-Section 2 of Section 237, has been transferred to this Section and re-enacted as Sub-Section 2-A, as more appropriate here than under Section 237.

Under this Sub-Section when a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.[1]

4. When minor offence requires complaint.—Sub-Section 3.

This Section must be read subject to Sections 198 and 199 *ante* which require the complaint of the aggrieved person, before the Court can take cognizance of offences referred to therein.

A person charged with one offence cannot therefore be convicted of a minor offence if the latter requires a complaint by a particular person mentioned in Sections 198 and 199 of the Code, when there is no such complaint. Thus a prosecution for adultery under Section 497 or for enticing away a married woman under Section 498 requires a complaint by the husband and therefore a person charged with rape or abduction cannot be convicted either under Section 497[1] or under Section 498[2] in the absence of a complaint by the husband. Similarly no conviction can be made under Section 498 when the complaint was specifically made under Section 497 only.[3] So also no conviction can be made under Section 500 for defamation in the absence of a complaint by the person aggrieved, where the complaint was under Sections 353, and 504[4] or under Section 501 Penal Code.[5] It has been held in the undermentioned case[6] that the Court cannot convict an accused person of a minor offence for the taking cognizance of which a complaint *under Section* 195 is necessary, without such complaint. (*See also* Note 6 to Section 190 and Section 196-A, Note 6 *ante*).

Note 3.

1. (1875) 12 Bom H C R 1 (7), *Reg* v. *Ravjirav Jivbajirav.*
   (1899) 26 Cal 863 (867), *Lala Ojha* v. *Queen Empress.*
   (1924) 1924 Cal 18 (43) : 25 Cri L Jour 1313, *Bilinghurst* v. *Blackburn.*
   (1932) 1932 Cal 723 (725, 726) : 60 Cal 179 : 34 Cri L Jour 177, *Hanuman Sarma* v. *Emperor.*
   (1925) 1925 Mad 480 (482) : 48 Mad 774 : 26 Cri L Jour 755, *Doraisamy Iyer In re.*
   (1910) 11 Cri L Jour 630 (630) : 13 Oudh Cas 295, *Shubrati* v. *Emperor.*
   (1917) 1917 Pat 699 (699) : 17 Cri L Jour 272 (272), *Sadho Lal* v. *Emperor.*
   (1934) 1934 Pat 561 (563) : 13 Pat 729 : 36 Cri L Jour 17, *Bhikhari Singh* v. *Emperor.*
   (1914) 1914 Cal 473 (475) : 41 Cal 537 : 15 Cri L Jour 4, *Kalicharan Mukerjee* v. *Emperor.* A case under the Bengal Excise Act.

Note 4.

(1882) 5 All 233 (235), *Empress* v. *Kallu.*
(1912) 13 Cri L Jour 287 (288) : 14 Ind Cas 671 (Bom), *Emperor* v. *Imamkhan Rasulkhan.*
(1902) 29 Cal 415 (416), *Chemon Garo* v. *Emperor.*
(1903) 30 Cal 910 (915, 916), *Tara Prasad Laha* v. *Emperor.* Distinguishing 20 Cal 483.
(1913) 14 Cri L Jour 284 (286) : 1912 Upp Bur R 155, *Nga Po Thaw* v. *Emperor.*

2. (1907) 5 Cri L Jour 164 (167) : 31 Bom 218, *Emperor* v. *Isap Mohammad.*
   (1904) 27 Mad 61 (62), *Bangaru Asari* v. *Emperor.*
   [But see (1893) 20 Cal 483 (486), *Jatra Shekh* v. *Reazat Shekh.* Distinguished in 30 Cal 910. In this case the deposition of the complainant was held to be a complaint and therefore coming under the Section.]
3. (1873) 1873 Pun Re No. 18 page 20 (21), *Sher Singh* v. *Crown.*
4. (1887) 10 All 39 (42, 43), *Queen Empress* v. *Deokinandan.*
5. (1923) 1923 Oudh 4 (6) : 26 Oudh Cas 44 : 23 Cri L Jour 641, *Gaya Barhai* v. *Emperor.*
6. (1925) 1925 All 129 (130) : 47 All 114 : 26 Cri L Jour 446, *Narain Singh* v. *Emperor.*

5. Powers of Appellate Courts and High Court. **Sec. 238 Note 5**

An appellate Court may exercise the powers under this Section and may alter a conviction for a major offence, into one for a minor offence.[1] It is competent for the High Court even in a reference under Section 307 of the Code to convict the accused of any offence which the jury could have convicted him of.[2] *See also* Notes to Section 423 *infra*.

239. When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence and another of abetment of, or attempt to commit, such offence, they may be charged and tried together or separately as the Court thinks fit, and the provisions contained in the former part of this Chapter shall apply to all such charges.

What persons may be charged jointly.

239.* The *following persons may be charged and tried together, namely :—* **Sec. 239**

What persons may be charged jointly.

(*a*) persons accused of the same offence committed in the course of the same transaction ;

(*b*) persons accused of an offence and persons accused of abetment or of an attempt to commit such offence ;

(*c*) *persons accused of more than one offence of the same kind within the meaning of Section 234 committed by them jointly within the period of twelve months ;*

(*d*) persons accused of different offences committed in the course of the same transaction ;

(*e*) *persons accused of an offence which includes theft, extortion or criminal misappropriation, and persons accused of re-*

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* **(Codes of 1882 and 1872.**—*Sections same as that of* 1898 *Code.*)

(Code of 1861.—*Nil.*)

Note 5.

1. (1922) 1922 All 143 (143) : 23 Cri L Jour 198, *Hanuman* v. *Emperor*. Conviction under S. 147, alternative one under S. 323.
   (1924) 1924 All 662 (663): 25 Cri L Jour 900, *Bandhu* v. *Emperor*. Conviction under S. 302 altered into one under S. 307.
   (1891) 14 All 25 (29), *Queen-Empress* v. *Hughes*. Conviction under S. 366 altered into one under S. 361.
   (1886) Ratanlal 293 (294), *Empress* v. *Balu*. Conviction under S. 457 altered into one under S. 414.
   (1927) 1927 Oudh 296 (296) : 2 Luck 503 : 28 Cri L Jour 673, *Jawao Hussain* v. *Emperor*.
2. (1877) 3 Cal 189 (192), *Empress* v. *Harai Mirdha*. Conviction under S. 143 on charge under Ss. 326 and 149.
   (1908) 8 Cri L Jour 143 (144) (Bom), *Emperor* v. *Chandrakrishna*. Conviction under S. 379 on charge under S. 395.
   (1895) 22 Cal 1006 (1009), *Queen-Empress* v. *Sitanath Mandal*. Conviction under S. 365 on a charge under Ss. 366 and 376.
   (1914) 1914 Mad 425 (428) : 37 Mad 236 : 13 Cri L Jour 739, *In re Adabala Muthiyalu*. Conviction under S. 326 on a charge under S. 397.

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ceiving or retaining or assisting in the disposal or concealment of property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last named offence ;

(*f*) *persons accused of offences under Sections 411 and 414 of the Indian Penal Code or either of those Sections in respect of stolen property the possession of which has been transferred by one offence; and*

(*g*) *persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence;*

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges.

Illustrations.

(a) *A* and *B* are accused of the same murder. *A* and *B* may be charged and tried together or the murder.

(b) *A* and *B* are accused of a robbery, in the course of which *A* commits a murder with which *B* has nothing to do. *A* and *B* may be tried together on a charge, charging both of them with the robbery, and *A* alone with the murder.

(c) *A* and *B* are both charged with a theft, and *B* is charged with two other thefts, committed by him in the course of the same transaction. *A* and *B* may be both tried together on a charge, charging both with the one theft, and *B* alone with the two other thefts.

Synopsis.

Other Topics.

Accused need not act together from start to finish. See Note 6, Pt. 6.
Bribery. See Note 8, Pt. 2.
Charge and not final result. See Note 6, Pt. 8.
Contempts of Courts by different persons. See Note 6, F-N. (4).
Dacoities. See Note 3, Pt. 4, Note 6; Pt. 7; Note 6 F-N. (4).
Different accused tried for different offences in same transaction. See Note 2, Pts. 3 to 7; Note 6, Pt. 1; Note 7, Pt. 1.
Different objects. See Note 7, Pts. 1 and 2; Note 8, Pt. 3.
Discretion. See Note 3.
Distinct and separate offences. See Note 6, F-N. (4).
Distinct offences in same transaction. See Note 2, Pt. 3a, Note 6, Pt. 1, Note 7; Note 8; Note 9; Pt. 3, Note 10; Note 11.
False information. See Note 6, F-N (2) and (4).
Fights. See Note 8 Pts. 3 to 5.
Forgery. See Note 5, F-N. (1); Note 6, F-N. (1).
Forgery and perjury. See Note 9, F-N. (1).
Jurisdiction not affected. See Note 1, Pt. 4.
Kidnapping with other offences. See Note 6, F-N. (4).
Legislative Amendments. See Note 2; Note 16; Note 17.
Local and special Acts. See Note 2, Pt. 8. Note 6, F-N. (1) and (4); Note 21 F-N. (1).
Murder with other offences. See Note 4, F-N. (4).
Murder and S. 201, I. P. C. See Note 2, Pt. 3; Note 6, F-N. (4).
Not in same transaction. See Note 2, Pts. 1, 2 and 5, Note 19.
Object. See Note 1, Pt. 1.
Objections. See Note 21, F-N. (1).
Offence under Ss. 401 and 413, I. P. C. See Note 6, F-N. (4), Note 16, Pt. 2.
Offences of same kind. See Note 2, Pts. 1, 2, 7 and 8.
Prejudice. See Note 21, Pt. 3; Note 1 F-N. (2).
Receivers of stolen property—Several and distinct. See Note 17, Pts. 1 to 5.
Receiving stolen property. See Note 16; Note 17; Note 6, F-N. (4).
Security proceedings. See Note 1, Pt. 3a; Note 6, F-N. (4).
Sections 411 and 458, I.P.C. See Note 6 F-N. (4).
Trials and not enquiries. See Note 1, Pts. 2 & 3.
Two opposing parties under S. 107. See Note 1, F-N. (3a).

1. Scope and applicability of the Section.

This is the last exception to the rule enacted in Section 233 that every offence must be tried separately. It is under this Section that the joint trial of several accused persons is permissible.[1]

The Section applies only to *trials* and not to enquiries. It is not illegal therefore to jointly commit several accused persons for offences not falling within the provisions of this Section[2] though it should, as a matter of prudence, be avoided.[3]

Inquiries under Chapter VIII stand on a somewhat different footing. Under Section 117 of the Code such inquiries have to be made as nearly as may be practicable in the manner prescribed for conducting trials. Section 239 will apply to such inquiries and a joint inquiry of several persons proceeded against under Chapter VIII would be illegal if the case does not come within

Section 239—Note 1.

1. (1908) 8 Cri L Jour 11 (13) : 4 Nag L R 71, *Emperor* v. *Balwant Singh.*
2. (1897) Ratanlal 915 (915), *Queen-Empress* v. *Raghu Valad Hari.*
(1902) 26 Mad 592 (594), *In the matter of Govindu.*
(1919) 1919 Mad 45 (47) : 20 Cri L Jour 379 : 42 Mad 561, *In re Nathiri Chachiah.*
[But see (1897) Ratanlal 925 (926), *Queen-Empress* v. *Daulata Dhondi.* Where it was quashed on account of prejudice caused].
3. (1869) 11 Suth W R 16 (16), *The Queen* v. *Kureem.*
(1881) 1881 Pun Re No. 22, page 47 (49) *Queen* v. *Haibat.*

Sec. 239 Notes 1—2

the terms of this Section.[3a]

The Section is subject to the rules as to jurisdiction laid down in Chapter 15 and consequently a Magistrate cannot try persons for offences committed outside his jurisdiction, though otherwise the case may fall within the provisions of this Section.[4]

The provisions of the Section refer to persons *accused*, that is to say, charged. The provisions are therefore intended to deal with the position as it exists at the time of charge, and not with the *result* of the trial. Hence, a joint trial of several persons under this Section is not vitiated merely by the fact that at the end of the trial the facts found happen to be different from those on the footing of which the charges were originally framed.[5]

2. This Section and Ss. 234 to 239, if mutually exclusive.

A and *B* are accused of jointly committing two distinct offences of the same kind but not forming part of the same transaction. Can they be tried together? Under the Section as it stood before 1923 there was no provision corresponding to Clause (c) of the present Section and there was a divergence of opinion on the question. According to one set of cases[1] the words at the end of the Section "and the provisions contained in the *former part* of this chapter shall apply to all such charges" did not refer to Section 234 to Section 238 but only to Sections 221 to 232, that, therefore, the word "person" in Section 234 could not in view of the said words in quotation, be read as including "persons," that neither Section 234 nor Section 239 consequently applied to the case and that therefore they could not be tried together. According to another class of cases[2] the words quoted above include also Sections 234 to 238, that in this view, the word "person" in Section 234 must be read as including "persons" and that the trial was not bad. Clause (c) of the present Section now makes it clear that such a trial is permissible.

There is still, however, a difference of opinion *in cases not covered by clause* (*c*) as to whether Sections 234 to 238 and this Section are, or are not, mutually exclusive. Where *A* and *B* were accused of murdering *X* and *B* was also accused in the alternative under Section 236 of an offence under Section 201 of the Penal Code, it was held that *A* and *B* could be tried together for the offences under Sections 302 and 201 respectively.[3] Similarly where *A*,

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3a. (1904) 1 Cri L Jour 58 (60) (Cal), *Pran Krishna Saha* v. *Emperor.*
(1891) Ratanlal 585 (586), *Queen-Empress* v. *Gaiba.*
(1891) Ratanlal 556 (557), *Queen-Empress* v. *Bapu.*
[See (1907) 5 Cri L Jour 197 (199) (Cal), *Kamal Narayan Chowdhury* v. *Emperor.* Two opposing parties under S. 107 proceeded against at one inquiry.]

4. (1929) 1929 Mad 839 (840) : 30 Cri L Jour 1161 : 52 Mad 991, *Sachidanandam* v. *Sowmya Gopala Aiyengar.*

5. (1935) 62 Cal 946 (950), *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Raghulal Brahman.*

Note 2.

1. (1914) 1914 Low Bur 263 (264) : 16 Cri L Jour 44 (45) : 7 Low Bur R 272, *Po Mya* v. *Emperor.*
(1918) 1918 Nag 139 (140) : 20 Cri L Jour 7 *Shyad Lal* v. *Emperor.*
(1906) 3 Cri L Jour 126 (128) : 33 Cal 292, *Budhai Sheikh v. Tarah Sheikh. A* and *B* looting on two occasions.
(1911) 12 Cri L Jour 266 (267) : 10 Ind Cas 331 (Lah), *Mahbub Ali* v. *Emperor.*
(1908) 8 Cri L Jour 191 (198) : 1 Sind L R 73, *Emperor* v. *Gulam valad Sarang.*
(1921) 1921 All 246 (247) : 22 Cri L Jour 657, *Ram Prasad* v. *Emperor.*

2. (1923) 1923 Mad 181 (181) : 23 Cri L Jour 719, *Kovaganti In re.*

3. (1908) 8 Cri L Jour 191 (198) : 1 Sind L R 73, *Emperor* v. *Gulam valad Sarang.*
[See also (1929) 1929 Cal 298 (299) : 56 Cal 1106 : 30 Cri L Jour 1015, *Tota Meah* v. *Emperor.* In the case of a joint trial of accused per-

Sec. 239 Notes 2—3

B and *C* jointly commit first, offence *X* and then offence *Y*, *X* and *Y* form parts of the same transaction, and *A*, *B* and *C* can be tried together for offences of *X* and *Y* under the provisions of Section 235 read with this Section.[3a] On the other hand where *A* and *B* were accused of jointly committing offences *X* and *Y* or in the alternative abetment thereof, it was held that the words quoted above did not refer to Sections 234 to 238, that Section 236 could not therefore be applied to cases coming under this Section and that the joint trial was bad.[4]

Where *A* and *B* were accused of jointly committing first an offence *X* and then another offence *Y*, (*X* and *Y* not being offences of the same kind nor forming part of the same transaction) it was held that, though Section 235 and this Section should be read together, neither of them applied to the case and that a joint trial of *A* and *B* for the said offences was not permissible.[5]

Where *A* was charged with being in dishonest possession of several bullocks belonging to different persons and *A*, *B* and *C* were charged with being in dishonest possession of the bullocks of one of such persons, it was held that *A*, *B* and *C* could be tried together by combining Sections 234 and this Section.[6]

It has also been held in the undermentioned case[7] that where several offences of the *same kind* form parts of the *same transaction* they can all be tried together and that Section 234 cannot be applied so as to limit the number of offences triable to three. This view seems however, to proceed on the basis that the words "former part" at the end of this Section do not apply to Sections 234 to 238. Offences under Section 41 (h) and 41 (j) of the Factories Act 1911 are offences of the "same kind" within the meaning of this Section.[8] In the case of a joint trial under this Section, it is open to the Court to convict a person of an offence of which he was not expressly charged, by applying the provisions of Section 237.[9]

3. "May be tried together."

Before the amendment of 1923 the Section contained the words "as it thinks fit" and it was held that it was in the discretion of the Court to adopt, in each case, whichever course it regarded as most conducive to the ends of justice.[1] The omission of the said words in the present Section does not however,

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sons an alternative charge against one of them is legal.]

3a. (1919) 1919 Cal 367 (368) : 20 Cri L Jour 122 : 46 Cal 712, *Kailash Chandra Pal* v. *Emperor.*
(1932) 1932 All 25 (26) : 33 Cri L Jour 122 : 54 All 337, *Kashi Nath* v. *Emperor.*
[See however (1916) 1916 Cal 124 (124) : 17 Cri L Jour 224 (224), *Rahiman Bibi* v. *Mobarak Mondal.* Fresh trial was ordered].

4. (1929) 1929 All 202 (203, 204) : 30 Cri L Jour 687 : 51 All 544. *Janeshar Das* v. *Emperor.*

5. (1913) 14 Cri L Jour 116 (117) : 18 Ind Cas 676 (All), *Shanker* v. *Emperor.*

6. (1934) 1934 All 811 (812, 813) : 35 Cri L Jour 1224, *Niranjan* v. *Emperor.*

7. (1926) 1926 Oudh 161 (165) : 26 Cri L Jour 1602, *Bishambhar Nath Tandon* v. *Emperor.*

8. (1932) 1932 Pat 188 (189) : 33 Cri L Jour 274, *Agarwala* v. *Emperor.*

9. (1935) 62 Cal 946 (950), *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Raghulal Brahman.*

Note 3.

1. (1923) 1923 All 91 (106, 107) : 45 All 226 : 25 Cri L Jour 497, *Emperor* v. *Har Prasad Bhargava.*
(1924) 76 Ind Cas 966 (967) : 25 Cri L Jour 294 (Cal), *Emperor* v. *Charu Chander Mukerjee.*
(1915) 1915 Cal 688 (689) : 16 Cri L Jour 3 (4) : *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Monmohan Roy.*
(1890) 13 Mad 426 (427), *Queen-Empress* v. *Sami.*
[See also (1920) 1920 Nag 255 (260,

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make any difference and the words "may be tried together" show that it is still in the discretion of the Court to adopt whichever course it thinks best.[2] Wherever the applicability of the Section is doubtful, it is far better that it should not be applied than that it should.[3] Where 4 dacoities were committed at 4 different places within 2 years and the accused, 14 in number, were alleged to have taken part in one or more of them, it was held that it would have been more proper to try them separately for the dacoities in which they took part rather than try them jointly for an offence under Section 400, Penal Code.[4]

An exercise of discretion under the Section even if improper, will not be interfered with unless it has occasioned a failure of justice.[5]

4. "Accused of the same offence"—Cl. (a).

The word "offence" has been defined in Section 4 (1) (o) *ante* as meaning "any act or omission made punishable by any law for the time being in force." The words "same offence" would therefore signify one and the same physical act of crime and not different acts constituting crimes called by the same name or punishable under the same Section.[1] Thus several persons being together in possession of the same stolen property[2] or several persons together subscribing their names to a false written statement[3] commit the same offence. See also the following cases.[4] Where 5 or more persons actuated by a single motive made several attacks against certain persons, it was held that they committed a *single riot* and not a number of separate riots.[4a]

In the undermentioned case[5] when *A* made a false charge against *X* of stealing goats, and next day *B* made a false charge against *X* of stealing the same goats, it was held that *A* and *B* committed the *same* offence. It is submitted that this is not correct. *A* and *B* cannot be said to have committed the *same act of crime* though they may be said to have committed similar acts forming part of the same transaction. The same observations would apply to the case cited below.[5a]

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261) : 16 Nag L R 9 : 21 Cri L Jour 810, *Govinda Sambhuji Mali* v. *Emperor*.]

2. (1915) 1915 Cal 688 (689) : 16 Cri L Jour 3 (4), *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Manmohan Roy*. Discretion is not trammelled in any way.

3. (1927) 1927 Mad 177 (178) : 50 Mad 735 : 27 Cri L Jour 1381, *Samiullah Sahib* v. *King Emperor*.

4. (1911) 12 Cri L Jour 260 (261) : 10 Ind Cas 833 (Lah), *Ghulam Mustafa* v. *Emperor*.

5. (1922) 1922 Cal 107 (113) : 49 Cal 573 : 23 Cri L Jour 657, *Abdul Salim* v. *King Emperor*.

Note 4.

1. (1916) 1916 Nag 73 (75) : 18 Cri L Jour 339 (342) : 13 Nag L R 35, *Gunwant* v. *Emperor*.

2. (1934) 1934 All 811 (812) : 35 Cri L Jour 1224, *Niranjan* v. *Emperor*.

3. (1884) 1884 All W N 52 (53), *Empress* v. *Mehrban Singh*.

4. (1919) 1919 Cal 367 (368) : 46 Cal 712 : 20 Cri L Jour 122, *Kailash Chandra Pal* v. *Emperor*. Two persons together cheating another.

(1917) 1917 Mad 524 (525) ; 17 Cri L Jour 30 (31), *Appathurai Iyer* v. *Emperor*. Three persons jointly entrusted with money and committing criminal breach of trust in respect thereof in collusion.

(1924) 1924 All 233 (234) : 27 Cri L Jour 193, *Abdullah* v. *Emperor*. Wilful murder by members of unlawful assembly in prosecution of common object of assembly.

(1933) 1933 Rang 271 (272) : 34 Cri L Jour 1185, *U Po Yone* v. *Emperor*. Complaint of dacoity with murder—All can be tried together.

(1935) 1935 Rang 299 (300) : 36 Cri L Jour 1380, *Nga Tha Aye* v. *Emperor*.

4a (1925) 1925 Oudh 65 (66) : 25 Cri L Jour 1169, *Prag* v. *King Emperor*.

5. (1903) 27 Mad 127 (129), *Mallappa Reddi* v. *Emperor*.

5a (1917) 1917 Pat 522 (523) : 18 Cri L Jour 687, *Emperor* v. *Lalu Gope*. Where five tenants who act in concert are charged with the offence of mischief

Where a single offence has been committed and the allegation of the prosecution is that *either A or B* committed the crime, it cannot be said that *A* and *B* committed the same offence.[6] They cannot therefore be tried together at one trial under this Section.[7]

5. Abetment and attempt.—Cl. (b).

Under Clause (b) persons accused of an offence and persons accused of abetment[1] or of an attempt to commit such offence,[2] may be jointly tried. The trial of offenders and their accomplices, would therefore come under this Clause;[3] so also would a trial of two persons one for attempt to commit an offence and another for abetment of the offence.[4]

6. "Same transaction"—Cl. (a).

Where *A* commits offence *X*, *B* commits offence *Y* and *C*, offence *Z*, and *X*, *Y* and *Z* form parts of the same transaction, *A*, *B* and *C* can, at one trial, be tried for the offences of *X*, *Y* and *Z* respectively.[1] The words "same

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committed in respect of different plots in their respective possessions, they can be said to have committed only one offence.

6. (1913) 14 Cri L Jour 563 (564) : 7 Low Bur R 68, *Azim-Ud-din* v. *Emperor.*
7. (1934) 1934 Rang 193 (194) : 35 Cri L Jour 1312, *Intaj Khan* v. *Emperor.*
(1923) 1923 Rang 67 (68) : 24 Cri L Jour 750, *Kyon Dwe* v. *King Emperor.*
[See (1899) 3 Cal W N 277*n* (278*n*), *Baldeo Lal* v. *Empress.*]
(1913) 14 Cri L Jour 562 (563) : 21 Ind Cas 162 (All), *Ramdhir Rai* v. *Emperor.*

Note 5.

1. (1912) 13 Cri L Jour 255 (256) : 14 Ind Cas 607 (Cal), *Priya Nath Bishai* v. *Emperor.*
(1915) 1915 Cal 743 (743) : 16 Cri L Jour 348 (348), *Dwarka Singh* v. *Emperor.*
(1884) 1884 All W N 52 (53), *Empress* v. *Mehrban Singh.*
(1882) 1882 Pun Re Cr No. 32, page 39 (40), *Thakur Singh* v. *Empress.*
(1924) 1924 Mad 384 (385, 386) : 25 Cri L Jour 792, *Arumuga Goundan* v. *Emperor.*
(1930) 1930 Mad 102 (103) : 31 Cri L Jour 457, *Subbayya Pillai* v. *Sesha Iyer.*
(1914) 1914 Oudh 275 (278) : 17 Oudh Cas 276 : 15 Cri L Jour 643, *Abbas Quli Khan* v. *Emperor.*
[See also (1904) 1 Cri L Jour 714 (716) : 31 Cal 1007, *Prasanna Kumar Das* v. *Emperor.*]
[But see (1920) 1920 All 358 (358) : 42 All 24 : 20 Cri L Jour 634, *Kadhe Mal* v. *Emperor.* User of forged document—Abetment of forgery.]
2. (1920) 1920 Lah 364 (365) : 1919 Pun Re Cr No. 30 : 21 Cri L Jour 306, *Akbar* v. *Emperor.* Offence of rape and an attempt to commit rape can be tried jointly when committed in the same transaction.
3. (1926) 1926 Mad 638 (640) : 50 Mad 274 : 27 Cri L Jour 394, *Sogiamuthu Padayachi, In re.*
4. (1911) 12 Cri L Jour 106 (107) : 38 Cal 453, *Kali Das* v. *Emperor.*

Note 6.

1. (1908) 8 Cri L Jour 75 (80) (Lah), *Ishar Das* v. *Emperor.*
(1908) 8 Cri L Jour 191 (195, 200) : 1 Sind L R 73, *Emperor* v. *Ghulam.* Ss. 201 and 302.
(1905) 2 Cri L Jour 582 (584) (Bom). *In re Shriniwas Krishna Shriralkar.*
(1927) 1927 Cal 149 (152): 53 Cal 929: 27 Cri L Jour 1268, *Ganguly* v. *Watson.* S. 72, Provincial Insolvency Act and S. 102, Presidency Towns Insolvency Act.
(1929) 1929 Mad 450 (450) : 52 Mad 532 : 30 Cri L Jour 983, *Sriramulu Naidu* v. *Emperor.* Where a person commits forgery and another abets forgery and uses the forged document as genuine, the offences are parts of the same transaction.
(1905) 2 Cal L Jour 47*n* (47*n*), *Kunja Behary Bose* v. *Emperor.* Ss. 363 and 372, Penal Code.
(1929) 1929 Cal 160 (161): 30 Cri L Jour 619, *Kali Kumar* v. *Nawab Ali.* All the offences committed by persons, whether substantive offences or abetment of those offences can be tried together provided they were committed by the persons in the course of the same transaction.
(1928) 1928 All 20 (21) : 50 All 412: 28 Cri L Jour 1001, *Darab* v. *Emperor.* Some persons are charged with offences punishable under Ss. 3 and 4, Gambling Act and others are charged under S. 4 only—Their joint trial is legal.
[See also (1931) 1931 Mad W N 397 (399), *T. V. Govindaraja Mudaliar* v.

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transaction" have the same meaning as they have in Section 235 *ante*.[1a] As seen in Note 2 to that Section the test whether the several offences are parts of the same transaction is to see whether they are so related to one another in point of purpose, or as cause and effect or as principal and subsidiary acts, as to constitute one continuous action.[2] Where there is such continuity of purpose or design and continuity of action, the different acts may be regarded as a transaction.[3] Where there is no identity or community of purpose and no concert but the accused persons seperately commit offences, whether of the same kind or not, they cannot be regarded as parts of the same transaction and a joint trial is bad.[4] As has been seen in Note 2 to Section 235, proximity of *time*

Emperor. Ss. 5 and 6 and R. 27-C, Motor Vehicles Act and S. 337, Penal Code.]

(1910) 11 Cri L Jour 30 (33, 35): 4 Ind Cas 700 (Mad). *In re Loganatha Iyer*. Persons associated from the first in the series of acts which form the same transaction.

(1906) 4 Cri L Jour 178 (179) (Lah), *Chhail Bihari* v. *Emperor*. *C*, who held a license for sale of opium, allowed *B*, who did not hold license, to sell opium. The accused can be jointly tried and convicted of an offence under S. 9, Opium Act.

1a. (1931) 1931 Pat 52 (53): 32 Cri L Jour 478, *Ganesh Prosad* v. *Emperor*.

2. (1905) 2 Cri L Jour 578 (579): 30 Bom 49, *Emperor* v. *Datto Hanmant*.

(1927) 1927 Sind 39 (45): 21 Sind L R 107: 27 Cri L Jour 1233, *Emperor* v. *Lukman*.

(1920) 1920 Pat 230 (234): 21 Cri L Jour 161, *Tepanidhi Gobinda Chandra Bharati* v. *Emperor*.

(1933) 1933 Nag 136 (140): 29 Nag L R 251: 34 Cri L Jour 505, *M. F. Rego* v. *Emperor*. Murder, the fabrication of evidence to suggest burglary and false information given by one of them are so connected together as to form one transaction.

3. (1917) 1917 Lah 78 (79): 18 Cri L Jour 282 (283, 284): 1917 Pun Re Cr No. 17, *Tulsi* v. *Emperor*. Ss. 467, 472 and 420.

(1919) 1919 Mad 487 (493): 20 Cri L Jour 354, *Kumaramuthu Pillai* v. *Emperor*. Ss. 348 and 380.

4. (1933) 1933 Pat 91 (92): 11 Pat 779: 34 Cri L Jour 215, *Ganesh Parshad* v. *Emperor*. Two petitioners tried for the misappropriation of various items of money which were independent transactions carried out by them independently of one another.

(1920) 1920 Cal 927 (928): 22 Cri L Jour 333: *Gopal Kahar* v. *Emperor*. Information to police given by two persons separately on different dates.

(1918) 1918 Cal 471 (471): 18 Cri L Jour 833 (833), *Emperor* v. *Fazal Sheik*. Two persons executed one kabuliyat and two others executed another kabuliat on the same day.

(1923) 1923 Rang 132 (132): 4 Upp Bur R 127: 25 Cri L Jour 319, *King-Emperor* v. *Nga Sein*. Disobedience of a lawful order under S. 19, Burma Village Act.

(1933) 1933 Nag 368 (369): 34 Cri L Jour 1175, *Emperor* v. *Amolak*. Illicit grazing of cattle—13 accused—No prior consultation or community of purpose proved.

(1884) 1 Weir 707 (707), *In re Raya*. Labourers charged for individual breaches of their contracts.

(1908) 8 Cri L Jour 243 (248): 1908 Pun Re Cr No. 12, *Mangal Singh* v. *Emperor*.

(1912) 13 Cri L Jour 240 (240): 14 Ind Cas 432 (Mad), *Public Prosecutor* v. *Irusan*. Joint trial of several persons for separate and distinct offences under S. 162-B, Local Boards Act is illegal

(1910) 11 Cri L Jour 412 (412): 37 Cal 895, *Bhairab Chandra Kolay* v. *Corporation of Calcutta*. Disobedience of an order under the Municipalities Act.

(1926) 1926 Lah 248 (249): 7 Lah 168: 27 Cri L Jour 465, *Aisha* v. *Crown*. (Do).

(1883) 1883 All W N 25 (25), *Empress* v. *Debidial*. Contempt of Court by several persons.

(1927) 1927 Mad 177 (177): 50 Mad 735: 27 Cri L Jour 1381. *In re Samiullah Sahib*. Theft by several persons of fish from waters.

(1914) 1914 Lah 42 (44): 1913 Pun Re No. 20: 15 Cri L Jour 11, *Emperor* v. *Nanakchand*. Joint trial of 68 persons individually charged with using short weights.

(1922) 1922 All 428 (429): 23 Cri L Jour 596, *Fateh Chand* v. *Emperor*.

(1923) 1923 Cal 11 (13): 50 Cal 159: 24 Cri L Jour 206, *Asutosh Das* v. *Purna Chandra*.

(1926) 1926 Cal 320 (321): 27 Cri L Jour 268, *Keramat Mandal* v. *Emperor*.

(1914) 1914 Lah 575 (576): 1914 Pun Re No. 21: 16 Cri L Jour 136, *Emperor* v. *Chuni*. Case under S. 110.

(1910) 11 Cri L Jour 293 (294) : 6 Ind Cas 242 (Mad), *Musalappa* v. *Emperor*. S. 21 (d), Madras Forest Act and S. 147, Penal Code.
(1903) 29 Cal 385 (386, 387), *King-Emperor* v, *Gobind Koeri*. S. 128, Railways Act and S. 225, Penal Code.
(1918) 1918 Lah 148 (149): 1917 Pun Re Cr No. 44 : 19 Cri L Jour 100, *Jai Singh* v. *Emperor*. S. 395, Penal Code and Arms Act.
(1933) 1933 Sind 352 (353) : 35 Cri L Jour 153, *Pirano Lakho* v. *Emperor*. Ss. 215 and 411.
(1907) 12 Cal W N 15*n* (16), *Jajnaram* v. *Emperor*. Ss. 224, 342, 225 and 147.
(1905) 2 Cri L Jour 393 (394) (Cal), *Emperor* v. *Esua Sheikh*. Distinct and separate offences committed by separate sets of persons at different times.
(1914) 1914 Low Bur 263 (264) : 16 Cri L Jour 44 (45) : 7 Low Bur R 272, *Po Mya* v. *Emperor*. S 457, Penal Code.
(1915) 1915 Mad 534 (535) : 15 Cri L Jour 695 (695), *In re Anantha Padiyara*.
(1909) 10 Cri L Jour 452 (453) : 4 Ind Cas 1 (Cal), *Laskari* v. *Emperor*. There was no continuity in the idea or method of the rioters.
1906) 4 Cri L Jour 479 (480) : 3 Low Bur R 214, *Emperor* v. *Madhub Chandra Raj*. Ss. 188 and 419.
(1925) 1925 Cal 413 (414) : 26 Cri L Jour 467, *Surendra Lal Das* v. *Emperor*. Joint trial of one charged under S. 201 and another under S. 304, I. P. C., was held illegal.
(1934) 1934 Pesh 112 (113, 114) : 35 Cri L Jour 1410, *Faiz Alam* v. *Emperor*. Ss. 211 and 161.
(1930) 1930 Rang 114 (117) : 7 Rang 821 : 31 Cri L Jour 387, *Maung Ba Chit* v. *Emperor*. Ss. 120-B, 379 and 413, Penal Code.
(1934) 1934 Lah 630 (631): 36 Cri L Jour 676, *Dhan Singh* v. *Emperor*. S. 174 and S. 406.
(1918) 1918 Nag 139 (140) : 20 Cri L Jour 7, *Shyad Lal* v. *Emperor*. S. 457.
(1932) 1932 Lah 486 (488) : 33 Cri L Jour 584, *Arjan Das* v. *Emperor*. Ss. 401 and 413.
(1906) 3 Cri L Jour 76 (76, 77) : 1905 Pun Re Cr No. 51, *Jagga* v. *Emperor*. Ss. 411 and 458, Penal Code.
(1905) 2 Cri L Jour 30 (31) (Lah), *Gurditta* v. *Emperor*. Ss. 411 and 457.
(1893) 1893 Pun Re Cr No. 13, page 61 (63), *Chanda* v. *Empress*. Ss. 363 and 368, Penal Code.
(1930) 1930 Lah 896 (896) : 32 Cri L Jour 139, *Mangha Ram* v. *Emperor*. Two persons abducting girl—Third person not taking part in abduction—Cheating third person by false representation as to caste of girl—Transactions cannot be said to be same.
(1882) 1882 All W N 215, *Empress* v. *Daya Ram*. Ss. 458 and 411.
(1917) 1917 Lah 191 (192) : 18 Cri L Jour 112 (112), *Muhammad* v. *Emperor*. Ss. 411 and 457.
(1924) 1924 All 316 (317) : 46 All 54 : 25 Cri L Jour 466, *Puttoo Lal* v. *Emperor*. Ss. 324 and 342.
(1883) 1883 All W N 188 (188), *Empress* v. *Harnam*. Ss. 193 and 471, I. P. C.
(1883) 1883 All W N 158 (158), *Empress* v. *Jurawan*. Ss. 411 and 457, I. P. C.
(1882) 1882 All W N 178 (178), *Empress* v. *Lekha*. Ss. 395 and 401, I. P. C.
(1930) 1930 Pat 159 (160) : 32 Cri L Jour 9, *Raghu Dasadh* v. *Emperor*.
(1906) 4 Cri L Jour 285 (286): 1906 Pun Re Cr No. 10, *Nawab Singh* v. *Emperor*, Ss. 302 and 201, I. P. C.
(1916) 1916 Mad 571 (571, 572): 16 Cri L Jour 298 (299), *In re Mela Mekalakati Subbadu*. Offences in different villages on different nights.
(1925) 1925 Lah 537 (538) : 26 Cri L Jour 1097, *Chhajju* v. *Emperor*. Ss. 401 and 413.
(1926) 1926 Lah 132 (133) : 26 Cri L Jour 1361, *Achpal* v. *Emperor*. A person cannot be tried upon a charge under S. 412, jointly with others who are being tried for the offence of dacoity under S. 396.
(1903) 1903 Pun Re Cr No. 17 page 44 (47), *Singhara* v. *Emperor*, Ss. 368 and 419, I. P. C.
(1920) 1920 Cal 927 (928) : 22 Cri L Jour 333, *Gopal Kahar* v. *Emperor*. Two persons giving separate false information on different dates.
(1883) 2 Weir 303 (303), *In re Porasu Nayako*. The accused persons acted independently and made separate defences, held the joint trial was illegal.
(1904) 1 Cri L Jour 713 (714) : 31 Cal 1053, *Hira Lal Thakur* v. *Emperor*. *H* and *S*, who were both concerned in an offence, committed on a certain date, were jointly tried for that offence, as also for another offence committed by *S* only on a previous date.
(1921) 1921 Lah 236 (236) : 22 Cri L Jour 145, *Ghasita Mal* v. *Emperor*. Several accused—Occurrences alone at intervals — All persons involved not same. S. 225-B. I. P. C.
(1925) 1925 All 301 (302, 303) : 26 Cri L Jour 734, *Tufail Ahmad* v. *Emperor*. Different offences were committed by different persons without common intent.
(1882) 1882 All W N 180 (180), *Empress* v. *Dalla*. Six persons tried for six dacoities committed on different

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is not essential to constitute the acts, parts of the same transaction.[5] Nor is it necessary that the accused should have acted together from start to finish.[6] On the other hand the mere fact that several offences of the same kind such as dacoity are committed at about a particular time, will not necessarily make them parts of the same transaction.[7]

In order to say whether several persons can be jointly tried as having committed offences forming parts of the same transaction, the Court has to look to the accusation, i. e., the prosecution case *as set forth in the charges themselves*, and if according to that case, the offences are such as could be regarded as parts of the same transaction it would be justified in holding a joint trial: It need not consider what the *final* result of the case would be.[8]

7. Acts done in pursuance of conspiracy.

It has been seen in Note 2 to Section 235 that where there is a conspiracy having a definite object in view, and several offences are committed in pursuance of such conspiracy, the several offences will generally form parts of the same transaction. This principle will also apply where the several offences

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dates, the dacoities do not form part of the same transaction.

(1921) 1921 All 408 (409): 22 Cri L Jour 397, *Ram Sahai* v. *Emperor*. Five dacoities were committed in the same district within the space of one week. In each dacoity some persons were common but others were not.

(1911) 12 Cri L Jour 208 (209): 10 Ind Cas 63 (Lah). *Karam Singh Mali* v. *Emperor*. *A* cheating *X*, *B* cheating *Y* and *C* cheating Z.

(1902) 1902 Pun Re Cr No. 16 page 45 (46). *Khushala* v. *Emperor*. (Do).

(1928) 1928 All 417 (417) : 30 Cri L Jour 214, *Sewak* v. *Emperor*. *A* harbouring two absconding offenders *L* and *N* and *S* with the same offence with respect to two different persons *H* and *P*.

(1929) 1929 Lah 142 (142, 143) : 29 Cri L Jour 1080, *Sultan Ahmed* v. *Emperor*.

(1910) 11 Cri L Jour 477 (477) : 7 Ind Cas 390 (Mad), *Shunmooga Thevan Sinna Thevan* v. *Emperor*. Four accused were charged and tried together for two offences of dacoity committed on 30th May and 2nd June 1909, not forming part of the same transaction.

(1931) 1931 Rang 90 (92-94) : 32 Cri L Jour 930 : 8 Rang 632, *Meeriah* v. *Emperor*.

5. (1905) 2 Cri L Jour 578 (579) : 30 Bom 49, *Emperor* v. *Datto Hanmant*.

(1925) 1925 Mad 690 (692) : 26 Cri L Jour 1513 : 49 Mad 74, *Gam Mallu Dora In re*.

(1917) 1917 Lah 78 (79) : 18 Cri L Jour 282 (283) : 1917 Pun Re Cr No. 17, *Tulsi* v. *Emperor*.

(1931) 1931 Pat 52 (53) : 32 Cri L Jour 478, *Ganesh Prosad* v. *Emperor*. The expression " same transaction " in S. 235, Criminal P. C., suggests not necessarily proximity in time so much as continuity of action and purpose.

6. (1911) 12 Cri L Jour 268 (269) : 10 Ind Cas 349 (Mad), *Madaswamy Chetty* v. *Emperor*.

7. (1934) 1934 Oudh 325 (326) : 35 Cri L Jour 1048 *Ganno* v. *Emperor*.

8. (1924) 1924 All 233 (236) : 27 Cri L Jour 193, *Abdullah* v. *King-Emperor*.

(1934) 1934 All 61 (65) : 35 Cri L Jour 1349, *Ram Das* v. *Emperor*.

(1929) 1929 Bom 128 (129, 130) : 30 Cri L Jour 588 : 53 Bom 344, *Emperor* v. *Gopal Raghunath*.

(1924) 1924 All 233 (236) : 27 Cri L Jour 193, *Abdullah* v. *Emperor*. Ss. 147 and 302.

[See also (1925) 1925 Mad 690 (699) : 26 Cri L Jour 1513 : 49 Mad 74, *Gam Mallu Dora, In re*. Legality of joint trial depends upon accusation and not upon result of trial.]

(1922) 1922 Cal 107 (113) : 23 Cri L Jour 657 : 49 Cal 573, *Abdul Salim* v. *King-Emperor*.

(1929) 1929 Cal 160 (161) : 30 Cri L Jour 619, *Kali Kumar* v. *Nanuvali*.

(1928) 1928 Cal 675 (677) : 29 Cri L Jour 1022 : 55 Cal 858, *Satya Narain Mohata* v. *Emperor*. Following 1922 Cal 107.

(1932) 1932 All 73 (75, 76) : 33 Cri L Jour 373, *Mohamed Yakub* v. *Emperor*.

(1933) 1933 Mad W N 528 (533), *Satyanarayana* v. *Emperor*.

(1925) 1925 Rang 296 (299) : 26 Cri L Jour 1329 : 3 Rang 95, *Abdul Rahman* v. *Emperor*.

are by *different* persons.[1] The offence of conspiracy and acts done in pursuance of the conspiracy form one and the same transaction.[2] The transaction continues so long as the conspiracy continues.[3]

8. Acts in prosecution of a common object.

All offences committed in prosecution of a common object will generally be parts of the same transaction.[1] Where *A*, *B* and *C* gave bribes on different occasions to *D* and *E*, Police Inspectors, with the same object namely to hush up the case against them, it was held that *A*, *B*, *C*, *D* and *E* could be tried at one trial for the offences of giving and taking bribes respectively.[2]

Where two opposite parties each consisting of 5 or more persons attack each other, each of the parties forms an unlawful assembly, with a different common object: they cannot be tried together as one unlawful assembly.[3]

Note 7.

1. (1922) 1922 Cal 107 (112): 23 Cri L Jour 657 : 49 Cal 573, *Abdul Salim* v. *Emperor.*
   (1915) 1915 Lah 16 (22) : 16 Cri L Jour 354 (398, 399) : 1915 Pun Re No. 17, *Balmokand* v. *Emperor.*
   (1894) 16 All 88 (93), *Queen-Empress* v. *Moss.* S. 418, Penal Code.
   (1929) 1929 Bom 128 (130) : 30 Cri L Jour 588 : 53 Bom 344, *Emperor* v. *Gopal Raghunath.*
   (1924) 1924 Rang 98 (99) : 25 Cri L Jour 270 : 1 Rang 604, *Emperor* v. *Nga Aung Gyaw.* Conspiring to boycott.
   (1918) 1918 Bom 117 (119, 121) : 20 Cri L Jour 71 : 43 Bom 147, *Emperor* v. *Madhav Laxman.*
2. (1934) 1934 All 61 (65) : 35 Cri L Jour 1349, *Ram Das* v. *Emperor.*
   (1933) 1933 Mad W N 528 (534), *Satyanarayana* v. *Emperor.*
   (1930) 1930 Rang 114 (116, 117) : 7 Rang 821 : 31 Cri L Jour 387, *Maung Ba Chit* v. *Emperor.*
3. (1915) 1915 Cal 719 (724) : 16 Cri L Jour 9 (10) : 42 Cal 1153, *Haresh Nath and Khagendra Nath* v. *Emperor.* The term " transaction " is not synonymous with the term " offence."

Note 8.

1. (1928) 1928 All 222 (227) : 30 Cri L Jour 530, *Emperor* v. *Jhabbar Mal.* Successive articles were written in a newspaper in pursuance of a common policy and all the persons who had a hand in the publication are jointly triable.
   (1924) 1924 Cal 389 (391) : 50 Cal 1004 : 25 Cri L Jour 1082, *Kushai Malic* v. *Emperor.* Where four accused were engaged in a crime from 25th June, but the 5th joined them only on the 7th July next—*Held*, that the trial of the four along with the 5th for an act before 7th July is legal.
   (1925) 1925 Cal 580 (581) : 26 Cri L Jour 369, *Patit Paban Ray* v. *Emperor.* Reaping paddy, on different dates by persons not all the same from different plots decreed to complainants, in order to assert a right over them is one transaction.
   (1931) 1931 Mad 225 (226) : 32 Cri L Jour 753, *Sambasiva Mudaliar* v. *Emperor.* Where the accused, six in number, were charged with having opened a sluice in the feeder channel of a river against an order of the P. W. D. first in the evening, and again in the next morning.
   (1916) 1916 Cal 41 (42) : 16 Cri L Jour 120 (121) : 42 Cal 760, *Deputy Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Kailash Chandra Ghose.* Wrongful confinement of *X* on several dates with the object of extorting money.
2. (1929) 1929 Bom 296 (299) : 53 Bom 479 : 31 Cri L Jour 65, *Emperor* v. *Ring.*
3. (1869) 12 Suth W R Cri Rul 75 (76), *Queen* v. *Surroop Chunder Paul.*
   (1906) 4 Cri L Jour 75 (76) : 1906 Pun Re Cr No. 5, *Ala Daya* v. *Emperor.*
   (1880) 6 Cal 96 (102), *Hossein Buksh* v. *Empress.*
   (1869) 1 N W P H C R 293 (297, 298), *Queen* v. *Mahomed Hossain.*
   (1872-1892) 1872-1892 Low Bur R 331 (331), *Queen-Empress* v. *Nga Shwe Tan.*
   (1872-1892) 1872-1892 Low Bur R 275 (275), *Queen-Empress* v. *Nga Shwe Ya.*
   (1881) 1881 All W N 28 (28), *Empress* v. *Bandho Singh.*
   (1881) 1881 All W N 28 (28), *Empress* v. *Lochan.*
   Oudh Sel Cas 75, *Lal Triloki Nath Singh* v *Queen-Empress.*
   (1925) 1925 Lah 149 (150) : 25 Cri L Jour 551, *Muhammad* v. *Emperor.*
   (1882) 1882 All W N 160 (161), *Empress* v. *Pulandhar.*
   (1867) 8 Suth W R 47 (49, 52), *Queen* v. *Sheikh Bazu.*
   (1881) 1881 Pun Re Cr No. 26, page 56 (57), *Empress* v. *Nawab.*
   (1881) 1881 Pun Re Cr No. 22, page 49 (49), *Empress* v. *Haibat.*

Sec. 239 Notes 8—9

Similarly where *A* as well as *B* cause hurt to each other in a fight, they cannot be tried together for the offence of causing hurt to each other.[4] The fighting cannot be considered as a "transaction."[5] It was however held in the undermentioned case[6] that where the object of two opposite parties to take forcible possession of the same piece of land, they could both be tried together in one trial. It is submitted that this view is not correct. It has also been held in the case cited below[7] that a mere common purpose, e. g., to drive the complainant out of a house, is not sufficient to make two perfectly distinct offences parts of the same transaction. Where *A* and *B*, drivers of two motor buses coming from opposite directions collided and 6 persons were injured thereby it was held that though the accused had no similar or identical purpose in view, the transaction was the same and they both could be tried together.[8]

9. Several persons giving false evidence in the same case.

Where *A* and *B* each gives false evidence in the same case the offences cannot, without anything more, be said to form parts of the same transaction.[1] But where the giving of false evidence by *A* and *B* is in furtherance of one sustained and continuous plot for screening the offender and is an incident in

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(1882) 1882 Pun Re Cr No. 15, page 18 (18), *Empress* v. *Saifulla.*

(1868) 9 Suth W R Cri Rul 33 (35), *Queen* v. *Durzoolbazu.*

4. (1903) 2 Low Bur R 106 (107), *Nga Tha Dun Aung* v. *King-Emperor.* [See also (1908) 12 Cal W N 153*n* (154), *Kundro Mohan Panigrahi* v. *Emperor.*]

5. (1892) 20 Cal 537 (547, 550) *Queen Empress* v. *Chandra Bhuiya.*

6. (1920) 1920 All 135 (135): 21 Cri L Jour 562, *Emperor* v. *Mangat.*

7. (1932) 1932 Bom 277 (278) : 33 Cri L Jour 619, *Krishnaji* v. *Emperor.*

8. (1931) 1931 Mad W N 556 (557, 558), *N. K. Baliah* v. *Emperor.*

Note 9.

1. (1912) 13 Cri L Jour 23 (24): 13 Ind Cas 215: 5 Sind L R 129, *Imperator* v. *Haji Alu.*

(1881) 1881 All W N 83 (83): *Empress* v. *Chand Khan.*

(1871) 3 N W P H C R 133 (134), *Queen* v. *Ameer Ali Khan.*

(1872-1892) 1872-1892 Low Bur R 129 (129), *Queen-Empress* v. *Ameer Ahmad.*

(1890) 2 Weir 304 (304), *In re Ponaganti Musalayya.*

(1867) 3 Mad H C App 32 (32).

(1883) 6 Mad 252 (253), *Kotha Subba Chetty* v. *The Queen.*

(1884) 10 Cal 405 (407), *Nathu Sheikh* v. *Queen Empress.* Where four persons were charged with perjury in the same proceedings and the Sessions Judge while professing to try each of them separately heard the evidence of the witnesses only once. *Held* that this was substantially a joint trial of all the accused and was an improper mode of procedure.

(1923) 1923 Lah 89 (90) : 22 Cri L Jour 439, *Lachman Singh* v. *Emperor.*

(1888) 1888 Pun Re Cr No. 39, page 100 (101), *Bagga Singh* v. *Empress.*

(1871) 16 Suth W R Cr 47 (47), *Queen* v. *Maharaj Misser.*

(1868) 9 Suth W R Cr 66 (66), *Queen* v. *Khoab Lall.*

(1867) 7 Suth W R Cr 51 (51), *Queen* v. *Bhairo Misser.*

(1868) 5 Bom H C R 55 (56), *Reg* v. *Bhavani Shankar Haribhai.*

(1885) 1885 All W N 29 (29), *Empress* v. *Din Dayal.*

(1882) 1882 All W N 44 (44), *Empress* v. *Rahmat Khan.*

(1882) 1882 All W N 160 (161), *Empress* v. *Lalak Singh.*

(1882) 1882 All W N 161 (163), *Empress* v. *Niaz Ali.*

(1882) 1882 All W N 124 (124), *Empress* v. *Changu.*

(1882) 1882 All W N 64 (64), *Empress* v. *Piari Lal.*

(1870) 2 N W P H C R 21 (23), *The Queen* v. *Ruttee Ram.*

(1903) 26 Mad 592 (594), *In the matter of Govindu.*

(1870) Ratanlal 31 (32), *Reg* v. *Jeevajee Abajee.*

(1906) 4 Cri L Jour 489 (489) : 3 Low Bur Rul 231, *Empress* v. *Shwe So.*

(1904) 4 Bom L R 53 (54, 55), *King-Emperor* v. *Krishna Rao.*

(1916) 1916 Nag 73 (76): 18 Cri L Jour 339 (342): 13 Nag L R 35, *Gunwant* v. *Emperor.* Dissenting from 13 Cri L Jour 833.

[See also (1882) 4 All 293 (295), *Empress* v. *Anant Ram.* Some accused using forged documents—And other giving false evidence.]

the whole transaction, *A* and *B* can be tried together.[2] In other words if the offences of giving false evidence by each of several persons form parts of the same transaction they could be tried together.[3]

10. Printing and publishing seditious matter.

In cases of sedition, the printer and publisher are concerned in the same transaction in regard to the publication of the seditious matter and can be tried at one trial.[1]

11. Defamation by different persons.

Where *A* filed one petition and *B* filed another making the same defamatory allegations against the complainant, and both the petitions were signed by the same pleader, it was held that the acts formed part of the same transaction.[1] Where *A* and *B* associate together in circulating on different occasions defamatory statements, the object of both of them being to defame the complainant about the same matter, they can jointly be tried at one trial under this Section.[2]

12. Continuing offence.

It has been held by Spencer, J. in the undermentioned case[1] that if an offence is a continuing one such as waging war it can be regarded as a continuous or same transaction. Reilly, J. in the same case has taken a contrary view namely that a continuing offence may or may not be a single transaction.

13. Kidnapping and abduction.

A joint trial of *A* for an offence under Section 366 and of *B* for an offence under Section 368 has been held to be bad in the following cases[1] while a contrary view has been taken in the cases cited below.[2] The question is however, really one of fact depending upon the facts of the particular case as to whether the two offences could be regarded as parts of the same transaction.

14. Keeping gaming house and using it.

It has been generally held that a person keeping a common gaming house and persons using it could be tried together as the two offences are interdependent and forming a complement of each other.[1]

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2. (1912) 13 Cri L Jour 833 (839) : 17 Ind Cas 705 (Bom), *Emperor* v. *Ganesh Narayan Dikshit.*
3. (1927) 1927 Bom 177 (181, 183) : 51 Bom 310 : 28 Cri L Jour 373, *Sejmal Punam Chand* v. *Emperor.* Common purpose to make a false statement, joint trial of two accused is legal.
(1926) 1926 All 334 (336) : 48 All 325 : 27 Cri L Jour 445, *Rafiz-Uz-Zaman* v. *Chhotey Lal.* There was identity of purpose though not community of purpose.

Note 10.

1. (1928) 1928 Bom 139 (139) : 30 Bom L R 320 : 29 Cri L Jour 683, *Shantaram Mirjakar* v. *Emperor.*

Note 11.

1. (1922) 1922 Cal 76 (77) : 23 Cri L Jour 685, *Banga Chandra De* v. *Annoda Charan Chowdhury.*
2. (1930) 1930 Sind 62 (63) : 30 Cri L Jour 1073, *Ali Muhammad* v. *Emperor.*
(1935) 1935 All 769 (770) : 36 Cri L Jour 1296, *Parsotam Das* v. *Emperor.*

Note 12.

1. (1925) 1925 Mad 690 (692, 697) : 49 Mad 74 : 26 Cri L Jour 1513, *Gam Mallu Dora, In re.*

Note 13.

1. (1933) 1933 Cal 563 (564) : 34 Cri L Jour 682, *Mozam Dafadar* v. *Emperor.*
(1929) 1929 Lah 496 (496), *Nawabkhan* v. *Emperor.* Distinguishing 1928 Lah 751.
2. (1932) 1932 Oudh 28 (29) : 33 Cri L Jour 275, *Emperor* v. *Zamin.*
(1928) 1928 Lah 751 (751) : 29 Cri L Jour 496, *Dosa* v. *Emperor.* 1924 Cal 389 Followed (Distinguished in 1929 Lah 496.)
(1932) 1932 Lah 203 (203) : 33 Cri L Jour 190, *Pritan Singh* v. *Emperor.* (*Quaere*).

Note 14.

1. (1919) 1919 Pat 139 (139) : 20 Cri L Jour 768, *Nathu Thakur* v. *Emperor.*

Sec. 239 Notes 15—16

15. Charge need not refer to transaction being same.

It is not necessary that the charge should contain a statement that the transaction is one and the same. It is the tenor of the prosecution and not the wording of the charge that must be considered as the test.[1]

16. Clause (e).

This clause was newly added in 1923. Before its introduction it was held that the joint trial of a thief and the receiver of stolen property was illegal unless they formed parts of the *same transaction*.[1] Now such a joint trial is expressly provided for by this clause.[1a] A receiver from a receiver of stolen property should not be tried with the receiver of the property and the thieves as the former is likely to be prejudiced by the course adopted.[1b]

This clause applies only to offences mentioned therein. So where an accused was charged under Section 413, Penal Code, with other persons who were charged under Section 401, Penal Code, it was held that this clause does not apply, as an offence under Section 401, Penal Code, cannot be said to include theft.[2] But an offence of dacoity (Penal Code Section 395) includes theft and hence, a joint trial of several persons for offences under Sections 395 and 412 is legal.[3]

(1927) 1927 Lah 699 (700) : 28 Cri L Jour 825, *Miran Bakhsh* v. *Emperor.*
(1919) 1919 Lah 204 (204, 205): 1919 Pun Re Cr No. 6 : 20 Cri L Jour 219, *Bhana Mal* v. *Emperor.* Dissenting from 16 Cri L Jour 220 and 11 Cri L Jour 211.
(1922) 1922 Lah 458 (458) : 3 Lah 359 : 23 Cri L Jour 621, *Khilinda Ram* v. *The Crown.*
(1913) 14 Cri L Jour 293 (294): 9 Nag L R 68, *Sheikh Moti* v. *Emperor.*
(1923) 1923 All 88 (88) : 24 Cri L Jour 155, *Ganeshi Lal* v. *Emperor.*
(1929) 1929 All 937 (938, 939) : 31 Cri L Jour 35, *Rure Mal* v. *Emperor.*
[See also (1926) 1926 Bom 195 (198) : 50 Bom 344: 27 Cri L Jour 503, *Emperor* v. *Abasbhai Abdul Hussain.*]

Note 15.

1. (1905) 2 Cri L Jour 578 (579) : 30 Bom 49, *Emperor* v, *Datto Hanmant.*

Note 16.

1. (1919) 1919 Cal 249 (250) : 46 Cal 741 : 20 Cri L Jour 394, *Ohi Bhusan Adikari* v. *Emperor.*
(1913) 14 Cri L Jour 124 (125) : 18 Ind Cas 684 (All), *Baiju* v. *Emperor.*
(1905) 29 Bom 449 (454, 465, 467), *Emperor* v. *Jethalal Hurlochand.* But see Aston, J., *contra*, whose view now comes under Cl. (e).
(1900) 28 Cal 10 (11), *Karu Kalal* v. *Ram Charan Pal.*
(1896) 1 Cal W N 35 (36), *Bishnu Banwar* v. *The Empress.*
(1918) 1918 Cal 494 (494) : 19 Cri L Jour 17, *Ram Ratan Sakul* v. *Emperor.*
(1923) 1923 Lah 394 (394) : 25 Cri L Jour 274, *Sohan Singh* v. *Emperor.*
(1916) 1916 Mad 571 (571, 572): 16 Cri L Jour 298 (300), *In re Mekalakati Subbadu.*
(1914) 1914 Mad 121 (121) : 15 Cri L Jour 471, *In re Nalli Veera Thevan.*
(1914) 1914 Mad 637 (637) : 15 Cri L Jour 256, *In re Govindaraju Mudali.*
(1916) 1916 All 321 (322) : 17 Cri L Jour 159 (161) : 38 All 311, *Emperor* v. *Bhima.*
(1922) 1922 All 208 (208) : 44 All 276 : 23 Cri L Jour 414, *Anwar* v. *Emperor.*
(1923) 1923 All 126 (126, 127) : 45 All 223 : 24 Cri L Jour 149, *Durga Prasad* v. *Emperor.*
(1910) 11 Cri L Jour 244 (245) : 5 Ind Cas 769 (Cal), *Janki* v. *Emperor.*
(1905) 2 Cri L Jour 37 (38) : 1905 Pun Re Cr No. 3, *Emperor* v. *Sunder Singh.*
(1902) 2 Low Bur R 19 (21, 22), *Nga Ta Pu* v. *King Emperor.*
(1907) 5 Cri L Jour 417 (418) : 3 Low Bur R 280, *Paw Tha* v. *Emperor.*
(1907) 6 Cri L Jour 23 (30) : 1907 Upp Bur R 5, *Nga Nyo Gyu* v. *Emperor.*
(1912) 13 Cri L Jour 59 (60): 13 Ind Cas 395 (Rang) *Nga Po Shat* v. *Emperor.*

1a. (1935) 62 Cal 946 (950), *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Raghulal Brahman.* Persons charged under S. 380, I. P. C., can be tried along with persons charged under S. 411.

1b. (1933) 1933 Sind 390 (390) : 27 Sind L R 461 : 35 Cri L Jour 205, *Keshowdas Uttamchand Shadiji* v. *Emperor.*

2. (1925) 1925 Lah 537 (538) : 26 Cri L Jour 1097, *Chhajju* v. *Emperor.*

3. (1935) 36 Cri L Jour 1467 (1468) : 158 Ind Cas 913 (Oudh), *Emperor* v. *Tehri.*

17. Clause (f). **Sec. 239 Note 17**

This clause was newly added in 1923. As pointed out by Mullick, J., in *Mt. Guljania* v. *Emperor*[1] the following cases may arise when stolen property is found in the possession of different persons:

1. There may be one or more thefts and the several persons may have *received the property jointly*, i. e., at one and the same time, e. g., when one person receives the property as agent of another. This case is not governed by clause (f) but independently of it, a joint trial of persons receiving stolen property is clearly permissible.
2. There may be *different* thefts and several persons may have *received the property at different times*. This case also is not governed by Clause (f). There is no community of purpose between the persons who have so received and their joint trial is bad.[2]
3. There may be *one* theft and the several persons may have received the property at *different times*. Before the introduction of Clause (f) it had been held in several decisions that a joint trial in such cases was illegal.[3] Clause (f) was intended to meet such cases and a joint trial would now be permissible.[4] The phrase "possession of which has been transferred by one offence" refers to the original theft of stolen property and not to the transfer of possession from the thief to the person receiving stolen property.[5]

The provisions of this clause cannot however be extended by analogy to a trial of persons accused of offences other than those specifically mentioned

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Note 17.

1. (1928) 1928 Pat 38 (39) : 6 Pat 583 : 28 Cri L Jour 962, *Mt. Guljania* v. *Emperor.*
2. (1935) 1935 Oudh 327 (328) : 36 Cri L Jour 602, *Bhaggan* v. *Emperor.*
   (1928) 1928 Pat 38 (39) : 6 Pat 583 : 28 Cri L Jour 962, *Mt. Guljania* v. *Emperor.*
   (1927) 1927 Lah 737 (738) : 28 Cri L Jour 459, *Emperor* v. *Jaschuddin.*
   (1904) 1 Cri L Jour 971 (971) (Lah), *Bhagat Singh* v. *Crown.*
3. (1916) 1916 All 102 (102) : 17 Cri L Jour 477 (477) : *Emperor* v. *Balgovind.*
   (1921) 1921 All 206 (206) : 23 Cri L Jour 409, *Jiwan* v. *Emperor.*
   (1922) 1922 All 459 (459), *Moosan* v. *Emperor.*
   (1921) 63 Ind Cas 620 (621) : 22 Cri L Jour 684 : (All), *Ram Sarup* v. *Emperor.*
   (1906) 3 Cri L Jour 391 (394, 399) : 33 Cal 1256, *Abdul Majid* v. *Emperor.*
   (1919) 1919 Cal 249 (250) : 46 Cal 741 : 20 Cri L Jour 394, *Ohi Bhusan Adhikari* v. *Emperor.*
   (1907) 5 Cri L Jour 479 (480) (Mad), *Kuppan Ambalam, In re.*
   (1915) 1915 Oudh 4 (4) : 16 Cri L Jour 270 (270) : 18 O C 92, *Jagan Nath* v. *Emperor.*
   (1916) 1916 Pat 250 (250) : 17 Cri L Jour 234, *Jadnandan Prasad* v. *Emperor.*
   (1920) 1920 Pat 190 (192) : 21 Cri L Jour 757, *Musai Kamat* v. *Emperor.*
   (1921) 1921 Pat 291 (291, 292) : 21 Cri L Jour 619, *Padma Naba Patnaik* v. *Emperor.*
   [See also (1910) 11 Cri L Jour 4 (4) : 3 Sind L R 136, *Emperor* v. *Umar.*]
   [But see (1904) 1 Cri L Jour 330 (332) : 28 Bom 412, *Emperor* v. *Keshav Krishna.* The case was taken to fall under Cl. (d).]
   (1909) 28 Cal 104 (106), *Kumudini Kanta Guha* v. *The Queen-Empress.* (Do).
   (1912) 13 Cri L Jour 59 (60) : 13 Ind Cas 395 (Rang). *Nga Po Shat* v. *Emperor.* (Do).
4. (1928) 1928 Pat 38 (39) : 6 Pat 583 : 28 Cri L Jour 962, *Mt. Guljania* v. *Emperor.*
   (1932) 1932 Bom 201 (202) : 33 Cri L Jour 394, *Emperor* v. *Lakha Amra.*
   (1935) 1935 Oudh 475 (476) : 36 Cri L Jour 1206, *Shakur* v. *Emperor.*
5. (1932) 1932 Bom 201 (202) : 33 Cri L Jour 394, *Emperor* v. *Lakha Amra.*

Sec. 239 Notes 17—21

therein. Therefore the joint trial of the accused both charged under Section 412 Penal Code,[6] or the joint trial of a person under Section 411, Penal Code, and another who has purchased the same from one of the accused[7] is illegal.

18. Clause (g).

In order that persons accused of an offence under Chapter XII of the Penal Code relating to the counterfeit coin can be tried under this clause with persons accused of any other offence under the same Chapter, or of abetment of or attempting to commit any such offence, all the offences must *relate to the same coin*. So where two persons are charged, one with uttering a counterfeit coin and the other with being in possession of *different* counterfeit coins, they cannot be jointly tried together under this clause.[1]

19. Simultaneous trials.

Simultaneous but separate trials of different accused persons for offences committed by them and not forming part of the same transaction are not bad unless the accused are prejudiced by the course adopted.[1]

20. Criminal breach of trust and receiving stolen property.

It has been held in the undermentioned case[1] that a person committing a criminal breach of trust and another who receives the stolen property can be tried together.

21. Effect of illegal trial.

A misjoinder of charges or joint trial, as has been seen in Notes to Section 233, vitiates the trial and is not cured by Section 537.[1] Where a joint

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6. (1925) 1925 Oudh 452 (452), 26 Cri L Jour 1291, *Behari* v. *Emperor*.
7. (1925) 1925 Cal 248 (248): 25 Cri L Jour 807, *Dalsuk Roy Agarwala* v. *Emperor*.
   (1908) 8 Cri L Jour 11 (14): 4 Nag L R 71, *Emperor* v. *Balwant Singh*.

Note 18.

1. (1933) 1933 Lah 228 (229): 34 Cri L Jour 1253, *Abdul Hamid* v. *Emperor*.

Note 19.

1. (1925) 1925 Pat 152 (153): 25 Cri L Jour 1018, *Shafayet Khan* v. *Emperor*. Following 8 Cal W N 344.
   (1920) 1920 Pat 177 (179): 21 Cri L Jour 739, *Dhakosingh* v. *Emperor*.
   (1904) 1 Cri L Jour 199 (204) (Cal), *Sahadev Ahir* v. *Emperor*.
   [See however (1883) 13 Cal L R 275 (278, 279), *Chakowri Lall* v. *Moti Kurmi*. Such a trial is however open to serious objections.]

Note 20.

1. (1904) 1 Cri L Jour 584 (585) (Bom), *Emperor* v. *Balabhai*. 1 Cal W N 35 dissented from.

Note 21.

1. (1916) 1916 Mad 571 (571, 572): 16 Cri L Jour 298 (299): *In re, Mala Mekala Kati Subbadu*.
   (1932) 1932 Bom 277 (278): 33 Cri L Jour 619, *Krishnaji Anant Dange* v. *Emperor*.
   (1925) 1925 Lah 326 (326): 26 Cri L Jour 1167, *Nur Khan* v. *Emperor*. S. 307, I. P. C. and S. 20, Arms Act.
   (1905) 2 Cri L Jour 694 (695): 1905 Pun Re Cr No. 38, *Emperor* v. *Sahib Singh*. Ss. 414, 441 and 454, I. P. C.
   (1933) 1933 All 354 (354): 34 Cri L Jour 863 *Paltu* v. *Emperor*. Ss. 348 and 352.
   (1882) 5 Mad 20 (21), *Pulisanki Reddi* v. *Queen*. Ss. 290 and 291.
   (1920) 1920 Pat 230 (231, 232): 21 Cri L Jour 161, *Tepanidhi Gobinda Chandra Bharati* v. *Emperor*, Ss. 323 and 354.
   (1927) 1927 Lah 274 (275): 28 Cri L Jour 357, *Muhammadi* v. *Emperor*.
   (1909) 9 Cri L Jour 147 (148): 1 Ind Cas 69 (Cal), *Tilakdhari Mahton* v. *Lali Singh*.
   (1914) 1914 Cal 589 (589): 15 Cri L Jour 472, *Shyamber Koyal* v. *Emperor*. Ss. 380 and 225, I. P. C.
   (1932) 1932 Mad 497 (500): 33 Cri L Jour 589, *Lakshumana Mudaliar* v. *Emperor*.
   (1934) 1934 Bom 255 (256): 35 Cri L Jour 1234, *Emperor* v. *Tamkin*. Ss. 14(a) and 21, Dangerous Drugs Act.
   (1914) 1914 Lah 455 (456): 1914 Pun Re Cr No. 20: 15 Cri L Jour 172, *Banwari Lal* v. *Emperor*. Even though the accused raised no objection to the joint trial.
   (1914) 1914 Oudh 171 (172): 15 Cri L Jour 420, *Lachchu* v. *Emperor*.

trial is illegally held it cannot be validated by simply quashing the proceedings against one of the accused.[2] Sec. 239 Note 21

It has been held in the undermentioned case[3] that even though a trial may be illegal, the High Court is not *necessarily bound* to set it aside but will do so only when there is prejudice to the parties.

240.* When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction), may proceed with the inquiry into or trial of the charge or charges so withdrawn. Sec. 240

Withdrawal of remaining charges on conviction on one of several charges.

Synopsis.

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* (**Code of 1882**—The Section began: "When more charges than one are made against the same person", in other respects it was the same as that of 1898 Code).

(Code of 1872—S. 459.)

459. In trials before a Court of Session or High Court, when more charges than one are preferred against the same person, and when a conviction has been had on one or more of them the Government Pleader or other officer conducting the prosecution may, with the consent of the Court, withdraw, or the Court of its own accord may suspend, the inquiry into the remaining charge or charges.

Withdrawal of remaining charges, on conviction on one of several charges.

(Code of 1861—*Nil.*)

(1921) 1921 All 151 (152): 23 Cri L Jour 8, *Ratan Singh* v. *Emperor*. Ss. 202 and 302.

(1902) 6 Cal W N 468 (469), *Govinda Koeri* v. *Emperor*.

(1902) 1902 Pun Re Cr No. 16, page 45, (46) *Khushala* v. *Emperor*.
[See also (1914) 1914 Low Bur 134 (135): 7 Low Bur R 75: 15 Cri L Jour 22, *Ba Nyun* v. *Emperor*.]

(1922) 1922 Lah 410, (411): 25 Cri L Jour 1533, *Khizar* v. *Emperor*. Ss. 366 and 376.

(1935) 1935 Oudh 327 (328): 36 Cri L Jour 602, *Bhaggan* v. *Emperor*.

(1888) 11 Mad 441 (442), *Queen-Empress* v. *Kutti*.

(1901) 25 Mad 61 (97): 28 Ind App 257 (P C), *Subramania Iyer* v. *Emperor*.

The following cases were all decided before the Privy Council decision in 25 Mad 61 and are no longer good law:—

(1889) 12 Mad 273 (275), *Queen-Empress* v. *Ramana*. Ss. 372 and 373.

(1882) Weir 3rd Edn. 900 (901), *Devi Sethi Kondaiya, In re*.

(1897) 9 All 452 (457 to 459), *Queen-Empress* v. *Abdul Kadir*.

2. (1927) 1927 Nag 22 (22, 23): 27 Cri L Jour 1099, *Emperor* v. *Daneshram*.

3. (1906) 4 Cri L Jour 75 (76): 1906 Pun Re Cr No. 5, *Ala Dya* v. *Emperor*.

Sec. 240 Notes 1—3

Other Topics.

Charges in same case and not in different cases. See Note 1, Pts. 2 and 3.
No withdrawal after verdict. See Note 3.
Powers of appellate Court or Court of revision. See Note 1, Pt. 3; Note 4.
Safest course is to convict for all offences and pass concurrent sentences. See Note 3, Pt. 1.
Withdrawal when available. See Note 3.

1. Scope and applicability of the Section.

This Section applies only when a charge containing more heads than one is framed against the same person. In other words it applies to a case where a person is accused of several distinct offences. Thus it applies to a case where there are charges of several distinct offences constituted by separate acts or series of acts, like those which fall under Sections 234 and 235, sub-section 1, but not where there are several charges founded on the same act as those which fall under Section 235, sub-sections 2 and 3, and Section 236.[1]

This Section applies again only to charges framed in the *same case* and not to separate charges for distinct offences in different cases. Thus the prosecution cannot, on conviction of the accused in *one* case, withdraw a charge against him in *another* case.[2] Nor can the Court, pending an appeal against the conviction in one case, *stay* the trial of charges in respect of other cases.[3]

2. "Conviction has been had."

The Section contemplates a withdrawal or stay of trial of charges only when a conviction *has been had* on one or more of them. So where a person is charged with murder under Section 302, of the Penal Code and with causing the disappearance of the evidence of murder under Section 201, Penal Code, but before the trial begins in the Court of Session, the Public Prosecutor withdraws the charge for the offence, under Section 201, Penal Code, the Section has no application to such a case. A trial on the charge under Section 201, Penal Code, could not therefore be proceeded with under this Section, when the conviction of the charge under Section 302, Penal Code, is set aside on appeal.[1]

3. "On one or more of them."

Where a person is convicted of one or more of the charges against him, it is only before the other charges are tried, that they could be withdrawn. But when all the charges have been tried and the accused found guilty, no withdrawal can be made of any charge. In such cases, if the Court considers a certain term of imprisonment adequate to meet the offence under each head, the practice is not to convict on one head and drop the others, but to convict on each head and pass concurrent sentences.[1]

Section 240—Note 1.

1. (1889) 1889 Pun Re Cr No. 24, page 79 (80), *Queen-Empress* v. *Amir Chand.*
(1929) 1929 All 899 (900): 51 All 977: 30 Cri L Jour 1089, *Ghamandi Nath* v. *Babu Lal.*
[See also (1881) 1881 All W N 68 (68), *Queen-Empress* v. *Faiz Ilahi.*]
2. (1888) Ratanlal 362 (362), *Queen-Empress* v. *Sadia.*
(1897) 10 C P L R 1 (6), *Empress* v. *Bhansi Dhur Deoria.*
3. (1909) 9 Cri L Jour 495 (496): 2 Ind Cas 128 (Mad), *Mantri Kamaraji, In re.*
(1898) Ratanlal 977 (978), *Queen-Empress* v. *Govinda.*

Note 2.

1. (1905) 2 Cal L Jour 18*n* (18*n*,) *Affiluddi* v. *Emperor.*

Note 3.

1. (1869) Ratanlal 19 (20), *Reg* v. *Ramchandra.*
(1886) Ratanlal 288 (288), *Queen-Empress.*

4. "With the consent of the Court."

The word "Court" in the Section is not restricted merely to the trial Court, but includes every grade of Court including the High Court in revision and in appeal. Thus when a charge containing more heads than one is framed against the same person and he had been convicted on one or more of them, and the complainant applies in revision praying for infliction of sentence on the others but subsequently withdraws the application, the withdrawal amounts to the withdrawal of the complaint, with regard to such charges, with the consent of the Court.[1] Again where an accused is charged with an offence under Section 408, Penal Code, in respect of ten receipts, and is tried and convicted in respect of three of them the High Court's direction in the appeal, that no further proceedings be taken in respect of the other receipts amounts to a stay of the trial with regard to those charges within the meaning of this Section.[2]

5. Effect of withdrawal or stay of trial.

A withdrawal of charges[1] or a stay of enquiry or trial thereof[2] under this Section has the effect of an acquittal (*See* Section 245 *infra*) on such charge or charges unless the conviction be set aside.[3] If the conviction is set aside, the Court may proceed with the trial or inquiry in respect of the other charges.

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES.

Procedure in summons-cases.

241.* The following procedure shall be observed by Magistrates in the trial of summons-cases.

Synopsis.

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* (Code of 1882—S. 241 and Code of 1872—S. 203, Para 1.)
Same as that of 1898 Code.

(Code of 1861—Nil.)

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v. *Narayana.*
(1886) Ratanlal 286 (286, 287), *Queen-Empress* v. *Lingo.*

Note 4.

1. (1929) 1929 All 899 (900): 51 All 977: 30 Cri L Jour 1089, *Ghamandi Nath* v. *Babu Lal.*
2. (1909) 10 Cri L Jour 482 (483): 4 Ind Cas 48 (Cal), *Basiruddin* v. *Emperor.*

Note 5.

1. (1929) 1929 All 899 (900): 51 All 977: 30 Cri L Jour 1089, *Ghamandi Nath* v. *Babu Lal.*
2. (1925) 1925 Pat 623 (624): 4 Pat 503: 27 Cri L Jour 359, *Jeobaran* v. *Ramkishun.*
3. (1889) 1889 All W N 8 (9), *Emperor* v. *Raghunandan Lal.*

Sec. 241 Notes 1—5

Other Topics.

Absence of complainant—Discharge and not acquittal. See Note 2, F-N (1).
Applicability of Chapter 19, Note 3.
Counsel and admission—Conviction illegal. See S. 243, Note 3; S. 205, Note 7.
Joint trial of summons and warrant cases—Charges should be framed for both. See Note 2, F-N (1).
Procedure different from warrant and sessions cases. See S. 242, Note 1.
Trial of summons and warrant cases together—dismissal of latter—Further cross-examination to be allowed. See Note 2, F-N (1); See also S. 256.

1. "Summons-Case"—Meaning of.—*See* Section 4 (v) and (w).

2. Joint trial of summons and warrant cases.

Where there is a joint trial of two offences one of which is triable as a summons-case and the other as a warrant case the Magistrate must follow the procedure of warrant cases with regard to both the offences,[1] the reason being that, in such cases, the procedure applicable to the graver charge should be followed in preference to the more summary procedure appropriate to the less serious offence.

3. Applicability of Chapter XIX of the Code to the trial of summons-cases.

The principles underlying the provisions of Chapter 19 apply to *the* trial of summons-cases also though there is no provision for the framing of a formal charge in such cases.[1]

4. Trial of summons-case as warrant case—Effect.

If a Magistrate trying a summons-case, finds that no case is made out against the accused and lets him go unconditionally he must be taken to have *acquitted* him though he may style his order of acquittal an order of discharge and tack on to it the number of some section of the Code which deals with discharge.[1] *See also* Section 247, Note 3, Point 2.

5. Commitment to Sessions.—*See* Notes to Section 207.

Sec. 242

242.* When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not

Substance of accusation to be stated.

* **(Code of 1882—S. 242—Same as that of 1898 Code.)**

Section 241—Note 2.

1. (1918) 1918 Mad 371 (372) : 41 Mad 727 : 19 Cri L Jour 613 : *Raghavalu Naiar* v. *Singaram.* Absence of complainant—Discharge under S. 259 and not acquittal under S. 247 is proper procedure.
(1906) 3 Cri L Jour 350 (350) : 3 Low Bur R. 113, *Emperor* v. *Maung Gale*—Formal charges should be framed for both.
(1915) 1915 Mad 1200 (1200): 16 Cri L Jour 540 (540) : 39 Mad 503, *In re Rallabandi Sobhanadri.* Right to recall prosecution witnesses for cross-examination should be allowed even in summons-case offences.
(1885) 11 Cal 91 (92), *Rajnarain Koonwar* v. *Lala Raut.*
(1902) 29 Cal 481 (482), *Hoosein* v. *Kalu.*
(1867) 8 Suth W R Cr 54 (54), *Queen* v. *Lalloo Singh.*
(1875) 1 Bom 15, *Reg* v. *Maruti Dada.*
(1929) 1929 Cal 401 (402) : 31 Cri L Jour 59, *Radha Krishna* v. *Jamunadas Fatehpuria.* But conviction for the offence for which charge was not framed was upheld, following 1923 Cal 596.

Note 3.

1. (1905) 2 Cri L Jour 739 (744) : 3 Low Bur R 52 (FB), *Emperor* v. *San Dun.*

Note 4.

1. (1910) 11 Cri L Jour 350 (350) : 6 Ind Cas 385 (Mad). *Sessions Judge of Tinnevelly* v. *Venkatrama Aiyar.*

be convicted; but it shall not be necessary to frame a formal charge.

Synopsis.

Other Topics.

"Shall be stated to him." See Note 8.
Summons-Case trial with warrant case—Charges for both needed. See S. 241, Note 2, F-N (1).
Trial of European British subject. See S. 445, Sub-section. (5).

1. Scope of the Section.

This Section which relates to the commencement of the trial of a summons-case may be compared with the corresponding provisions relating to the trial of warrant cases and sessions trials. In the trial of a summons case the particulars of the offence are stated to the accused and his plea is recorded at the very commencement of the trial, whereas in warrant cases the trial commences with the taking of the evidence for the prosecution, and the framing of the charge and recording of the accused's plea are postponed till after the prosecution evidence has been recorded. In this respect, the commencement of a sessions trial resembles that of a summons case, rather than that of a warrant case, because in sessions trials also (Section 271) the charge is read and explained to the accused and his plea is recorded at the very commencement of the trial.

2. "When the accused appears."

As to the right of the accused to appear by pleader, *see* Section 205 and Notes thereunder.

(Code of 1872—S. 203, Para. 2 and S. 206.)

CHAPTER XVI.

Of the trial of summons-cases by Magistrates.

203. * * * * * *

Object and effect of complaint.

No formal charge need at any time be made against the accused person, and neither the complaint nor the summons shall be regarded otherwise than as notice to the accused person of the facts to be inquired into.

206. * * * * * *

Substance of complaint to be stated.

On the appearance of both parties, on the day fixed for the trial, the substance of the complaint shall be stated to the accused person, and he shall be asked if he has any cause to show why he should not be convicted.

* * * * * * *

(Code of 1861—S. 265.)

265. On the appearance of both parties on the day fixed for the trial, the substance of the complaint shall be stated to the accused person, and he shall be asked if he has any cause to show why he should not be convicted.

Admission by accused of truth of complaint.

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Sec. 242 Notes 3—8

3. Particulars of offence.

The Section requires that the particulars of the offence charged must be stated to the accused. A general reference to the terms of the marginal note of a section is not sufficient.[1] It is not necessary that the Magistrate should make a record of what he has stated to the accused in explaining the offence.[1a] Nor is it necessary that the record should contain a note to the effect that the particulars of the offence were stated to the accused.[2] In the undermentioned case,[3] the accused was sent up by the police on certain allegations. It was held that on such allegations being found not to amount to *any* offence, it was not open to the Magistrate to proceed against the accused on some other footing which would inculpate him.

4. No formal charge necessary.

As to cases where the Magistrate frames a charge in a summons case and the accused is misled into believing that he will be given an opportunity to further cross-examine the prosecution witnesses, *see* Notes under Section 251.

5. Plea of accused.

In summons cases, the Magistrate must record the accused's plea at the commencement of the trial.[1] See Section 243.

6. Joinder of charges.

Though this Section provides that in summons-cases it is not necessary to frame a formal charge, the provisions of the Code relating to the joinder of charges and the joint trial of accused persons apply to the trial of summons cases also.[1]

7. Joint trial of a summons and a warrant case.—*See* Notes under S. 241.

8. Effect of non-compliance with the Section.

Does the omission to state the particulars of the offence to the accused as required by this Section amount to an illegality or to a mere irregularity curable under Section 537 *infra*? On this question there is a conflict of decisions. On the one hand, it has been held by the Calcutta High Court[1] that such an omission is an illegality and not a mere irregularity covered by Section 537. On the other hand, it has been held by the High Court of Madras[2] and the Judicial Commissioner's Court of Nagpur that such an omission

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Section 242—Note 3.

1. (1903) 28 Bom 129 (142), *Emperor* v. *Alloomiya.*
   (1872-92) 1872-92 Low Bur R 594 (594), *Queen* v. *Sein Kaing.*
1a. (1934) 1934 Nag 258 (258) : 36 Cri L Jour 361, *Jagannath Singh* v. *Emperor.*
2. (1932) 1932 Nag 127 (127) : 28 Nag L R 163 : 33 Cri L Jour 938 : *Mt. Lahani* v. *Khushal.*
3. (1900) 1 Low Bur Rul 43 (44) : *Queen-Empress* v. *Tun E.*

Note 5.

1. (1912) 15 Ind Cas 488 (489) : 40 Cal 71 : 13 Cri L Jour 488, *Audh Nath Dey* v. *Mohendra Nath.*
   (1930) 1930 Sind 64 (65) : 30 Cri L Jour 1077, *Mahomed Jamal* v. *Emperor.*

Note 6.

1. (1905) 2 Cri L Jour 739 (744) : 3 Low Bur R 52 (F B), *Emperor* v. *San Dun.*
   (1914) 1914 Cal 603 (606) : 41 Cal 694 : 15 Cri L Jour 73, *Biswas* v. *Emperor.*
   [See also (1872-92) 1872-92 Low Bur R 398 (398), *Queen* v. *Nga Than You.*

Note 8.

1. (1927) 1927 Cal 196 (196) : 54 Cal 359 : 28 Cri L Jour 155, *Gopalakrishna* v. *Matilal Singh.*
   (1928) 1928 Cal 339 (340) : 29 Cri L Jour 123, *Ashita Ranjan Bose* v. *Emperor.*
2. (1919) 1919 Mad 52 (52) : 42 Mad 787 : 20 Cri L Jour 395, *Public Prosecutor* v. *Sankaralinga Moppan.*

is only an irregularity which under Section 537 does not vitiate the trial unless it has occasioned a failure of justice.[3] Sec. 242 Note 8

Sec. 243

243.* If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and if he shows no sufficient cause why he should not be convicted, the Magistrate *may* convict him accordingly.

Conviction on admission of truth of accusation.

Synopsis.

Other Topics.

Comparison with Sessions and warrant cases. See S. 242, Note 1.
Conviction on confession discretionary. See Note 2, Pts. 4 to 6.
Record of actual words. See Note 4, Pt. 1.
Record—Immediate. See Note 4, Pt. 2.

1. Legislative Changes.

The word "may" has been substituted for the word "shall" by the amendments of 1923 thereby restoring the language of the Codes of 1872 and 1861.

For commentary, *see* Note 2.

2. Conviction on admission of truth of accusation.

This Section empowers a Magistrate to convict an accused person when he admits that he has committed the offence of which he is accused and

* **(Code of 1882—S. 243.)**

Instead of the word "may" there was, "shall"; in other respects the section was the same.

(Code of 1872—S. 206, Para 2.)

206. * * * * * * *

Conviction on admission of truth of complaint.

If the accused person admit the truth of the complaint, his admission shall be recorded, and if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly of such offence (coming under this chapter) as he may appear to have committed.

(Code of 1861—S. 265.)

265. * * * * * * *

Admission by accused of truth of complaint.

If the accused person admit the truth of the complaint, and show no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly.

3. (1932) 1932 Nag 127 (128) : 28 Nag L R 163 : 33 Cri L Jour 938, *Mt. Lahani* v. *Khushal.*
(1927) 1927 Nag 210 (211) : 28 Cri L Jour 511, *Damdoo* v. *Harba.*

Sec. 243 Note 2

does not show any sufficient cause why he should not be convicted.[1] But a mere admission of the truth of all or any of the facts alleged against him does not amount to an admission of guilt under the Section unless such facts constitute an offence in the eye of the law and he cannot be convicted on such an admission.[2] Further, the admission referred to in the Section is the admission made *before* the trying Magistrate by an accused in pursuance of the questions put to him under Section 242 *ante*. Therefore, where there has been no plea of "guilty" before the trying Magistrate, he cannot rely upon an admission alleged to have been made by the accused in some other case and at some other time.[3]

Under the Code as it stood prior to the amendments of 1923 a Magistrate was *bound* to convict an accused person if he pleaded guilty.[4] The Section in its present form, however, leaves it to the discretion of the Magistrate whether to accept the accused's plea of guilty or not. If he exercises his discretion by not accepting the plea of guilty and proceeds to hear the evidence, he must satisfy himself that the evidence justifies a conviction. If the evidence does not prove the charge, he is bound to acquit the accused. It is not open to him to go back to the plea of guilty and convict the accused on that plea.[5] Nor is it open to him to take from the accused a further plea of guilty and relieve himself of the duty of examining the remaining witnesses cited on behalf of the prosecution.[6]

A Magistrate may call for evidence even after he has accepted the plea of guilty made by the accused with the object of acquainting himself with the facts of the case in order to pass an adequate sentence.[7] A plea of "guilty" can be allowed to be withdrawn if the accused was at the time of making it

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Section 243—Note 2.

1. (1924) 1924 All 188 (188): 46 All 41: 25 Cri L Jour 655, *Angnoo* v. *Emperor*.
   (1928) 1928 Oudh 402 (403): 3 Luck 680: 29 Cri L Jour 893, *Emperor* v. *Shiwa Datta*.
   (1928) 1928 All 270 (270): 50 All 599: 30 Cri L Jour 6, *Emperor* v. *Kishan Narain*.
   [See also (1933) 1933 Cal 186 (187): 60 Cal 351: 34 Cri L Jour 345, *Probodh Chandra Chakravarthy* v. *Emperor*. Plea of guilty involves admission of truth of all facts essential for guilt.]
2. (1932) 1932 Lah 363 (364): 33 Cri L Jour 646, *Bahadur Singh* v. *Emperor*.
   (1926) 1926 Lah 406 (406): 7 Lah 359: 27 Cri L Jour 907, *Basant Singh* v. *The Crown*.
   (1915) 1915 Cal 153 (153): 15 Cri L Jour 703 (703), *Gaya Roy* v. *Emperor*.
   (1920) 1920 All 203 (204): 21 Cri L Jour 665, *Banwari Lal* v. *Emperor*. Accused admitting that he travelled without ticket does not necessarily admit that he did so with fraudulent intention.
   (1925) 1925 Lah 153 (155): 25 Cri L Jour 707, *Emperor* v. *Ghulam Raza*.
   (1931) 1931 Nag 100 (101): 32 Cri L Jour 1132, *Kanhaya Lal* v. *Emperor*.
   (1888) 1 C P L R Cri 25 (26), *Empress* v. *Mt. Adhika*.
   (1928) 1928 Lah 827 (828): 29 Cri L Jour 645, *Mt. Darkan* v. *Emperor*.
   (1908) 7 Cri L Jour 208 (209): 1907 Upp Bur Rul 9, *Nga Pyo* v. *Emperor*.
   [See also (1934) 1934 Nag 65 (65): 35 Cri L Jour 696: 30 Nag L R 317, *Emperor* v. *Homnarain*. Even if accused says "guilty" Court must see what he really means. If he merely means to say that he caused the alleged injury but that it was purely accidental, he cannot be convicted].
3. (1905) 2 Cri L Jour 532 (534): 29 Cal 595, *Emperor* v. *Mohunt Ram Das*.
4. (1914) 1914 Sind 158 (159): 8 Sind L R 213: 16 Cri L Jour 238, *Emperor* v. *Aslum Gul Mahomed*.
   (1923) 1923 Mad 364 (365): 46 Mad 476: 24 Cri L Jour 358, *Crown Prosecutor* v. *Duraiswami*.
5. (1931) 1931 Bom 195 (196): 32 Cri L Jour 719, *Emperor* v. *Janardan Kashinath*.
6. (1928) 1928 Cal 243 (244), *Lalji Ram* v. *Corporation of Calcutta*.
7. (1931) 1931 Bom 195 (196): 32 Cri L Jour 719 (F B), *Emperor* v. *Janardan*

enfeebled by illness and was undefended.[8]

Sec. 243 Notes 2—8

As to the power of the Magistrate to convict an accused on the basis of a consent to abide by the complainant's oath, *see* the undermentioned case.[9]

3. Admission by pleader.—*See* Section 205, Note 7.

4. Record of admission.

This Section requires that an admission of an accused should be recorded as nearly as possible *in the words* used by him.[1] Further, an admission should be recorded *immediately* it is made and not afterwards from rough notes or memory.[2]

5. One admission for several accused.

The law requires that each accused should be questioned separately and that the answers given should be taken, as nearly as possible, in the words used by each accused. Therefore, where a Magistrate records *one* admission for a number of accused persons, the admission is bad.[1]

6. Warrant case tried as a summons-case—Conviction on plea of accused.—*See* Section 252 and Notes thereunder.

7. Whether order for security for keeping the peace may be based on consent of person sought to be bound.—*See* Section 117 Notes thereunder.

8. "If he shows no sufficient cause why he should not be convicted."

These words are to be read along with the earlier part of the Section and not as a distinct and separate part. Where an accused does not admit his guilt he cannot be convicted merely because he does not show sufficient cause against his conviction.[1]

Sec. 244

244.* (1) *If the Magistrate does not convict the accused under the preceding section or*, if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence:

Procedure when no such admission is made.

* **(Code of 1882—S. 244**—Same as that of 1898 Code).

Kashinath.

8. (1915) 1915 Lah 487 (493): 16 Cri L Jour 257 (263), *Emperor* v. *L. C. E. Shuldham.*

9. (1927) 1927 All 742 (743): 28 Cri L Jour 301, *Triloknath* v. *Emperor.*

Note 4.

1. (1872-1892) 1872-92 Low Bur Rul 594 (594), *Empress* v. *Sain Kaing.*

(1899) 1899 All W N 81 (82), *Queen-Empress* v. *Muhammad Hanif.* But failure to record in accused's own words was held mere irregularity).

(1907) 6 Cri L Jour 332 (333) (Mad), *In re, Subba Naickan.*

(1928) 1928 Cal 243 (244), *Lalji Ram* v. *Corporation of Calcutta.*

(1933) 1933 Cal 117 (118): 34 Cri L Jour 250, *Ganesh Chandra Khan* v. *The Corporation of Calcutta.*

[See (1873) 20 Suth W R Cri 55 (56), *In the matter of Mohesh Chandar.*

2. (1892) 15 Mad 83 (87), *Empress* v. *Erugadu.*

Note 5.

1. (1932) 1932 Sind 211 (212): 26 Sind L R 345: 34 Cri L Jour 67, *Tejumal Hassomal* v. *Emperor.*

Note 8

1. (1903) 1 Low Bur Rul 95 (96), *Vadivalooswamy* v. *Crown.*

Sec. 244

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue process to compel the attendance of any witness or the production of any document or other thing.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue *a summons to any witness directing him to attend or to produce* any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

Synopsis.

(Code of 1872—Ss. 207 and 361.)

Procedure when no such admission is made.

207. If the accused person does not admit the truth of the complaint, the Magistrate shall proceed to hear the complainant and such witnesses as he produces in support of his complaint, and also to hear the accused person and such witnesses as he produces in his defence.

Summons Cases.

In summons cases.

361. In summons cases, the Magistrate may summon any person who appears to him likely to give material evidence on behalf of the complainant or the accused.

Ordinarily it shall be the duty of the complainant and accused in non-cognizable cases, to produce their own witnesses.

In such cases, it shall be in the discretion of the Magistrate to summon any witnesses named by the complainant or the accused; and he may require, in such cases, a deposit of the expenses of a witness before summoning him.

(Code of 1861—Ss. 262 and 266.)

Summons to witness to attend and give evidence.

262. If it appear to the Magistrate that any person is likely to give material evidence on behalf of the complainant, or the accused person, and that such person will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the hearing of such complaint, the Magistrate shall issue his summons to such person under his signature and seal, requiring him to appear at a time and place mentioned in the summons, to testify what he knows concerning the matter of the complaint.

Proceeding when no such admission is made

266. If the accused person do not admit the truth of the complaint, the Magistrate shall proceed to hear the complainant and such witnesses as he may produce in support of his complaint, and also to hear the accused person and such witnesses as he shall produce in his defence.

Other Topics.

Closing of the case by a party. See Note 3, Pts. 10 & 11.
Compulsion of attendance of witnesses. See Note 9, Pts. 1 to 5.
Connected cases—Copies—Depositions not to be used. See Note 3, Pt. 14.
Conviction of complainant. See Note 2, Pt. 11.
Conviction on evidence recorded in another case. See Note 2, F-N (1).
Costs of adjournment by accused. See Note 2, Pt. 12.
Discretion to summon witnesses. See Note 8, Pts. 2 to 6.
Documents filed by accused. See Note 7, Pt. 7.
Duty to take all evidence of prosecution. See Note 2, Pts. 2 to 5; Note 3, Pts. 1 to 3 & 6.
Duty to take evidence for accused. See Note 7, Pt. 3.
Evidence in presence of accused. See Note 2, Pt. 10.
Evidence of co-accused-witness. See Note 3, Pt. 12.
Examination of accused. See Note 7, Pts. 3 to 6.
Exhibiting documents. See Note 3, Pt. 8.
Failure to deposit process-fee—Effect. See Note 11, Pts. 2 & 3.
Non-examination of complainant. See Note 2, Pts. 9 & 10.
Non-payment of process by accused. See Note 11, Pt. 3.
Subsequent plea of guilt. See Note 3, Pt. 13.
Supplementary witnesses. See Note 8, Pt. 8; Note 10, Pts. 4 & 5.
Witnesses residing in foreign territory. See Note 8, Pt. 7.

1. Legislative changes.

(1) The words "if the Magistrate does not convict the accused under the preceding Section" which have been added at the commencement of sub-section 1 are in keeping with the amendment of Section 243 whereby the Magistrate is no longer obliged to convict on a plea of guilty but *may* notwithstanding such plea record evidence before convicting the accused.

(2) The proviso to sub-section 1 is new and provides for a case where a complaint is made by a Court.

(3) In sub-section 2 for the words "issue process to compel the attendance of any witness" the words "issue a summons to any witness directing him to attend" have been substituted.[1]

2. "Shall proceed to hear the complainant."

When an accused person denies the truth of the complaint made against him the Magistrate ought to hear the complainant and his witnesses, in support of the prosecution and also the accused and his witnesses.[1] He is bound to hear the complainant and take all evidence that he produces in support of the prosecution before he can acquit the accused.[2] An acquittal passed without this being done is illegal,[3] and the High Court may set it aside in revision.[4] In a trivial case, however, when the complainant was not examined and it did

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Section 244—Note 1.

1. (1926) 1926 Mad 361 (361): 27 Cri L Jour 76, *Selvamuthu* v. *Chinnappan Chettiar.*
(1897) 20 Mad 388 (389), *Queen* v. *Sinnai Goundan.*
(1891) Ratanlal 539 (539), *Queen* v. *Toulman.*
(1867) 7 Suth W R Cr 45 (45), *Queen* v. *Sreenath Mookopadhia.*
(1868) 10 Suth W R Cri Rule 61, (61) *Bulash* v. *Makroo.*
(1871) 16 Suth W R Cri Rule 48 (49), *Kishore Sahai* v. *Mungeri Sahai.*
(1874) 21 Suth W R Cr 21 (22), *Queen* v. *Hatookhan.*
3. (1896) 18 Cal 221 (223), *Kesri* v. *Mahomed Bakhsh.*
4. (1913) 14 Cri L Jour 177 (178): (1912) Upp Bur R 148, *Emperor* v. *Nga Sen Wein.*

Note 2.

1. (1866) 6 Suth W R Cr 75 (75), *Queen* v. *Ahlad Monee Dossee.*
(1870) 14 Suth W R Cr 25 (26): *Queen* v. *Chooramoni.*
(1871) 15 Suth W R Cr 6 (6), *Queen* v. *Betts.* Conviction on evidence recorded in another case.
(1921) 1921 Oudh 147 (147): 24 Oudh Cas 267: 22 Cri L Jour 765, *Emperor* v. *Kanhaiya Lal.*
(1907) 6 Cri L Jour 424 (425) (Bom), *Emperor* v. *Somabhai Nathabhai.*
2. (1895) 2 Weir 305 (305). *Naranapiar* v. *Ramaswami Aiyar.*

Sec. 244 Notes 2—3

not appear probable that a fresh investigation would produce a different result it was held that the non-examination was an irregularity but not such as required interference in such a trivial case.[5]

The accused cannot be convicted except upon the evidence that he did commit the offence; the latter part of Section 243 must not be read as distinct and separable from the first part.[6] A conviction is illegal which is arrived at without the recording of the prosecution evidence.[7] Where the accused was convicted upon a statement of the complainant not made on oath before a Magistrate it was held to be illegal.[8]

This Section does not make the examination of the *complainant himself* absolutely necessary, so as to vitiate a conviction if such examination does not take place.[9] But when a complainant's evidence is taken it should be in the presence of the accused. The not uncommon practice of not examining the complainant at the trial but only under Section 200 of the Code is contrary to law.[10]

A Magistrate while enquiring into the complaint cannot, in the same case, convict the complainant himself because the evidence discloses that he too was a party to an affray. If the complainant is to be convicted it can only be in separate proceedings taken against him.[11]

Criminal Courts have no authority to order the accused to pay the complainant costs of an adjournment on the failure of the accused to appear on the day fixed for hearing the complaint.[12]

3. Evidence in support of the prosecution.

The language of the Section is compulsory and the Magistrate is bound to take all such evidence as may be produced in support of the prosecution.[1] Even when the complainant declines to be examined it is the duty of the Magistrate to proceed to take the evidence of his other witnesses before dismissing the complaint, although in any event a strong preliminary presumption against the truth of the complainant's case would arise from his continuous refusal to be examined.[2] In summons cases the parties have an undoubted right to examine their witnesses and their right could only be curtailed by the Court upon the ground that the examination of these witnesses will delay and possibly defeat the ends of justice.[3] But where a complainant did not apply to the Magistrate to issue summons to other witnesses it was held that the Magistrate was not wrong in deciding the case on evidence before him.[4] A Magistrate has no jurisdiction to refuse to examine a witness who is deaf but

5. (1872) 17 Suth W R Cr 37 (37), *Kabil Nus Yo Pyada* v. *Baharullah.*
6. (1900-1902) 1 Low Bur R 95, *Vadiveluswamy* v. *Crown.*
7. (1866) 6 Suth W R Cr 92 (92), *Queen* v. *Sameeroddeen.*
   (1905) 2 Cri L Jour 532 (534) (Cal), *Emperor* v. *Mohunt Ram Das.*
   (1929) 1929 Pat 406 (406): 30 Cri L Jour 517, *Munshi Mian* v. *Emperor.*
8. (1873) 20 Suth W R Cr 55 (55), *In the matter of Mohesh Chunder.*
9. (1920) 1920 Cal 68 (69): 21 Cri L Jour 252, *Amir Miya* v. *Sarafdi Hazi.*
10. (1897-1901) 1 Upp Bur R 67, *Empress* v. *Nga Ngwe Nyun.*
11. (1888) Ratanlal 403 (404), *Queen* v. *Kissan Malhari.*
12. (1922) 1922 All 184 (184): 23 Cri L Jour 243, *Budha* v. *Emperor.*

Note 3.

1. (1932) 1932 All 188 (188): 54 All 416: 34 Cri L Jour 18, *Ali Husain* v. *Lachmi Narain Mahajan.*
2. (1927) 1927 Nag 210 (211): 28 Cri L Jour 511, *Damodar* v. *Harba.*
3. (1921) 1921 Pat 308 (310): 22 Cri L Jour 430, *Biswanath Mahapatra* v. *Shivanand Saraswathi.*
4. (1871) 15 Suth W R Cr 87 (87), *Queen* v. *Notobro Bera.*

who is able to speak and write. Such refusal, is materially prejudicial, and vitiates the trial.[5]

Magistrate should always be chary of taking upon himself the duty of deciding on behalf of the parties which witnesses should be examined.[6] Generally it is not the province of the Court to examine the witnesses, and as a rule the Court should leave the witnesses to the pleaders to be dealt with as provided for in Section 138 of the Evidence Act. Section 495, sub-section 3 also tends in the same direction.[7]

It is no doubt ordinarily the duty of the prosecution if they rely on documents to tender them in evidence together with such formal proof as may be necessary. But where documents actually on the file of the proceedings are not formally exhibited and put on record as evidence the Magistrate should in the exercise of a wise discretion, before the close of the prosecution case, draw the attention of the prosecution to the fact that the documents have not been exhibited, or ascertain whether they are to be regarded as having been produced as evidence for the prosecution under Section 244.[8]

But a Magistrate cannot after the trial is closed and while writing judgment admit in evidence a document without giving the accused an opportunity of raising objection to its relevancy and admissibility.[9]

The closing of the case for the prosecution is no mere form, but, with certain exceptions closes the door to any further evidence against the accused. The prosecution cannot re-open the case and make additions to it except such voluntary addition as the accused can himself make.[10] A statement by a party that he has closed his case should bear the signature of the party. In the absence of such signature, it is not recorded in accordance with law and there is no presumption of its correctness.[11]

Statements made by a defence witness against accused persons other than the one who called him as a witness cannot be considered as if it were evidence led on behalf of the complainant.[12]

Where a Magistrate adopts the procedure prescribed by this Section on the footing that there was no admission of guilt on the part of the accused person he is not competent to take a further plea of guilty from the accused and relieve himself of the duty of examining other prosecution witnesses.[13]

In connected cases it is not proper to take the depositions in one case and have them copied and used in the other.[14]

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5. (1924) 1924 Cal 541 (541): 24 Cri L Jour 688, *Ganoda Dassya* v. *Srimanta Ghosh.*
6. (1915) 1915 Mad 825 (825): 16 Cri L Jour 156 (157), *Duggirala Venkatappaya* v. *Mulpuri Venkaramanayya.*
7. (1924) 1924 Oudh 371 (372): 27 Oudh Cas 246: 25 Cri L Jour 1226, *Fanki* v. *Thakur Sheo Narain Singh.*
8. (1909) 10 Cri L Jour 408 (409): 3 Sind L R 84, *Emperor* v. *Ghulam Hussein.*
9. (1916) 1916 Mad 1084 (1085): 16 Cri L Jour 458 (459), *In re Vayalappra Kelappan Nair.*
10. (1923) 1923 All 322 (323): 45 All 323: 25 Cri L Jour 305, *Mahadeo Prasad* v. *Emperor.*
11. (1926) 1926 Lah 656 (656): 27 Cri L Jour 1071, *Mt. Bholan* v. *Matu.*
12. (1931) 1931 Lah 57 (58): 12 Lah 385: 32 Cri L Jour 672, *Chatur Bhuj* v. *Emperor.*
13. (1928) 1928 Cal 243 (244), *Lalji Ram* v. *Corporation of Calcutta.*
14. (1923) 1923 Cal 196 (197): 50 Cal 223: 24 Cri L Jour 198, *Mozahur Ali* v. *Emperor.*

Sec. 244 Notes 4—7

4. Duty of Prosecution.

The duty of the prosecution is to prove all the relevant facts essential to establish the guilt of the accused.[1]

The prosecution cannot be permitted at the last moment to change its ground.[2]

5. Cross-examination.

The Section does not contain any express provision for cross-examination, but a cross-examination must certainly be allowed at some stage and hence the right is exercisable under this Section.[1] In the procedure laid down for the trial of summons cases the accused has no right to postpone the cross-examination of any prosecution witnesses as in the trial of warrant cases. But if the cross-examination is postponed in accordance with the direction of the Magistrate, he is bound to give the accused a further opportunity to cross-examine the witnesses. Without such examination the evidence will not be legally admissible and the irregularity vitiates the trial.[2]

6. Extra-judicial information.

It is extremely improper for a Magistrate in disposing of a case to rely in any way on statements made to him out of Court.[1]

7. Evidence of the accused.

The evidence of the accused should be taken after that of the complainant.[1] But where no prejudice was caused, it was held that the fact of a Deputy Magistrate having recorded some evidence of the defence before the close of the case for the prosecution, would be no ground for reversing his decision.[2]

The Section makes it obligatory on the Magistrate to hear the accused and record the evidence which he adduces in his defence after the prosecution evidence is recorded.[3] When the Section says that the Magistrate shall hear the accused it certainly means that he should ask the accused what he has to say in his own defence against the charge which has been brought against him and in explanation of the evidence which has been led to support the charge.[4] But the examination need not be recorded with the same formality as in warrant cases or preliminary enquiries.[5] As to the applicability of Section 342 to summons cases, *see* Notes to Section 342 and the under-mentioned cases.[6]

Note 4.

1. (1923) 1923 All 322 (324): 45 All 323: 25 Cri L Jour 305, *Mahdeo Prasad* v. *Emperor.*
2. (1928) 1928 All 696 (697): 51 All 463 : 29 Cri L Jour 1084, *Bhan Deb* v. *Emperor.*

Note 5.

1. (1931) 1931 All 621 (623): 54 All 212: 33 Cri L Jour 310, *Lachmi Narain* v. *Emperor.*
2. (1922) 1922 Pat 296 (298) : 23 Cri L Jour 440, *Parmeshwar Lal Mitter* v. *Emperor.*

Note 6.

1. (1890) 14 Bom 572 (573), *Empress* v. *Sahadev Valad Tukaram.*

Note 7.

1. (1925) 1925 All 614 (614): 47 All 341: 26 Cri L Jour 905, *Bechan Teli* v. *Emperor.*
2. (1882) 8 Cal 154 (156), *Empress* v. *Kalicharan Churari.*
3. (1921) 1921 Bom 374 (375, 377): 45 Bom 672: 22 Cri L Jour 17, *Fernandez* v. *Emperor.*
   (1868) 9 Suth W R Cr 62 (63), *Queen* v. *Bissesur Sevi.*
   (1870) 13 Suth W R Cr 63 (64), *Queen* v. *Ameerchand Nohatta.*
4. (1922) 1922 Bom 290 (291) : 46 Bom 441: 23 Cri L Jour 45, *Gulabjap* v. *Emperor.*
5. (1870) 14 Suth W R Cr 76 (76), *Queen* v. *Chedee Koonjee.*
6. (1921) 1921 Bom 374 (375): 46 Bom 672: 22 Cri L Jour 17, *Fernandez* v. *Emperor.*
   (1921) 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor* v. *Rustomji Mancherji.*
   (1922) 1922 Bom 290 (291): 46 Bom 441 : 23

No Criminal Court can shut its eyes to the statement of an accused person when that statement refers to certain documents to which the accused is a party. The Court may not be satisfied with the statement or may require further proof but it cannot brush aside the documents to which the accused are parties when the accused themselves file those documents in Court along with their statements. As the accused cannot be examined on oath they can only file a statement or refer to some documents to which they have been parties.[7]

A conviction by a Magistrate who refused to examine a witness who was formally tendered on behalf of the accused is illegal.[8] The refusal to examine the witnesses tendered by the accused deprives the accused of a right he has by law and his conviction is therefore bad.[9]

Where after closing hours the Magistrate insisted on going on with the case and the accused's counsel wanted an adjournment to examine the witnesses who were in attendance and the adjournment was refused, one ground being that no defence list had been filed it was held that the ground for refusal was wrong and the convictions were set aside.[10]

It is the duty of Magistrates when dealing with ignorant individuals accused of technical offences to go very thoroughly into the evidence and where they are not defended by advocates to give them some assistance in putting up obvious defensive pleas.[11]

8. "May issue summons. . . . ."

Under the Code of 1861 Section 263, it was in the discretion of the Magistrate to summon the witnesses "if he considered the evidence essential to the just decision of the case," and incumbent on him to summon them only if it appeared to him that they were likely to give material evidence and that they would not voluntarily appear for the purpose of being examined.[1]

Under the present Section also the Magistrate is under no obligation to issue process to compel the attendance of any witness either on the application of the complainant or the accused. He has a discretion in the

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Cri L Jour 45, *Gulabjap* v. *Emperor*.
(1927) 1927 Cal 250 (253): 54 Cal 286: 28 Cri L Jour 297, *Bechulal Kayastha* v. *Injured Lady*.
(1926) 1926 Lah 667 (668): 27 Cri L Jour 1000, *Demello* v. *Mrs. Demello*.
(1927) 1927 Lah 268 (269): 28 Cri L Jour 480, *Kale Khan* v. *Emperor*.
(1921) 1921 Pat 11 (12): 22 Cri L Jour 427, *Gulam Rasul* v. *Emperor*.
(1922) 1922 Pat 296 (297): 23 Cri L Jour 440, *Parmeshwar Lal Mitter* v. *Emperor*.
(1921) 1921 Pat 11 (12): 61 Ind Cas 715 (716): 22 Cri L Jour 427, *Gulam Rasul* v. *Emperor*.
(1931) 1931 Rang 244 (246): 9 Rang 506: 32 Cri L Jour 1190 (F B), *Emperor* v. *Nga La Gyi*.
(1926) 1926 Sind 1 (3): 20 Sind L R 34: 26 Cri L Jour 1554, *Emperor* v. *Nabu*.
(1926) 1926 Sind 281 (282): 19 Sind L R 121: 27 Cri L Jour 1290, *The Crown* v. *Pario*.
(1924) 1924 Mad 15 (17, 18): 46 Mad 758: 24 Cri L Jour 833 (F B), *Ponnusami Odayar* v. *Ramasami Thattan*.
7. (1928) 1928 Mad 1135 (1136): 29 Cri L Jour 1041, *Muhammed Salia Rowther* v. *Emperor*.
8. (1869) 12 Suth W R Cr 77 (79), *Queen* v. *Mohima Chundar Chackraburtty*.
9. (1925) 1925 All 318 (318): 26 Cri L Jour 703, *Bhagwan Das* v. *Saddiq Ahmed*.
10. (1902-03) 7 Cal W N 714 (716), *Emperor* v. *Keso Singh*.
11. (1930) 1930 Rang 349 (350): 32 Cri L Jour 206, *Ali Hossein* v. *Emperor*.

Note 8.

1. (1870) 2 N W P H C R 393 (393), *Queen* v. *Mohuree*.
(1868) 10 Suth W R Cr 42 (42), *Akbar Faguddeen* v. *Punchoo Biswas*.
(1870) 13 Suth W R 63 (64), *Queen* v. *Ameerchand Nohatta*.
(1871) 15 Suth W R Cr 87 (87), *Queen* v. *Notobur Bera*.

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matter.[2] The discretion, however, should not be exercised to the detriment of the applicant in an arbitrary manner.[3] The arbitrary exercise of discretion does not necessarily amount to acting without jurisdiction so as to justify the High Court's interference in all cases; but where the refusal to issue process amounts to a denial of justice, the High Court would interfere.[4] Thus when the accused was a Police Constable and it was not improbable that the witnesses for the prosecution would not voluntarily appear it was held that it was just such a case in which the Magistrate should have exercised his discretion and issued summons.[5] Where, on the other hand, no prejudice is caused the High Court will not interfere with the order of the Magistrate.[6]

Though there is no provision for securing the attendance of witnesses residing in a foreign territory the Magistrate is bound to use all reasonable efforts to procure their attendance.[7]

Where an accused who was called upon to let in evidence applied for and obtained the summoning of his witnesses on his behalf it was held that he had exhausted the power of summoning witnesses for the defence and all that he could do was to move the Magistrate to summon any other witnesses whom he might deem necessary under Section 540.[8]

An application for summoning witnesses cannot be granted by a Magistrate not seized of the case.[9]

9. Re-issue of summons.

It was held by the Calcutta Court in cases decided prior to the amendment of sub-section 2 that there was no discretionary power given by Section 244 to a Magistrate to refuse to compel the attendance of witnesses upon whom processes had already been issued.[1] This view has also been adopted by the Patna High Court subsequent to the amendment.[2] But the Madras view is that the change in the new Code by the substitution of the words "may . . . . . issue *summons* to any witness" for the words "may issue process to *compel the attendance* of any witness," renders it no longer obligatory on a Magistrate to compel the attendance of a witness who has received the summons.[3]

But every endeavour should be made to secure attendance of witnesses who have been summoned,[4] and a Court should see that its summons and warrants are duly executed.[5]

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2. (1920) 1920 All 209 (210): 21 Cri L Jour 385, *Jhabboo* v. *Emperor*.
3. (1903) 30 Cal 508 (514): *Surya Kanta Acharjee* v. *Hem Chunder Chowdhury*.
4. (1903) 30 Cal 508 (514), *Surya Kanta Acharjee* v. *Hem Chunder Chowdhury*.
   (1871) 15 Suth W R Cr 87 (88), *In re Jehan Buksh*.
   (1905) 2 Cri L Jour 679 (683, 686): 32 Cal 1093, *Tara Pada Biswas* v. *Nurul Huque Mia*.
   (1911) 12 Cri L Jour 566 (567): 12 Ind Cas 654 (Mad), *Lunmo of Mahalunma* v. *Emperor*.
5. (1868) 9 Suth W R Cr 3 (3), *Boiddonath Bania* v. *Bheedu Dass*.
6. (1908) 7 Cri L Jour 344 (345) (Cal), *Gosthu Behari Saha* v. *Emperor*.
7. (1873) 1873 Pun Re Cr No. 4, page 5 (5), *Crown* v. *Ruttun Singh*.
8. (1914) 1914 All 197 (198): 36 All 13: 15 Cri L Jour 164, *Emperor* v. *Mangal*.
9. (1914) 1914 All 197 (198) : 3 6All 13 : 15 Cri L Jour 164, *Emperor* v. *Mangal*.

Note 9.

1. (1903) 30 Cal 121 (122), *Daulat Singh* v. *Brinda Belder*.
   (1901-02) 6 Cal W N 548 (550), *Bhomar Munshi* v. *Digambar Das*.
2. (1933) 1933 Pat 494 (495) : 34 Cri L Jour 1203, *Ajab Lal Rai* v. *Bhagawan Sahu*.
3. (1926) 1926 Mad 361 (361) : 27 Cri L Jour 76, *Selvamuthu* v. *Chinnappan Chettiyar*.
4. (1882) 4 All 53 (54), *Empress* v. *Ruknuddin*.
5. (1921) 1921 All 142 : 23 Cri L Jour 124, *Bissay* v. *Emperor*.

When a Magistrate is unable to record the evidence of witnesses in attendance on the date fixed and the case is adjourned, the witnesses should be told to appear on the adjourned date; a party should not be required to repeatedly summon his witnesses on payment of fresh process-fees merely because the Magistrate is unable to record their evidence on the date originally fixed.[6]

10. Adjournment for procuring attendance of witnesses.

The terms of the Section apparently suppose that the defence witnesses attend voluntarily and accompany the accused.[1] The law intends that as a general rule the prisoner should have his witnesses present at the day of the trial.[2] If a summons is necessary to procure the attendance of any witness it should be applied for before the date fixed for hearing. When no such application was made a Magistrate does not exercise his discretion wrongly in refusing an adjournment asked for at the trial.[3] On the other hand, however, it is not an irregularity to adjourn a trial for the purpose of enabling accused to procure the attendance of his witnesses.[4]

The Section no doubt imposes an obligation on parties of procuring their evidence in summons cases, but the Court, should before convicting an accused in such a case take the precaution of ascertaining from the accused whether he has any witnesses, and if he has, but they are not present, should consider whether he should not be allowed a further opportunity of bringing or summoning his witnesses through Court; where this was not done, a conviction was set aside.[5] But a Court is not bound to do this and although the Magistrate may not have exercised, a wise discretion in not sending for the defence witnesses, the High Court held in a case that it was unable to say that there was any illegality requiring it to question the conviction.[6]

11. Process-fees.

Sub-Section confers on the Magistrate the power of demanding from a party the expenses to be incurred by his witnesses.[1] Where, however, a complainant is required to pay the fees for summoning his witnesses and fails to do so the Magistrate cannot dismiss the complaint but must deal with the case on such evidence as he has before him.[2] If the accused fails to pay the process-fees for his witnesses the Magistrate may refuse to issue process, but it is an order which should be passed sparingly.[3]

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6. (1912) 13 Cri L Jour 176 (176) : 13 Ind Cas 928 (Lah), *Balmokand* v. *Nanak Chand.*

Note 10.

1. (1868) 10 Suth W R Cr 36 (36), *Bhikha Roy* v. *Dhotun Roy.*
2. (1871) 16 Suth W R Cr 21 (22), *In re Dinoo Roy.*
   (1908) 7 Cri L Jour 344 (345) (Cal), *Gostho Behari Saha* v. *Emperor.*
3. (1887) Ratanlal 355 (355), *Empress* v. *Mulchand.*
   (1870) 14 Suth W R Cr 76 (76), *In re Chedee Konjra.*
   (1871) 16 Suth W R Cr 28 (29), *In re Bholanath Mukerjee.*
4. (1871) 16 Suth W R Cr 21 (22), *In re Dinoo Roy.*
5. (1884) 1884 Pun Re Cr No. 7, page 9 (10), *Empress* v. *Jewan Singh.*
6. (1868-69) 4 Mad H C App 29 (29).

Note 11.

1. (1912) 13 Cri L Jour 554 (555) : 8 Nag L R 65, *Birdhichand* v. *Lakhmichand.*
2. (1882) 5 Mad 160, *Korapulu* v. *Monappa.*
3. (1898) 1898 Pun Re Cr No. 7, page 19 (19), *Qadu* v. *Queen Empress.*

Sec. 245

245.* (1) If the Magistrate upon taking the evidence referred to in Section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

Acquittal.

(2) If he finds the accused guilty, he shall pass sentence upon him according to law.

Sentence.

(2) *Where the Magistrate does not proceed in accordance with the provisions of Section* 349 *or* 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Sentence.

Synopsis.

Other Topics.

Discharge or dismissal. See Note 4, Pts. 2 and 3.
Duty to take all evidence. See Note 2.

1. Legislative Changes.

Sub-Section (2) has been amended by adding the words "where the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562".

Similar amendments are effected in Sections 258 and 306. *See* Note 6.

2. When to acquit.

A Magistrate is not empowered to record an order of acquittal until he has heard all the prosecution and defence evidence. An order of acquittal passed before the evidence on both sides is over, is not in accordance with the law and is liable to be set aside.[1] Where a Magistrate refuses to proceed with

* **(Code of 1882—S. 245**—Same as that of 1898 Code).

(Code of 1872—S. 211. Paras. 1 and 2).

Acquittal.

211. If the Magistrate in any case tried under this chapter, finds the accused person not guilty, he shall record a judgment of acquittal.

Sentence.

If the accused person is convicted, the Magistrate shall pass sentence upon him according to law.

(Code of 1861—S. 272—Section same as that of 1872 Code)

Section 245—Note 2.

1. (1891) Ratanlal 539 (539), *Queen* v. *Toulman.*
(1867) 7 Suth W R Cr 45 (45), *Queeen* v. *Sreenath Mookopadhia.*
(1896) 18 All 221 (223), *Kesri* v. *Muhammad Baksh.*
(1913) 14 Cri L Jour 177 (178) : 1912 Upp Bur Rul 148, *Emperor* v. *Nga San Wein*
[See (1913) 14 Cri L Jour 559 (561) : 36 Mad 315, *In re Muthia Moopan.*]
(1932) 1932 Mad 25 (26) : 33 Cri L Jour 274, *Emperor* v. *Varadarajula Naidu.*

a complaint on a legal objection raised by the defence, as for instance, the want of sanction of a particular authority, his order is not one of acquittal.[2]

3. "If he thinks fit".

As to whether these words make the examination of the accused prescribed by Section 342 optional in summons cases, *See* Notes on Section 342.

4. Effect of dismissal of complaint or discharge.

In the trial of a summons case the law contemplates no other order except an order of acquittal or of conviction. When the Magistrate does not find the accused guilty, he is bound to record an order of acquittal.[1] Therefore, when the Magisrtate finds that no case is made out against the accused, he *acquits* the accused *in law*, although he may style his order as an order of discharge[2] or of dismissal of complaint.[3]

5. Trial of warrant case as summons case and acquittal.—Effect.

When a warrant case is tried as a summons case and the accused is acquitted under this Section, the acquittal amounts only to a discharge under Section 253 and can be dealt with under Section 436.[1]

6. Sentence.

When a Court convicts an accused person of any offence it is *bound* to pass some sentence, however light it may be unless it acts under Section 349 or Section 562 *infra*.[1] It is illegal to adjourn the passing of sentence for an *indefinite* period.[2] Section 349 deals with the procedure to be followed when the trying Magistrate cannot pass sentence sufficiently severe.

Section 562 deals with the power of the Court to release first offenders under 21 years of age on probation of good conduct.

7. Whether Magistrate can find accused guilty while acting under S. 349.—*See* S. 349 and notes thereunder.

8. Committal to Sessions.

As to the legality of committing to Sessions offence triable as summons cases, *See* Note 3 to Section 207 *supra*.

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2. (1924) 1924 Mad 487 (487): 25 Cri L Jour 442, *Sesha Ayyar* v. *Venkatasubba Chetty.*

Note 4.

1. (1871) 3 N W P H C R 273 (275), *Queen* v. *Tiloke Chund.*
   (1900) 1900 Pun Re Cr No. 19, page 43 (44), *Amir Khan* v. *Empress.*
2. (1910) 11 Cri L Jour 350 (350) : 6 Ind Cas 385 (Mad), *Sessions Judge of Tinnevelly* v. *Venkatram Aiyer.*
3. (1871) 3 N W P H C R 273 (275), *Queen* v. *Tiloke Chund.*
   (1876) 25 Suth W R Cr 63 (63), *Irfan Biswas* v. *Jimnut Bibee.*

Note 5.

1. (1886) 1886 All W N 260 (260), *Empress* v. *Judu.*
   (1888) 1888 All W N 96 (97), *Empress* v. *Lajja Ram.*
   (1905) 2 Cri L Jour 382 (382) (Mad), *Sabapathi Mudaliar* v. *Kuppusami Mudalir.*

Note 6.

1. (1872-1892) 1872-1892 Low Bur Rul 409 (409), *Empress* v. *Mi Bank.*
   (1886) Ratanlal 291 (292), *Empress* v. *Jakia.*
   (1900) 2 Bom L R 611 (612), *Empress* v. *Hanmantdas.*
   (1869) 2 Weir 305 (306), *H. C. Proceedings 12th August* 1869, *No.* 1513.
   (1934) 1934 Rang 338 (339) : 12 Rang 419 : 36 Cri L Jour 460, *Emperor* v. *Mi Hlwa.*
   [See also (1895) 22 Cal 805 (809), *Dewan Singh* v. *Empress.*]
   (1934) 1934 Nag 117 (117) : 35 Cri L Jour 760, *Emperor* v. *Kaka.* Sentence not inadequate merely because imprisonment is not awarded.
2. (1912) 13 Cri L Jour 288 (288) : 14 Ind Cas 672 (Bom), *Emperor* v. *Keshavlal Girdhar.*

Sec. 246

246.* A Magistrate may, under S. 243 or S. 245, convict the accused of any offence triable under this Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons.

Finding not limited by complaint or summons.

Synopsis.

Other Topics.

Altogether different offences. See Note 1, Pt. 4.

Both offences to be summons cases. See Note 1, Pts. 1 and 2.

Conviction for different offence than that specified in complaint. See Note 1, Pts. 1 to 4.

Conviction without re-opening trial. See Note 1, Pt. 3.

1. Scope of the Section.

This Section is analogous to Section 227 *ante* and enables the Magistrate to convict the accused of any offence which, from the facts proved or admitted, he appears to have committed, though it is different in its nature from the offence originally charged. But in order that the Section may apply, it is necessary that both, the original offence and the offence of which the accused is sought to be convicted, are triable *as summons cases*.[1] The fact that the offence originally charged was one under a local or special law and that the offence of which the accused is sought to be convicted is under the Penal Code does not affect the applicability of the Section provided that both are triable as summons cases.[2]

When convicting an accused person under this Section for a different offence from that originally charged it is not necessary to re-open the trial and to follow again procedure prescribed by Sections 243 and 244.[3] But this does not mean that a Magistrate can convict an accused person of an offence in

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*(**Code of 1882—S. 246**—*Same as that of* 1898 *Code.*)

(**Code of 1872—S. 203, Para. 2.**)

CHAPTER XVI.

OF THE TRIAL OF SUMMONS CASES BY MAGISTRATES.

203. * * * * *

Object and effect of complaint.

The Magistrate may convict the accused person of any offence (coming under this chapter) which, from the facts proved, he appears to have committed, whatever may be the nature of the complaint or summons.

(**Code of 1861**—*Nil.*)

Section 246—Note 1.

1. (1884) 7 Mad 454 (456), *Empress* v. *Papadu*
(1894) Ratanlal 708 (709), *Empress* v. *Viswanath*. Original charge under Sec. 71 of the Bom Act IV of 1890 —Conviction under Sec. 68 legal.
(1931) 1931 Mad 228 (231) : 32 Cri L Jour 432, *Chairman, Municipal Council, Mangalore* v. *Vasudewa Kamathi*.
2. (1904) 1 All L J 206*n* (206*n*), *Mahabir Sahai* v. *Emperor*. Original charge under Railways Act, S. 100—Conviction under S. 352, I. P. C., legal.
(1926) 1926 Bom 255 (255) : 27 Cri L Jour 496, *Framji Bomanji* v. *Emperor*. Original charge under City of Bombay Police Act, S. 122—Magistrate can convict under I. P. C., Sec. 352.
3. (1909) 10 Cri L Jour 557 (559) : 36 Cal 869, *Dasarath Rai* v. *Emperor*.

respect of which he has had no opportunity of defending himself.[4] Further, the Section refers to the *nature* of the offence, and not to the date on which the offence was committed. Hence, the Section does not empower a Magistrate in a summons case to convict an accused person of an offence alleged to have been committed on a date different from that of the offence originally charged.[5] Sec. 246 Note 1

247.* If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day: Sec. 247

Non-appearance of complainant.

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

Synopsis.

* (Code of 1882—S. 247—Same, except the proviso which was added in 1898.)

(Code of 1872 —S. 205, S. 208, Para. 3 and S. 212)

205. If upon the day appointed for the appearance of the accused person, or any day subsequent thereto on which the case may be called on, the complainant does not appear, the Magistrate shall dismiss the complaint, unless for some reason he thinks proper to adjourn the hearing of the same to some other day. Such adjournment shall be made upon such terms as the Magistrate thinks fit.

Non-appearance of complainant.

208. * * * * * *

If the complainant does not appear, the Magistrate may dismiss the complaint.

Adjournment.

212. The dismissal of a complaint under this chapter shall operate in like manner as the acquittal of the accused person.

Effect of Dismissal.

No complaint shall be dismissed under the provisions of this chapter, except in so far as it refers to a summons case.

4. (1890) Ratanlal 529 (530), *Empress* v. *Nathoo Lalji.*
(1901) 5 Cal W N 567 (568), *In the matter of Chinibas Pal.*
(1869) 12 Suth W R Cr 40 (41), *Kalidas Battacharjee* v. *Mohendranath.*
[See also (1882) 8 Cal 195 (197), *Empress* v. *Radoinath Shaha.*]

5. (1921) 62 Ind Cas 575 (576) : 22 Cri L Jour 559 (Cal), *Sarkar* v. *Howrah Municipality.*

Sec. 247 Notes 1—2

Other Topics.

Accused—Absence immaterial. See Note 4, Pt. 3.
Acquittal mandatory unless adjourned. See Note 2, Pt. 1; Note 7, Pt. 1.
Adjournment not legally made. See Note 5, Pt. 5; Note 7, Pts. 9 and 10.
Complainant absent but his Vakil present. See Note 5, Pt. 1.
Date for arguments. See Note 4, Pt. 1.
Date for judgment. See Note 4, Pt. 2.
Discretion as to acquittal. See Note 7, Pts. 14 and 15.
Discretion as to adjournment. See Note 7, Pts. 5 to 13a.
Issue of summons on complaint. See Note 2, Pt. 4.
Non-applicability to Workmens Breach of Contract Act. See Note 2, Pt. 5.
Non-payment of process-fees. See Note 5, Pt. 6.
Non-service of summons on accused. See Note 4, Pt. 4.
Order of striking off or dismissal. See Note 7, Pt. 16.
Transfer without knowledge of complainant. See Note 7, Pt. 8.
Warrant cases. See Note 2, Pts. 2 and 3; Note 3, Pt. 2.

1. Legislative Changes.

In the Code of 1861 (Section 259) the procedure was to *dismiss* the complaint[1] on the failure of the complainant to appear on the day of hearing. In the Code of 1872 it was provided that on default of appearance of the complainant on the date of hearing the complaint might be dismissed and that the effect of such a dismissal was the same as an acquittal.[2] In the later Codes, it was provided that in such circumstances the accused shall be acquitted.

The proviso to the Section was added for the first time in the 1882 Code.

2. Scope, object and applicability of the Section.

This Section provides that if on the day of hearing the complainant does not appear, the accused shall be *acquitted* unless the Magistrate thinks fit to adjourn the case. The object of the Section is to prevent the complainant from being dilatory in the prosecution of the case.[1] The Section applies only to *summons* cases. In warrant cases, the Magistrate has no jurisdiction to *acquit* an accused on the ground of the absence of the complainant.[2] As to the

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(Code of 1861—Ss. 259 and 269)

259. If upon the day appointed for the appearance of the accused person, or any day subsequent thereto on which the case may be called on, the complainant does not appear, the Magistrate shall dismiss the complaint, unless for some reason he shall think proper to adjourn the hearing of the same to some other day, upon such terms as he shall think fit.

Non-appearance of complainant.

269. Before or during the hearing of any complaint, it shall be lawful for the Magistrate to adjourn the hearing of the same to a day to be then appointed and stated in the presence and hearing of the party or parties; and if on the day to which such hearing or such further hearing shall have been so adjourned, the accused person shall not appear, the Magistrate may issue his warrant for the arrest of such person, and if the complainant shall not appear, the Magistrate may dismiss the complaint.

Adjournment.

Section 247—Note 1.

1. (1868) 4 Mad H C App 8 (9).
2. (1873) 19 Suth W R Cr 52 (52), *In re J. G. Bagram.*
   (1875) 23 Suth W R Cr 63 (64) : *The E. B. Rly. Co.* v. *Kali Dass Dutt.*
   (1882) 1882 All W N 229 (229), *In the petition of Bansidhar.*

Note 2.

1. (1926) 1926 Mad 1009 (1010) : 49 Mad 883 : 27 Cri L Jour 988, *Nagarambilli Tonkya* v. *Matta Jagannath.*
2. (1869) Ratanlal 16 (16), *Reg.* v. *Goolab Chand.*
   (1900) 4 Cal W N 26 (27), *Ram Coomar* v. *Ramjee.*
   (1923) 1923 Mad 439 (440) : 24 Cri L Jour 469, *Venkatrama Aiyer* v. *Sundaram Pillai.*
   (1934) 1934 All 340 (341) : 56 All 750 : 3

procedure to be followed in such cases if the complainant absents himself on the date of hearing, *see* Section 259 *infra*. But where the Magistrate treats a case throughout as a summons case and follows the procedure prescribed for such cases he is at liberty to acquit the accused under the Section although the *complaint* mentioned offences triable as warrant cases.[3] As the opening words of the Section show, the Section does not apply unless the proceedings have been instituted on a complaint.[4]

Inquiries under Section 1 of the Workmen's Breach of Contract Act (1857) are not criminal proceedings and the Section does not apply to them.[5]

3. Applicability of Section to cases consisting both of offences triable as summons cases and offences triable as warrant cases.

As seen in Notes to Section 241, where a case consists of two chrages, one of which is a summons case and the other a warrant case, the procedure prescribed for the trial of the graver offence should be followed and the case ought to be tried as a warrant case. Hence, if the complainant absents himself on the date of hearing, the Magistrate cannot acquit the accused under this Section but can only discharge him under Section 259.[1]

Where, however, a case is begun as a warrant case but a charge is framed only for an offence triable as a summons case, it has been held by the Madras High Court that the accused is entitled to acquittal under this Section on the complainant's absence on the day of hearing. This view proceeds on the ground that this Section confers a substantive right on the accused of which he cannot be deprived merely by reason of the adoption of a particular procedure by the Magistrate.[2]

4. "Upon the day . . . . adjourned."

The Section refers to the absence of the complainant on the date fixed for the appearance of the accused or to which the *hearing* has been adjourned. If the Magistrate under a mistake takes up the case on a day to which it was not posted and dismisses the complaint, this Section does not apply.[1a] The Section applies though the case has been posted only for arguments, because in such a case the hearing of the case cannot be said to be finished.[1] But where the hearing of the case is finished and the case is only posted for judgment, the Section does not apply and the accused cannot be acquitted merely because the complainant is absent on such a day.[2] Similarly, if a case is only nominally fixed for hearing and it cannot be reasonably expected to be reached

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Cri L Jour 65, *Suraj Bali* v. *Emperor*.

3. (1874) 22 Suth W R Cr 40 (41), *Maddoosoodun* v. *Haridass*.

4. (1924) 1924 All 528 (528) : 26 Cri L Jour 170, *Mt. Basanti* v. *Maqsud Ali Khan*.

5. (1913) 14 Cri L Jour 404 (404) : 7 Low Bur Rul 35, *Krishna Perdan* v. *Pasaud*.
(1923) 1923 Mad 719 (720) : 46 Mad 723 : 24 Cri L Jour 465, *Ramamma* v. *Gurunathan*.

Note 3.

1. (1885) 11 Cal 91 (93) : *Rajnarain Koonwar* v. *Lala Tamoli Raut*.
(1918) 1918 Mad 371 (373) : 41 Mad 727 : 19 Cri L Jour 613, *Raghavalu Naicker* v. *Singaram*. Order does not operate as acquittal even in cases of summons case offence.

2. (1923) 1923 Mad 439 (440) : 24 Cri L Jour 469, *Venkatarama Aiyer* v. *Sundaram Pillai*.

Note 4.

1a (1934) 1934 All 1025 (1026) : 36 Cri L Jour 328, *Mahadeo* v. *Emperor*.

1. (1914) 1914 Cal 768 (769) : 15 Cri L Jour 163, *Ramjiwan Rai* v. *Abilakh Barai*.

2. (1919) 1919 Cal 201 (201) : 46 Cal 867 : 20 Cri L Jour 492, *Girish Chandra Das* v. *Bhusan Das*.
(1923) 1923 Nag 158 (158) : 19 Nag L R 48 : 24 Cri L Jour 205, *Emperor* v. *Jangu Singh*.

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and is not in fact reached during the day, this Section has no application and the accused cannot be acquitted on the ground of the complainant's absence.[2a] The power of the Court to acquit an accused under this Section on the ground of the complainant's absence at the hearing is not affected by the fact that the *accused* is not present[3] or even by the fact that the process was not served on him.[4]

5. "The complainant does not appear."

The appearance of the complainant must be *in person*. The presence of the complainant's pleader is not enough to avoid the consequences specified in the Section.[1] The complainant must be present when the *case is called*; it is not enough if he appears afterwards though it may be in the course of the same working day.[2] But it has been held in a certain decision of the Madras High Court[3] that if a case is posted for 11 A. M. on a certain day and the complainant appears at that time but the Court does not sit till 2 P. M. and the complainant does not wait till then, he cannot be said to have failed to appear within the meaning of the Section.

Where on the day to which a case is posted, the case is not taken up at all, the complainant cannot be said to fail to "appear" within the meaning of the Section though he does not attend Court on such date as the time at which appearance is contemplated is when the case is *called on for hearing*.[4]

It has been held by the Madras High Court that where the date of hearing has not been communicated to the complainant at all, his absence cannot be regarded as a failure to appear for the purposes of this Section.[5]

The accused can be acquitted under the Section only on the failure of the complainant to *appear*. His failure to *pay process-fees* is no ground for acquitting the accused under this Section.[6]

In a joint charge for three offences under Section 234, where there are three complainants in respect of the three offences, the absence of one of the complainants can be ground only for acquitting the accused of the offence against the *particular* complainant who was absent and does not affect the

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2a (1934) 1934 Bom 130 (132) : 35 Cri L Jour 1139, *Jamnabai Meghji, In re.*

3. (1924) 1924 Pat 140 (141) : 24 Cri L Jour 815, *Kiran Sarkar* v. *Emperor.*
(1929) 1929 Bom 408 (409) : 53 Bom 693: 31 Cri L Jour 1000, *Shankar* v. *Dattatraya.*
(1911) 12 Cri L Jour 41 (42) : 34 Mad 253, *In re, Guggilapu Peddaya.*
(1932) 1932 Mad 563 (564) : 33 Cri L Jour 579, *Sriramulu* v. *Viraragavalu.*
[See (1865) 3 Suth W R 36 (36), *Queen* v. *Chandria Sikdar.*]
[See also (1900) 4 Cal W N 346 (347), *Panchu Singh* v. *Umar Mahomed.*]

4. (1924) 1924 Pat 140 (141) : 24 Cri L Jour 815, *Kiran Sirkar* v. *Emperor.*
(1929) 1929 Bom 408 (409) : 53 Bom 693 : 31 Cri L Jour 1000, *Shankar* v. *Dattatraya.*
[But see (1892) 2 Weir 307 (307), *In re Kandappa Chetty.*]

Note 5.

1. (1926) 1926 Mad 1009 (1010) : 49 Mad 883 : 27 Cri L Jour 988, *Nagarambilli Tonkya* v. *Matta Jagannatha.*

2. (1884) 7 Mad 356 (357), *Syed Ammadathi Kuttiyali* v. *Pari Mukri.*
(1926) 1926 Mad 1009 (1010) : 49 Mad 883 : 27 Cri L Jour 988, *Nagarabilli Tonkya* v. *Metta Jagannath.*
(1927) 1927 Mad 172 (173) : 28 Cri L Jour 118, *Pullamma* v. *Sanjivi Reddi.*

3. (1927) 1927 Mad 393 (394) : 28 Cri L Jour 208, *Ahmed Meera Sahib* v. *Meeran Sahib.*

4. (1926) 1926 Cal 102 (103) : 26 Cri L Jour 1050, *Rashbehari Karury* v. *Corporation of Calcutta.*

5. (1928) 1928 Mad 1158 (1164) : 30 Cri L Jour 191 : 52 Mad 695, *Nune Panakalu* v. *Ravelu Subba Rao.*
(1892) 2 Weir 307 (308).

6. (1925) 1925 All 392 (393) : 26 Cri L Jour 963, *Nana Mia* v. *Manu Mia.*
(1882) 5 Mad 160 (160), *Korapalu* v. *Monappa.*

charge as regards the others.[7]

6. Death of complainant.

The maxim *actio personalis moritur cum persona* or Section 306 of the Succession Act 1925 does not apply to criminal prosecutions.[1] Hence the death of a complainant does not *ipso facto* terminate a criminal prosecution. The contrary view taken in the undermentioned cases[2] is, it is submitted, not correct.

There is a difference of opinion on the question whether this Section applies to cases where the absence of the complainant on the day of hearing is due to his death. It has been held by the High Courts of Calcutta[3] and Lahore[4] that the Section applies. The High Court of Madras has, on the other hand held that the section does not apply.[5] While the High Courts of Bombay[6] and Patna[7] and the Judicial Commissioner's Court of Nagpur[8] have *doubted* if the Section applies. If it be held that the Section applies to such cases, it is open to the Magistrate either to acquit the accused[9] or to adjourn the case to enable another person to continue the prosecution.[10] If it be held that the Section does not apply, it is conceived that the Magistrate has no power to acquit the accused but must go on with the case.[11] In this view the under-

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7. (1915) 1915 Cal 366 (367) : 16 Cri L Jour 332 (334) : 43 Cal 13, *Subedar Ahir* v. *Emperor.*

Note 6.

1. (1926) 1926 Bom 178 (179) : 27 Cri L Jour 491, *Mahomed Azam* v. *Emperor.*
   (1922) 1922 Lah 227 (229) : 2 Lah 27 : 22 Cri L Jour 166, *Hazara Sing* v. *Emperor.* S. 89 of the Probate and Administration Act equivalent to S. 306, Succession Act.
   (1924) 1924 Lah 72 (73) : 4 Lah 7 : 24 Cri L Jour 29, *Emperor* v. *Mauj Din.* Charge of abduction does not abate by the death of the husband complainant.
   (1924) 1924 All 666 (667) : 25 Cri L Jour 1007, *Musa* v. *Emperor.* Prosecution under S. 323 does not abate.
   (1868-69) 4 Mad H C App 55 (55). But it is desirable that prosecution for adultery is withdrawn on the death of complainant.
   (1921) 1921 Mad 278 (278, 279) : 44 Mad 417 : 23 Cri L Jour 117, *Muhammad Ibrahim* v. *Shaik Dawood.* Charge under S. 323, I. P. C., does not abate.
   (1931) 1931 Mad 772 (772) : 54 Mad 768 : 33 Cri L Jour 14, *Narayana Naick* v. *Emperor.*
   (1908) 8 Cri L Jour 190 (190) : 1 Sind L R 72, *Imperator* v. *Nur Mahommed Wd Kadar.* Complaint under S. 498, I. P. C., does not abate by the death of the husband (complainant).
   [See also (1929) 1929 Rang 14 (15) : 6 Rang 664 : 30 Cri L Jour 345, *U. Maung Gaing* v. *Po Sin.*]
2. (1917) 1917 Lah 403 (404) : 18 Cri L Jour 688 (688) : 1917 Pun Re Cr No. 26, *Rama Nand* v. *Emperor.*
   (1919) 1919 Lah 409 (409) : 1919 Pun Re Cr No. 25 : 20 Cri L Jour 717, *Labhu* v. *Emperor.*
   [See also (1908) 1908 Pun Re Cr No. 10, Page 30 (30) : 7 Cri L Jour 290 (291), *Ishar Das* v. *Emperor.*]
3. (1915) 1915 Cal 708 (708) : 16 Cri L Jour 322 (323), *Puran Chandra Moulik* v. *Dengar Chandra Pal.*
   [But see (1915) 1915 Cal 263 (263) : 15 Cri L Jour 726, *Madho Chowdhry* v. *Turab Mian.*]
4. (1922) 1922 Lah 227 (229) : 2 Lah 27 : 22 Cri L Jour 166, *Hazara Singh* v. *Emperor.*
5. (1928) 1928 Mad 167 (168) : 51 Mad 339 : 29 Cri L Jour 257, *In re, Bontu Appala Naidu.*
6. (1926) 1926 Bom 178 (179) : 27 Cri L Jour 491, *Mahomed Azam* v. *Emperor.*
7. (1916) 1916 Pat 152 (153) : 37 Ind Cas 519 (521) : 18 Cri L Jour 151, *Jitan Dusadh* v. *Domoo Sahoo.*
8. (1932) 1932 Nag 72 (73) : 28 Nag L R 49 : 33 Cri L Jour 407, *Anand Rao* v. *Gadi.*
9. (1915) 1915 Cal 708 (708) : 16 Cri L Jour 322 (323), *Puran Chandra Moulik* v. *Dengar Chandra Pal.*
10. (1916) 1916 Pat 152 (154) : 18 Cri L Jour 151, *Jitan Dusadh* v. *Domoo Sahoo.*
11. [See (1916) 1916 Pat 152 (154) : 18 Cri L Jour 151, *Jitan Dusadh* v. *Domoo Sahoo.*]
    (1932) 1932 Nag 72 (73) : 28 Nag L R 49 : 33 Cri L Jour 407, *Anand Rao* v. *Gadi.*

Sec. 247 Notes 6—7

mentioned decision of the Madras High Court[12] seems to be incorrect.

7. "The Magistrate shall . . . . some other day."

If the complainant does not appear on the day of hearing, the accused is entitled to be acquitted unless the Magistrate for some reason thinks it proper to adjourn the case.[1] The Magistrate has no power to dispense with the appearance of the complainant[2] or *compel* him to go on with the case.[3] But unless an order of acquittal is actually passed by the Magistrate the mere absence of the complainant on the day of hearing does not *ipso facto* result in the acquittal of the accused.[4] The exercise of discretion in favour of the complainant once by adjourning the hearing does not deprive the Magistrate of the power of acquitting the accused on the non-appearance of the complainant at a subsequent hearing.[5]

The following are illustrative of the circumstances under which a Magistrate would be exercising his discretion under the Section properly by adjourning the case and giving the complainant a further opportunity instead of acquitting the accused:—

(a) When the complainant is not definitely informed of the place of trial.[6]

(b) When the complainant is prevented by heavy floods from appearing.[7]

(c) When the case is transferred from the file of one Magistrate to another without notice to the complainant and he is present in the original Court in ignorance of the transfer.[8]

(d) After repeated unnecessary adjournments and after the accused is put on his defence on a day to which no legal adjournment is made.[9]

(e) When the adjournment is not made in the presence and hearing of the parties.[10]

(f) When all the evidence for the complainant is taken and he is not specially directed to appear.[11]

(g) When the case is adjourned several times to suit the convenience of the Court and the complainant is only temporarily absent for a short time on the day the accused is acquitted.[12]

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12. (1928) 1928 Mad 167 (168) : 51 Mad 339 : 29 Cri L Jour 257, *Bontu Appala Naidu* v. *Emperor.*

Note 7.

1. (1903-04) 2 Low Bur Rul 165 (165) : *King* v. *Nga Aung Nyan.*
   (1908) 8 Cri L Jour 139 (140) (Bom), *In re, S. E. Dubash.*
2. (1926) 1926 Lah 628 (628) : 27 Cri L Jour 1022, *Maula Baksh* v. *Marshall.*
3. (1875) 24 Suth W R Cr 32 (33), *Queen* v. *Dukhan Patan.*
4. (1923) 1923 Cal 725 (727) : 25 Cri L Jour 492, *Shermull* v. *Corporation of Calcutta.*
5. (1890) 2 Weir 308 (308), *In re, Latchmana Patriko.*
6. (1882) 1882 All W N 229 (229), *In the petition of Bansidhar.*
7. (1875) 24 Suth W R Cr 64 (65), *Sreemmutee Tazoonnissa* v. *Wassil.*
8. (1919) 1919 Cal 1 (2) : 47 Cal 147 : 20 Cri L Jour 782, *Ganpat Rai Khemka* v. *W. G. Good.*
   (1917) 1917 Cal 314 (315) : 18 Cri L Jour 104 (105), *Etim Haji* v. *Hamid.*
   (1883) 13 Cal L R 303 (305), *Romanath Bal* v. *Behari Bag Bagdi.*
9. (1871) 16 Suth W R Cr 58 (58), *Mahomed Alum* v. *Sheikh Akil.*
10. (1875) 8 Mad H C App 5 (6).
11. (1888) 2 Weir 306 (306), *In re, Nagayya.*
    [See also (1869) 12 Suth W R Cr 27 (27), *Queen* v. *Bodoor Ghose.*]
12. (1872) 18 Suth W R Cr 59 (59), *Gurucharan* v. *Moor Saman.*

(h) When the complainant is prevented by illness from appearing.[13] *See also* the undermentioned case.[13a]

The following cases show under what circumstances the Magistrate would be exercising his discretion under the Section properly if he acquits the accused instead of adjourning the case:—

(a) Where the complainant has gone abroad and will not be available for some considerable time.[14]

(b) Where the accused is charged for repairing a public road without permission when the repair is admittedly for the public good.[15]

The Section only contemplates an order of *acquittal* or of adjournment. An order striking off a case or dismissing a complaint is not within the terms of the Section. But such an order if passed in the circumstances mentioned in the Section will amount to an order of *acquittal*.[16]

Where a case is *adjourned* the fact that the Magistrate examined some witnesses on that day does not vitiate the proceedings.[17]

8. Whether acquittal under this Section bars fresh trial under Sec. 403—*See* Notes to Section 403.

9. Complaints by public servants—Proviso.

The Section does not by virtue of the proviso, apply to cases where the complainant is a public servant and the Court deems it fit to dispense with his personal attendance.[1]

10. Review.—*See* Section 369 and Notes thereunder.

11. Power to restore a case in which accused has been acquitted under this Section.—*See* Notes under Section 369.

12. Revision.

The High Court can interfere in revision with an order of acquittal under this Section.[1] It will, however, very rarely interfere and set aside an acquittal especially when there is no error of law on the face of the record.[2]

As to the power to order further enquiry into a case, disposed of under this Section, *see* Notes under Section 436.

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13. (1867) 8 Suth W R Cr 5 (6), *Queen* v. *Ram Narain Ghose.*
(1891) 1891 All W N 120 (121), *Empress* v. *Hardeo Singh.*

13a (1927) 1927 Mad 139 (140) : 27 Cri L Jour 1391, *Subbiah* v. *Indukoti Obiah.*

14. (1926) 1926 Lah 628 (628) : 27 Cri L Jour 1022, *Maula Baksh* v. *Marshall.*

15. (1867) 7 Suth W R Cr 31 (32), *Queen* v. *Bholanath Banerjee.*

16. (1884) 1884 All W N 115 (115), *In the matter of Musahib Khan.*
(1885) 1885 All W N 43 (43), *Empress* v. *Bhawani Prasad.*
(1917) 1917 Lah 143 (143) : 18 Cri L Jour 324 (325), *Saifuddin* v. *Emperor.*
(1925) 1925 Oudh 44 (45) : 25 Cri L Jour 359, *Bindra* v. *Bhagawanta.*
(1927) 1927 Nag 388 (388) : 28 Cri L Jour 183, *Yashoda* v. *Banu Bai.*
[But see (1908) 8 Cri L Jour 139 (140) (Bom), *In re, S. E. Dubash.*]

17. (1920) 1920 Cal 68 (69) : 21 Cri L Jour 252, *Amir Mia* v. *Sarafdi Hazi.*

Note 9.

1. (1930) 1930 Nag 33 (34) : 25 Nag L R 194 : 31 Cri L Jour 382, *Nante* v. *Municipal Committee, Jubbulpore.*
[See also (1878) Ratanlal 137 (138), *Empress* v. *Ramchandra.*]

Note 12.

1. (1882) 1882 All W N 229 (229), *In the petition of Bansidhar.*
(1924) 1924 Oudh 64 (64) : 26 Oudh Cas 282 : 25 Cri L Jour 794, *Ram Nidh* v. *Ram Saran.*
(1927) 1927 Mad 172 (173) : 28 Cri L Jour 118, *Pullamma* v. *Sanjivi Reddi.*
(1928) 1928 Mad 1158 (1162) : 30 Cri L Jour 191 : 52 Mad 695, *Nune Panakalu* v. *Ravalu Subba Rao.*
(1930) 1930 Mad W N 190 (190), *Anam Anjayya* v. *Anam Subbamma.*

2. (1927) 1927 Mad 473 (474) : 28 Cri L Jour 270, *Lakshminarasimham* v. *Nalluru Bapanna.*
(1873) 19 Suth W R Cr 52 (52), *In re, J. G. Bagram.*

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248.* If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

[Withdrawal of complaint.

Synopsis.

Other Topics.

1. Legislative Changes.

The clause at the end of the Section "and shall thereupon acquit the accused" was substituted in the Code of 1882 and the subsequent Codes for the words "a complaint withdrawn under this Section shall not again be entertained" which occurred in the corresponding Sections of the Codes of 1861 and 1872.

2. Scope of the Section.

This Section provides that under the circumstances specified therein a complaint may be *withdrawn* with the permission of the Court and that upon such withdrawal the accused must be acquitted. The Section, however, applies only to summons cases. (*See* Note 6 *infra*). An analogous provision is made in Section 494 for the withdrawal of prosecution by *the Public Prosecutor* with the permission of the Court. That Section applies to *all* offences and is not confined like the present one to summons cases. Section 345 provides for the *compounding* of offences. As to differences between withdrawal of complaint under this Section and compounding of an offence under Section 345, *see* Note 3.

Section 537 of the Calcutta Municipal Act which authorises the Corporation of Calcutta to withdraw legal proceedings must be read subject to the provisions of this Section and unless the Magistrate is satisfied that there are

* **(Code of 1882—S. 248**—Same as that of 1898 Code.)

(Code of 1872—S. 210 and **Code of 1861—S. 271**, were materially the same as that of 1898 Code, except the change noted in Note 1 above.)

sufficient grounds for permitting a complaint to be withdrawn, the Corporation cannot withdraw a criminal complaint.[1]

As to *abandonment* of criminal proceedings, *see* the undermentioned cases.[2]

See also the Notes to Sections 494 and 333.

3. Withdrawal of complaint and compounding of offences—Difference between.

1. "Compounding" implies the *consent of the accused* whereas, such consent is not necessary for the withdrawal of a complaint under this Section.[1]

2. The right to withdraw a complaint under this Section applies only to offences triable as *summons cases* (*See* Note 6). But the right to compound an offence under Section 345 applies both to summons as well as to warrant cases provided they relate to the offence specified in the Section.[2]

3. Under this Section a complaint can be withdrawn in respect of *all* offences which are triable as summons cases. But under Section 345 the right to compound applies only to certain offences specified in the Section.[3]

4. In the case of withdrawal of complaint under the Section the *permission of the Court* is necessary in all cases. But under Section 345 there are several offences which are compoundable without the permission of the Court and such permission is necessary only with reference to *certain* offences.[4]

5. The withdrawal of a complaint under this Section does not by itself result in the acquittal of the accused, unless the Court passes an order acquitting the accused. But the compounding of an offence under Section 345 by itself results in the acquittal of the accused.[5]

4. "Complaint."

Under this Section, a complaint can be withdrawn with the permission of the Court, by a *complainant*. Thus, where the sanction of a certain public servant is necessary for the criminal proceedings in question and a complaint is filed with the sanction of such public servant, the complaint can be withdrawn by the *person filing* it and the sanction of the public servant is not necessary for such withdrawal.[1]

But, the power to withdraw is *confined* to the complainant. Thus where a complaint with reference to an offence under the Municipal law is filed by the Municipal Secretary, the complaint cannot be withdrawn by the

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Section 248—Note 2.

1. (1926) 1926 Cal 786 (788) : 53 Cal 631 : 27 Cri L Jour 984, *Sishir Kumar Mitter* v. *Corporation of Calcutta.*
2. (1920) 1920 Cal 345 (346) : 21 Cri L Jour 558, *Nando Lal Guho* v. *Corporation of Calcutta.*
   (1923) 1923 Cal 725 (726) : 25 Cri L Jour 492, *Shermull* v. *Corporation of Calcutta.*

Note 3.

1. (1892-96) 1 Upp Bur Rul 219 (220), *Queen-Empress* v. *Nga Po Gaung.*
   (1888) 1888 Pun Re Cr No. 19, pages 35 (35 to 38), *Empress* v. *Khushali Ram.*
   (1894) 21 Cal 103 (112, 113), *Murray* v. *Queen-Empress.*
   (1916) 1916 Pat 200 (202) : 18 Cri L Jour 107, *Bayan Ali* v. *Emperor.*
   (1924) 1924 Lah 595 (596) : 5 Lah 239 : 25 Cri L Jour 629, *Anantia* v. *Emperor.*
2. [See Foot-note 1].
3. [See Foot-note 1].
4. [See Foot-note 1].
5. [See Foot-note 1].

Note 4.

1. (1871) Ratanlal 45 (45), *Reg.* v. *Jeejibhai Nathu Bhai.*
   [But see (1878) 2 Bom 653 (653, 654), *In re Muse Ali Adam.* Complaint can be withdrawn only by the public servant.]

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Municipal Council.[2] Moreover, the term "Complainant" is used in the restricted sense of a person who files a "Complaint" as defined by Section 4 (h) *ante*. Hence, the term does not apply to a person who sets the Police in motion by making a complaint to them. Therefore, where a person makes a complaint to the police and the police make a report to the Magistrate who takes cognizance of the offence on such report, he cannot act under this Section and acquit the accused on the application for 'withdrawal' by the person who made the complaint to the Police.[3]

5. At any time before a final order is passed.

A complaint can be withdrawn under this Section at any time[1] before a final order is passed in the case. But this does not mean that a complaint can be withdrawn and the accused can be *acquitted* so as to bar a re-trial of the accused under Section 403, even before any process is issued against the accused.[2]

6. In any case under this Chapter.

This Section applies only to offences triable as summons cases and does not apply to offences triable as warrant cases. In such cases there is no provision in the Code which provides for the termination of the proceedings on the complainant offering to withdraw his complaint.[1] An offence under Section 24 of the Cattle Trespass Act being triable as a summons case, a complaint of such an offence can be withdrawn under this Section.[2]

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2. (1914) 1914 Mad 387 (387) : 15 Cri L Jour 299, *S. Paramananda Nadar* v. *Karunakara Dass.*
3. (1900) 23 Mad 626 (626), *Queen-Empress* v. *Chenchayya.*

Note 5.

1. (1933) 1933 Lah 884 (885) : 35 Cri L Jour 86, *Mehr Singh* v. *Emperor.*
2. (1913) 14 Cri L Jour 559 (561) : 36 Mad 315, *In re Muthia Moopan.*

Note 6.

1. (1869) Ratanlal 23 (24), *Reg.* v. *Jagjivan.*
   (1927) 1927 Rang 174 (174, 175) : 5 Rang 136 : 28 Cri L Jour 649, *Maung Thu* v. *U Po.*
   (1894) 21 Cal 103 (113), *Murray* v. *Queen-Empress.*
   (1913) 14 Cri L Jour 77 (77) : 37 Bom 369, *Emperor* v. *Ranchod Bawla.*
   (1870) 2 N W P H C R 234 (235), *The Queen* v. *Gambhur.*
   (1871) 3 N W P H C R 341 (341), *Queen The* v. *Jugroop Ugrabee.*
   (1889) 13 Bom 600 (605), *In re Ganesh Narayan Sathe.*
   (1882) 5 Mad 378 (378), *Sambasivanna* v. *Bhogappa.*
   (1898) 22 Bom 711 (713), *In re Samsudin.*
   (1889) Ratanlal 461 (461), *Queen-Empress* v. *Lilladhar.*
   (1869) Ratanlal 17 (17), *Reg.* v. *Jeenka.*
   (1869) 12 Suth W R Cri 59 (59, 60), *On a reference to the High Court.*
   (1871) 1871 Pun Re Cr No. 8, page 9 (10), *Mohun* v. *Gunsham.*
   (1933) 1933 Lah 323 (324) : 34 Cri L Jour 718, *Dogar Singh* v. *Budh Singh.* Order allowing proceedings to be dropped though technically incorrect was not interfered with in revision in the particular circumstances of the case.
   (1909) 10 Cri L Jour 14 (15) : 1908 Upp Bur Rul Cri 15, *Nga Maung Gyi* v. *Nga Lu Gale.*
   (1929) 1929 Mad 7 (8), *Narasimhalu Naidu* v. *Naina Pillai.* Withdrawal cannot by itself end the case—The accused can only be discharged by the Magistrate for want of sufficient evidence.
   [See (1888) Ratanlal 391 (392), *Queen-Empress* v. *Moti Das.* The order of a Magistrate in a warrant case, permitting the withdrawal of a complaint of a non-compoundable offence is equivalent to an order of discharge under S. 253].
   [But see (1887) Ratanlal 330 (330), *Queen-Empress* v. *Vithoba*].
   [But compare (1868) 5 Bom H C Cri 27 (28), *Reg.* v. *Ramlo Jerio.* Trial before Sessions Court for adultery—Sessions Judge discharging accused on husband of woman intimating he was not willing to proceed further—High Court refused to interfere].
2. (1919) 1919 All 31 (31) : 42 All 202 : 21 Cri L Jour 305 : *Emperor* v. *Julua.*

7. "Satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint."

The withdrawal of a complaint under this Section is permissible only if the *Magistrate* is satisfied that there are "sufficient grounds" for permitting such withdrawal.[1] But where a complaint of offences under Sections 183 and 185 of the Penal Code is made by a Court and such Court subsequently finds that it made a mistake in filing the complaint and wishes to withdraw it, the Magistrate will scarcely be justified in refusing to allow a withdrawal.[2]

The power to allow a complaint to be withdrawn under this Section rests entirely with the Magistrate. The *Police* have no power to entertain an application for withdrawal of a complaint.[3]

Under this Section it is competent to a Magistrate in a proper case to treat an application to the effect that the offence has been compounded as an application for withdrawal of complaint.[4]

8. "Shall thereupon acquit the accused."

Under the Section, upon the withdrawal of a complaint, the Magistrate has no power to dismiss the case or discharge the accused but must *acquit* the accused.[1]

9. Withdrawal of complaint against one of several accused.—Effect.

Where there are several accused persons in a case and the complaint is allowed to be withdrawn as against one of the accused, the withdrawal does not enure to the benefit of the other accused and they are not entitled to acquittal under this Section.[1]

10. Power to order further inquiry.

As to the power to order further inquiry into the case of an accused person acquitted under this Section, *see* Section 436 and Notes thereunder.

11. Re-trial of accused, whether barred.

As to whether a fresh trial of an accused acquitted under this Section is barred under Section 403, *See* Notes to that Section.

Note 7.

1. (1926) 1926 Cal 786 (788) : 53 Cal 631 : 27 Cri L Jour 984, *Sishir Kumar* v. *Corporation of Calcutta.*
2. (1927) 1927 Oudh 51 (51) : 2 Luck 395 : 27 Cri L Jour 1247, *King-Emperor* v. *Ram Nath Bux Singh.*
3. (1875) Ratanlal 91 (91), *Surat District Magistrate's Letter No.* 306.
4. (1919) 1919 All 31 (31) : 42 All 202 : 21 Cri L Jour 305, *Emperor* v. *Julna.*

Note 8.

1. (1924) 1924 Lah 595 (596) : 5 Lah 239 : 25 Cri L Jour 629, *Ananta* v. *Emperor.* Per Harrison, J.
   (1901) 25 Bom 422 (428), *Queen-Empress* v. *Hussein Haji.* But such an order is only an irregularity.

Note 9.

1. (1922) 1922 Oudh 145 (146) : 23 Cri L Jour 271, *Rohti Singh* v. *Makhdum Kalwar.*
   (1924) 1924 Lah 595 (599) : 5 Lah 239 : 25 Cri L Jour 629, *Ananta* v. *Emperor.*
   [See also (1901) 25 Bom 422 (425), *Queen-Empress* v. *Hussein Haji*].
   [But see contra (1920) 1920 Pat 828 (828, 829) : 20 Cri L Jour 824, *Behari Singh* v. *Sagar Singh.*]

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Power to stop proceedings when no complainant.

249.* In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class, or with the previous sanction of the District Magistrate, any other Magistrate, may for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

Synopsis.

	Note No.		Note No.
"In any case instituted otherwise than upon a complaint."	1	Revival.	2

Other Topics.

Applicability of Section 403. See Note 2, Pt. 3.
Applicability of Sections 437 and 436. See Note 2, Pt. 2.
Case on police report. See Note 1, F-N (1).
Effect of an order under this Section. See Note 2.
Warrant cases. See Note 1, Pt. 3.

1. "In any case instituted otherwise than upon a complaint."

This Section applies only to cases instituted *otherwise* than upon a complaint.[1] Further, a Magistrate can proceed under this Section only in summons cases.[2] If he proceeds under this Section in a warrant case his order will be void and the case will be deemed to continue on the file of the Court.[3]

2. Revival.

On general principles, the Magistrate who passed an order of stay under this Section may for sufficient reasons, remove the stay and proceed further.[1] But an order stopping further proceedings under this Section does not operate as an order of discharge and there is no power under Section 436 to order further inquiry into a case in which such an order has been passed.[2] At the same time, the order is expressly excluded by the explanation to Section 403 from being an acquittal and hence it does not act as a bar to fresh proceedings against the accused with reference to the same matter.[3]

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* **(Code of 1882—S. 249** *was newly added in* 1882 *and was same as that of* 1898 *Code.)*

Section 249—Note 1.

1. (1900) 23 Mad 626 (628), *Queen-Empress* v. *Chenchayya.*
   (1920) 1920 Pat 469 (470): 21 Cri L Jour 184, *Nathu Thakur* v. *Emperor.*
   Case started on police report-Section applies.
   (1912) 13 Cri L Jour 860 (861): 1913 Pun Re Cr No. 9, *Achhru* v. *Emperor.*
2. (1926) 1926 Pat 292 (293) : 5 Pat 243 : 27 Cri L Jour 698, *Firangi Singh* v. *Durga Singh.*
3. (1926) 1926 Pat 292 (294): 5 Pat 243 : 27 Cri L Jour 698, *Firangi Singh* v. *Durga Singh.*

Note 2.

1. (1906) 29 Mad 126 (142, 146): 3 Cri L Jour 274, *In re, Chinna Kaliappa Goundan and Subbier.*
2. (1912) 13 Cri L Jour 860 (861): 1931 Pun Re Cr No. 9, *Achhru* v. *Emperor.*
   (1934) 1934 All 17 (19): 35 Cri L Jour 564, *Emperor* v. *Sripal.*
3. (1912) 13 Cri L Jour 860 (861): 1913 Pun Re Cr No. 9, *Achhru* v. *Emperor.*

Frivolous Accusations in Summons and Warrant Cases.

Frivolous or vexatious accusations.

250. (1) If, in any case instituted by complaint as defined in this Code, or upon information given to a police officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, by his order of discharge or acquittal, direct the person upon whose complaint or information the accusation was made to pay to the accused, or to each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit:

False, frivolous or vexatious accusations.

250.* *(1) If, in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused before a Magistrate of of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid.*

*** (Code of 1882—S. 250.)**

250. If, in any case instituted upon complaint, a Magistrate acquits the accused under Section 245 or Section 247, and is of opinion that the complaint was frivolous or vexatious, he may, in his discretion, by his order of acquittal, direct the complainant to pay to the accused, or to each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit.

Frivolous or vexatious complaints.

The sum so awarded shall be recoverable as if it were a fine: provided that, if it cannot be realized, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

Recovery of compensation.

(Code of 1872—S. 209.)

209. A Magistrate may dismiss the complaint as frivolous or vexatious, and may, in his discretion, by his order of dismissal, award that the complainant shall pay to the accused person such compensation, not exceeding fifty rupees, as to such Magistrate seems just and reasonable.

Compensation in cases of frivolous or vaxatious complaints.

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Provided that, before making any such direction, the Magistrate shall—

(*a*) record and consider any objection which the complainant or informant may urge against the making of the direction, and

(*b*) if the Magistrate directs any compensation to be paid, state in writing, in his order of discharge or acquittal, his reasons for awarding the compensation.

(2) Compensation to which a Magistrate has ordered payment under Sub-section (1) shall be recoverable as if it were a fine.

Provided that, if it cannot be recovered, the imprisoment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs.

(2) *The Magistrate shall record and consider any cause which such complainant or informant may show, and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.*

(*Omitted.*)

(2-*A*) *The Magistrate may, by the order directing payment of the compensation under Sub-section* (2), *further order that, in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days.*

(2-*B*) *When any person is imprisoned under Sub-section* (2-*A*), *the provisions of Ss. 68 and 69, I. P. C., shall, so far as may be, apply.*

In such cases, if more persons than one are accused in the complaint, the Magistrate may, in like manner, award compensation not exceeding fifty rupees to each of them.

Recovery of such compensation.

The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant which may be found within the jurisdiction of the Magistrate of the District; and such order shall authorize the distress and sale of any moveable property belonging to the complainant without the jurisdiction of the Magistrate of the District, when the order has been endorsed by the Magistrate of the District in which such property is situated, and, if the sum awarded cannot be realised by means of such distress, by imprisonment of the complainant in the civil jail, for any time not exceeding thirty days, unless such sum is sooner paid.

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(2-C) No person who has been directed to pay compensation under this Section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him:

Provided that any amount paid to an accused person under this Section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.

[(5) *below*]

(3) A complainant or informant who has been ordered under Sub-section (1) by a Magistrate of the second or third class to pay compensation to an accused person may appeal from the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(3) A complainant or informant who has been ordered under Sub-section (2) by a Magistrate of the second or third class to pay compensation, *or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees*, may appeal from the order in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under Sub-section (3), the compensation shall not be paid to him before the period allowed for

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under Sub-section (3), the compensation shall not be paid to him before the period allowed

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(Code of 1861—S. 270.)

270. In any case where the Magistrate shall dismiss the complaint as frivolous and vexatious, it shall be lawful for him in his discretion, by his order of dismissal, to award that the complainant shall pay to the accused person such amends, not exceeding fity rupees, as to such Magistrate shall seem just and reasonable. The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant, which may be found within the jurisdiction of the Magistrate of the District and in default of such distress by imprisonment in the civil jail, for any time not exceeding thirty days unless such amends shall be sooner paid.

Magistrate may award amends in cases of frivolous and vexatious complaints.

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the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any compensation paid or recovered under this Section.

for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided, *and where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.*

Synopsis.

Other Topics.

Absence of complainant—Procedure. See Note 10, Pt. 1.
Acquittal owing to absence of complainant. See Note 7, Pt. 4.
Appellate Court has no power to award compensation. See Note 6. Pt. 3.
"As if it were a fine"—Not a fine. See Note 13, Pts. 2 and 3.
Case heard by two Magistrates—Magistrate deciding is to act. See Note 6, Pt. 6.
Cases on police report—Section inapplicable. See Note 3, Pt. 3.
Cattle Trespass Act—Complaint under. See Note 4, Pt. 8.
Charge framed—No bar. See Note 8, Pt. 4.
Complainant—Servant or master. See Note 14, Pts. 6 and 7.
Composition. See Note 7, Pt. 4.
Co-accused convicted — Still compensation awarded. See Note 15, Pt. 1.
Court making a complaint under S. 476. See Note 14, Pt. 1.
Death of party pending revision. See Note 18.
Dismissal of complaint — Section inapplicable. See Note 7, Pts. 5 and 6 also Pt. 1.
General, Special or Local Acts. See Note 4, Pts. 4 to 11.
Guardian of a minor complainant. See Note 14, Pt. 8.
Informant when liable and when not. See Note 3, Pts. 4 to 10; Note 14, Pt. 9.
Irregularity—Curable under S. 537. See Note 9, F.-N. (1); Note 20, Pt. 2
Magistrate acting under S. 30. See Note 5, Pt. 4.
Magistrate without jurisdiction. See Note 5, Pt. 9.
Nature of order under the Section—Summary. See Note 2, Pt. 1.
No adjournment. See Note 10, Pt. 2.

1. Legislative changes.

1. *Changes made in* 1869:—

(a) Under Section 270 of the Code of 1861, the compensation awarded could not exceed rupees fifty, whether there were one accused person or more.[1] Act VIII of 1869 amended the Section and made rupees fifty awardable as compensation for each of the accused where there were more than one.[2]

(b) The words "false and frivolous" were changed into "false *or* frivolous".[3]

2. *Changes made in* 1872:—

The second part of Section 270 of the 1861 Code relating to the mode of recovery of compensation was omitted in Section 209 of the Code of 1872, provision having been made therefor in Section 307 of the latter Code.

3. *Changes made in* 1882:—

(a) For the words "dismiss the complaint as frivolous or vexatious" and "by his order of dismissal," the words "acquits the accused under Section 245 or Section 247" and "is of opinion that the complaint was frivolous or vexatious" and "by his order of acquittal" were substituted.

(b) The provisions as to recovery of the sum awarded, as if it were a fine and imprisonment if the same is not realised were re-introduced as para 2.

(c) Para 3 was added.

4. *Changes made in* 1891:—

Act IV of 1891 repealed Section 250 of the Code of 1882 and in its place substituted Section 560 at the end of that Code. The chief changes made were (*In sub-section* 1):—

(a) After the word 'complaint' the words "or upon information given to a Police Officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate" were added.

Section 250—Note 1.

1. (1870) 2 N W P H C R 430 (431), *Queen-Empress* v. *Gopal.*
(1867) 8 Suth W R Cr 54 (55), *Queen-Empress* v. *Lalloo Singh.*
2. (1870) 14 Suth W R Cr 75 (75), *In re Bhyroo Lall.*
(1919) 1919 Lah 227 (228) : 1919 Pun Re Cr No 15 : 20 Cri L Jour 495, *Shankar Sahai* v. *Emperor.*
3. (1903) 30 Cal 123 (132) (F B), *Beni Madhub Kurmi* v. *Kumud Kumar Biswas.*

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(b) After the word "Magistrate" the words " by whom the case is heard" were added.

(c) For the words "acquits, etc.," the words "discharges or acquits" were substituted.

(d) The provisos as to the recording and considering the objections of the complainant and the recording of reasons for the orders were added.

(e) Paras 3 and 4 regarding appeals were added.

5. *Changes made in* 1898:—

There was no change in the Code of 1898.

6. *Changes made in* 1923:—

(a) *In sub-sections* 1 *and* 2:

1. For the words "frivolous *or* vexatious," the words "false *and* either frivolous or vexatious" were substituted.
2. The words beginning with "if the person upon whose complaint" to the end of sub-section 1 were new.
3. The words "fifty rupees" were substituted by the words "one hundred rupees or if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees."

(b) The words "second proviso to sub-section 1" were substituted by "sub-section 2-A" and sub-section 2 was omitted.

(c) *Sub-section* '2-*B*' is new.

(d) *Sub-section* '2-*C*' is new. The proviso is the same as sub-section 5 of the Code of 1898.

(e) In *sub-section* 3 after the words "pay compensation" the words "or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees" were added.

(f) In *sub-section* 4 the last sentence is new.

2. Object and applicability of the Section.

The object of the Section is twofold, *firstly*, to award by a summary order some compensation to the person against whom a frivolous or vexatious accusation is brought, leaving it to him to obtain further redress against the complainant, if he seeks for it by a regular civil suit or criminal prosecution[1] and *secondly* to deter persons from making vexatious and frivolous complaints.[1a] The powers, however, should never be used as a punitive measure.[1b]

Under the Code as it stood before it was amended in 1891 it was held that this Section applied only to summons cases and not to warrant cases.[2] By the amendment of 1891 the Section was made applicable to *any*

Note 2.

1. (1903) 30 Cal 123 (129) (F B), *Beni Madhub Kurmi* v. *Kumud Kumar Biswas.*

1a (1904) 1 Cri L Jour 433 (434) : 26 All 512, *Bindesri* v. *King Emperor.*

1b (1881) All W N 167 (168), *In re Sarnam.*

2. (1881) 1881 All W N 154 (154), *Empress* v. *Angu.*

(1881) 1881 All W N 161 (161), *Empress* v. *Jokhan.*

(1882) 1882 All W N 115 (116), *Jagmohan* v. *Sheobalak.*

(1883) 1883 All W N 130 (130), *Niazullah* v. *Najju.*

(1885) 1885 All W N 45 (45), *In the matter of Harbans.*

(1885) 1885 All W N 258 (258), *Kalka* v. *Babu.*

(1868-69) 5 Bom H C R Cri 12 (12), *Reg* v. *Ramji Valad Daji.*

(1870) 7 Bom H C R Cri 58 (58, 59), *Reg* v. *Gurlingapa.*

(1864) 1 Suth W R Cri 1 (1,2), *Chidi Chowte* v. *Bhowany.*

case.[3] It is applicable also to cases triable summarily whether tried summarily or not.[4]

3. "Upon complaint or upon information given to a police officer or to a Magistrate."

Before the year 1891 the corresponding Section of the old Code applied only where a case was instituted upon a *complaint* and not to cases instituted on any information.[1] After the amendment of that Section in 1891 and also under the present Section a case instituted "upon information given to a Police Officer or to a Magistrate" is within the Section.[2]

As has been seen already in Section 4 (*h*) a *police report* is not a complaint and compensation cannot be awarded in a case instituted on such report.[3] The words "information given to a Police Officer" means information given and entered in the register of cognizable cases under Section 154 of the Code,[4] and the words "information given to a Magistrate," must, it is

(1864) 1 Suth W R Cri 6 (7), *Assuruddee Khan* v. *Baboo Khan.*
(1865) 2 Suth W R Cri 57 (57), *Queen* v. *Gogal Sein.*
(1865) 3 Suth W R Cri 60 (60), *Queen* v. *Nijanund.*
(1865) 3 Suth W R Cri 70 (70), *Juhoorun* v. *Girdharee Ram.*
(1866) 5 Suth W R Cri 1 (1), *Ratuah* v. *Phokondee.*
(1866) 6 Suth W R Cri 55 (55), *Jalil Munshi* v. *Fadnan Hossein.*
(1867) 7 Suth W R Cri 11 (11), *Jharu* v. *Bahar Ali.*
(1867) 7 Suth W R Cri 12 (12), *Dhurai Noshyo* v. *Hubu Nashyo.*
(1867) 7 Suth W R Cri 40 (40), *Chootoo Dhoon Bharbhoma* v. *Abdool Meah.*
(1867) 8 Suth W R Cri 54 (54), *Queen* v. *Lalloo Singh.*
(1868) 10 Suth W R Cri 49 (49), *Hothoor Laloog* v. *Hindoo Singh Mouz.*
(1872) 17 Suth W R Cri 1 (1, 2), *Azgur Howladar* v. *Asarudddin.*
(1872) 18 Suth W R Cri 6 (6,7) *Jhananee* v. *Baloo Khan.*
(1873) 20 Suth W R Cri 59 (60), *Jitan Khan* v. *Durga Singh.*
(1874) 22 Suth W R Cri 12 (13, 14), *Radha Nath Punja* v. *Woomschuran.*
(1866) 1866 Pun Re Cri No. 14, p. (14), *Boota* v. *Baggoo.*
(1866) 1866 Pun Re Cri No. 27, p. (28), *Kaloo* v. *Eman Bux.*
(1866) 1866 Pun Re Cri No. 102, p. 101 (107), *Jumna Dass* v. *Ramla.*
(1869) 1869 Pun Re Cri No. 6, p. (5), *Ghulam Yaseen* v. *Khanan Khan.*
(1870) 1870 Pun Re Cri No 28, p. 45 (46), *Ahmed* v. *Khoda Bux.*
(1886) 1886 Pun Re Cri No 31, p. 74 (75), *Empress* v. *Samwan Singh.*
(1887) 1887 Pun Re Cri No 17, p. 34 (36), *Empress* v. *Ghulam Hossain.*
(1869-70) 5 Mad H C R App 40 (40).
(1871) 6 Mad H C R App 49 (49).
[See also (1883) 6 Mad 316 (318, 319), *Somu* v. *Queen.*]
[But see (1870) 13 Suth W R Cri 39 (40), *Madhoosoodun* v. *Jayram*].
(1875) 23 Suth W R Cri 17 (18), *Kali Churn* v. *Shoshee Bhooshun.*

3. (1927) 1927 Oudh 175 (175, 176): 28 Cri L Jour (450), *Paighambar* v. *Emperor.*
4. (1881) 11 Mad 142 (143), *Queen-Empress* v. *Basava.*

Note 3.

1. (1884) 6 All 96 (97), *Ishri* v. *Bakhshi.*
(1884) 7 Mad 563 (563, 564), *Queen-Empress* v. *Polavarapu.*
2. (1926) 1926 All 165 (166), 27 Cri L Jour 35, *Jairaj Singh* v. *Bansi.*
(1926) 1926 All 295 (296): 27 Cri L Jour 702, *Faridudin* v. *Emperor.*
(1910) 11 Cri L Jour 201 (202): 5 Ind Cas 693 (Cal), *Jogdami Pershad* v. *Mahadeo Kenoo.*
(1925) 1925 Oudh 558 (558): 26 Cri L Jour 527, *Hafiz Khan* v. *Emperor.*
3. (1883) 1883 All W N 257 (257), *Empress* v. *Durga.*
(1884) 6 All 96 (97), *Ishri* v. *Bakshi.*
(1901) 1901 All W N 142 (142), *King Emperor* v. *Habil.*
(1898) 22 Bom 934 (935), *Queen-Empress* v. *Sakar Jan Mahomed.*
(1894) 21 Cal 979 (984), *Ramjeevan Koormi* v. *Durga Charan Sadhu.*
(1900) 5 Cal W N 370 (371), *Sheo Charan Ojha* v. *Munmonia Doshad.*
(1902-03) 7 Cal W N 206 (208), *Syed Bahadur Ali* v. *Nur Mahomed.*
(1879) 1879 Pun Re Cri No 16, p. 43 (44, 45), *Karm Ilahi* v. *Morrison.*
(1884) 7 Mad 563 (563, 564), *Queen-Empress* v. *Polavarappa.*
(1897-1901) 1 Upp Bur R 68 (68), *Queen-Empress* v. *Sahawath Ali Khan.*
(1932) 1932 Sind 156 (156): 26 Sind L R 299; 33 Cri L Jour 644, *Saleh* v. *Emperor,*
4. (1920) 1920 Sind 73 (74): 13 Sind L R 166: 21 Cri L Jour 49, *Wali Mahomed* v. *Emperor.*

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conceived, be such information as falls within Section 190, Clause (c) of the Code. A *statement* by a person to a police officer in the course of a police enquiry is not an "information" given to him and a case instituted on the basis of such statement is not within the Section.[5] But where *S* points out two persons to the police as those who assaulted him and the police treats this as first information the case is one that falls under this Section.[6]

The report of a civil Court Amin to the civil Court that he has been obstructed in the execution of the process entrusted to him is neither a complaint nor information to a Police Officer or to a Magistrate, and where the civil Court directs a prosecution on the basis of such report, the Amin cannot be ordered to pay compensation under this Section.[7] Similarly where *A* tells *B* and *B* tells *C* and *C* tells the police, *A* cannot be said to give any information to the police and no order can be made against him under this Section.[8] The High Court of Allahabad, has however, held in the undermentioned case,[9] that where *A* tells *B* about *C* with a view to securing the punishment of *C* and *B* informs the Magistrate, *A* can be ordered to pay compensation. It is submitted that this view is not correct. Where, however, information is given to a person whose *duty* it is to report the same to the police or the Magistrate (as in cases coming under Section 45 of the Code) the latter only acts as a channel for conveying the information given by *A* and he can therefore be ordered to pay compensation.[10]

4. "Accused of an offence."

The Section by its terms applies only where in pursuance of a complaint or information a person is accused before a Magistrate of an *offence*. It does not therefore apply to the following cases where there is no accusation of any '*offence*' as defined in Section 4 (1) (*o*) of the Code:—

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5. (1920) 1920 Sind 73 (74) : 13 Sind L R 166 : 21 Cri L Jour 49, *Wali Mahomed* v. *Emperor*.
   (1916) 1916 Pat 211 (212) : 17 Cri L Jour 336 (333), *Sarjuj Prasad Singh* v. *Emperor*.
6. (1920) 1920 Sind 41 (42) : 14 Sind L R 168 : 22 Cri L Jour 120, *Faiz Muhammad* v. *Emperor*.
7. (1904) 26 All 183 (184), *In the matter of the Petition of Ram Padarath*.
   (1888) 1888 All W N 216 (216), *In the matter of Nain Sukh*.
   (1875) 1 Bom 175 (176), *In re Keshav Lakhshman*.
   (1893) 20 Cal 481 (482, 483), *Bharat Chunder Nath* v. *Jabed Ali Biswas*.
   (1910) 11 Cri L Jour 634 (634) : 1910 Pun Re Cri No 25, *Emperor* v. *Abdul Ghani*.
   (1913) 14 Cri L Jour 1 (1,) : 18 Ind Cas 145 (Bom), *In re Krishna Doss*. Deposition of decree-holders in the course of obstruction proceedings.
8. (1929) 1929 Mad W N 785 (785), *Ketayadha Udayan* v. *Thardan Talayari*.
9. (1918) 1918 All 111 (111) : 40 All 79 : 19 Cri L Jour 76, *Emperor* v. *Bahawal Singh*.
10. (1924) 1924 Mad 91 (92) : 24 Cri Lour J 717, *Kaliyaperumal Naidu* v. *Bavaji Sole*
    (1914) 1914 Mad 694 (695) : 39 Mad 1006 : 15 Cri L Jour 431, *Nachimuthu* v. *Muthusami*.
    (1917) 1917 Mad 630 (661): 18 Cri L Jour 11 (12, 13), *Margasahaya Chetty* v. *Gadola Nadiabba*.
    (1917) 1917 Mad 967 (968) : 17 Cri L Jour 503 (503), *Thonokadavath Awalla* v. *Ammian Mannil Kattiah*.
    (1915) 1915 Mad 1076 (1076) : 16 Cri L Jour 248 (248), *Maradai Veeran* v. *Pichan Ambalagaran*.
    [See also (1929) 1929 Mad W N 785 (785), *Kelayatha Udayan* v. *Thandan Talayari*.]
    [But see (1901) 25 Mad 667 (668, 669), *Emperor* v. *Thammana*.]
    (1912) 13 Cri L Jour 29 (29, 30) : 13 Ind Cas 221 (Mad), *In re Arulanandam Pillai*.

1. Security proceedings under Section 107,[1] and Section 110.[2]
2. Application for maintenance under Section 488.[3]
3. Complaints under Section 1[4] or Section 2 Clause 1[5] of the Workmen's Breach of Contract Act XIII of 1859.
4. Complaint under Section 28 of the Bombay Police Conveyance Act.[6]
5. Complaint under Section 41 of Bombay District Police Act.[7]

The Section applies to a complaint under Section 20 of the Cattle Trespass Act, as it has specifically been introduced in the Code of 1898 as an offence under the Code. Therefore the undermentioned rulings,[8] holding that compensation could not be awarded in such cases, are no longer law.

It was held in a decision under the Code of 1861, that the provisions of this Section were inapplicable to a complaint under a special Law[9] and in another that it would be applicable.[10] Under the present Section it is applicable to a case of "*any*" offence as for example under the Railways Act XVIII of 1854.[11]

5. "Triable by a Magistrate."

The offence must be one which is *triable by a Magistrate*[1] that is, one which is shown as triable by a Magistrate in Column 8 of Schedule II.[2] Thus the Section does not apply to cases where the offence is triable exclusively by the Court of Session but is enquired into by the Magistrate under Chapter

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Note 4.

1. (1910) 11 Cri L Jour 446 (446, 447) : 7 Ind Cas 290 (All), *Ram Sukhari* v. *Mahomed Rai.*
   (1914) 1914 All 370 (370, 371) : 36 All 382 : 15 Cri L Jour 578, *Bindhachal Prasad Rai* v. *Lal Behari Rai.*
   (1922) 1922 All 321 (321): 23 Cri L Jour 474, *Mannu Khan* v. *Chandi Prasad.*
   (1923) 1923 All 332 (332) : 45 All 363 : 24 Cri L Jour 228, *Ram Badan* v. *Janki.*
   (1927) 1927 All 531 (532) : 49 All 750 : 28 Cri L Jour 604, *Baij Nath* v. *Kali Charan.*
   (1912) 9 All L J (N) 10 (10), *In re Chattar.*
   (1900) 25 Bom 48 (49), *Govind Hanmant In re.*
   (1884) 1884 Pun Re Cri No. 37 page 72, *Jay Singh* v. *Kanhya.*
   (1883) 1883 Pun Re Cri No. 16 page 70 (71), *Hazarimal* v. *Meman Mal.*
   (1896) 1896 Pun Re Cri No. 4 page 13 (13), *Natha Singh* v. *Pala Singh.*
   (1902) 1902 Pun Re Cri No. 33 page 86 (87), *Crown* v. *Kaura.*
   (1935) 1935 Lah 29 (30), *Rohel* v. *Kaura.*
2. (1870) 2 N W P H C R 447 (448), *Queen* v. *Balkishan.*
   (1893) 15 All 365 (366, 367), *Queen-Empress* v. *Lakhpat.*
3. (1910) 11 Cri L Jour 156 (157) : 4 Ind Cas 1045 (Mad), *Amboo* v. *Baboo.*
4. (1919) 1919 All 395 (395, 396) : 41 All 322 : 20 Cri L Jour 570, *Jamil Ahmad* v. *Muhammad Ishaq.*
5. (1892) Ratanlal 617 (618), *Queen Empress* v. *Namdeo.*
   (1899-1900) 4 Cal W N 253 (254), *In the matter of Ram Sarup Bhakat.*
6. (1920) 1920 Bom 350 (350) : 44 Bom 686 : 21 Cri L Jour 380, *In re Valli Mitha.*
7. (1913) 14 Cri L Jour 320 (320) : 6 Sind L R 254, *Imperator* v. *Mussammat Khairi.*
8. (1896) 18 All 353 (353, 354), *Meghai* v. *Sheobhaik.*
   (1886) 13 Cal 304 (305), *Kalachand* v. *Gudhadhar Biswas.*
   (1886) 9 Mad 102 (102), *Pitchi* v. *Ankappa.*
   (1886) 9 Mad 374 (375), *Kottalanada* v. *Muthaya.*
9. (1870) 14 Suth W R Cri 36 (39), *Queen* v. *Abdul Azeez Khan.*
10. (1872) 1872 Pun Re Cri No 1, Page 49, *Alla Ditta* v. *Shere Mahomed.*
11. (1872) 4 N W P H C R 94 (96, 97), *Queen* v. *Turner.*

Note 5.

1. (1927) 1927 All 744 (744): 28 Cri L Jour 983, *Bansidar Pande* v. *Chunni Lal.*
   (1922) 1922 All 188 (188): 23 Cri L Jour 319, *Sarup Sonar* v. *Ram Sundar Thakurain.*
   (1916) 1916 Bom 96 (96) : 18 Cri L Jour 463, *Emperor* v. *Chhaba Dolsong.*
   (1886) 2 Weir 315 (316), *In re Poligadu.*
   (1927) 1927 Oudh 175 (175) : 28 Cri L Jour 450, *Paighambar* v. *Emperor.*
2. (1930) 1930 Lah 482 (483) : 11 Lah 558 : 31 Cri L Jour 1133, *Amin Lal* v. *Emperor.*

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XVIII of the Code[3] or is even tried by him under the special powers under Section 30 of the Code.[4]

Where a complaint is made of offences some of which are triable by the Magistrate and some by the Sessions Court and the accused is discharged in respect of all the offences, an order for compensation can be passed under this Section only in respect of the offences triable by the Magistrate[5] and not in respect of the other offences also.[6]

In filing a complaint, the complainant must, for the purposes of this Section, be deemed to make an accusation which includes not merely the offence charged therein but also any offence which the facts in the complaint disclose in the light of any enquiry or trial. The mere fact that the complaint charges the accused with an offence which is not triable by a Magistrate does not oust the jurisdiction of the Magistrate to pass an order under this Section, if after enquiry, the Magistrate finds that the accusation is really one in respect of an offence triable by him.[7] But it is not incumbent upon a Magistrate to find whether a case is triable by a Court of Session or by himself and if he *tries* an accused for an offence *prima facie* triable by him, an order under this Section is not illegal even if really the facts prove the offence to be one triable by a Court of Session.[7a] The question, therefore whether an offence is triable by a Magistrate is not to be decided solely by the complaint. The proper criterion is the form of the proceeding (i. e.) whether they were conducted under Chapter XVIII or Chapter XXI.[8]

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3. (1918) 1918 All 126 (126) : 40 All 615 : 19 Cri L Jour 706, *Hait Ram* v. *Ganga Sahai.*
(1922) 1922 All 188 (188): 23 Cri L Jour 391 *Sarup Sonar* v. *Ram Sundar Ihakurain.*
(1927) 1927 All 744 (744): 28 Cri L Jour 983, *Bansidhar Pande* v. *Chunni Lal.*
(1931) 1931 All 355 (355) : 53 All 461 : 32 Cri L Jour 670, *L. Shiam Lal* v. *Nand Ram.*
(1898) Ratanlal 961 (961), *Queen Empress* v. *Bhavabhai Kasari Singh.*
(1916) 1916 Bom 96 (96) : 18 Cri L Jour 463, *Emperor* v. *Chabba Dolsingh.*
(1902) 1902 Pun Re Cri No. 14, page 39 (40), *Crown* v. *Hamirchand.*
(1930) 1930 Lah 482 (483) : 11 Lah 558 : 31 Cri L Jour 1133, *Amin Lal* v. *Emperor.*
(1886) 2 Weir 315 (316), *In re Poligadu.*
(1909) 9 Cri L Jour 502 (502): 2 Ind Cas 159 (Mad), *In re Kesava Panda.*
(1893-1900) 1893-1900 Low Bur Rul 443 (443). *Ma Pwa Yon* v. *Maung Po Mya*, Offence under S. 366, I. P. C. not triable by a Magistrate—This Section not applicable.

4. (1902) 1902 Pun Re Cri No. 26 Page 74 (75), *Crown* v. *Qadu.*
(1910) 11 Cri L Jour 396 (396) : 6 Ind Cas 735 (Lah), *Ramzan* v. *Rajan.*
(1902) 1902 Pun Re Cri No. 26, page 75 : 3 Pun L R No. 139, page 602 (605), *Emperor* v. *Qadu.*
(1919) 1919 Lah 192 (193): (1919) Pun Re Cri No. 1: 20 Cri L Jour 141, *Mahomed Hayat* v. *Bhola.*
(1919) 1919 Lah 227 (228) : 1919 Pun Re Cri No. 15: 20 Cri L Jour 495, *Shankar Sabai* v. *Emperor.*
(1923) 1923 Rang 15 (15): 11 Low Bur R 151 : 23 Cri L Jour 289, *Ma. E. Dok.* v. *Maung Po Than.*

5. (1930) 1930 Lah 482 (483): 11 Lah 558: 31 Cri L Jour 1133, *Amin Lal* v. *Emperor.*
(1919) 1919 Lah 227 (228): 1919 Pun Re Cri No. 15: 20 Cri L Jour 495, *Shankar Sahai* v. *Emperor.*

6. (1930) 1930 Lah 482 (483): 11 Lah 558 : 31 Cri L Jour 1133, *Amin Lal* v. *Emperor.*
(1918) 1918 All 126 (126): 40 All 615 : 19 Cri L Jour 706, *Hait Ram* v. *Ganga Sahai.*
(1926) 1926 All 159 (160): 48 All 166 : 27 Cri L Jour 6, *Harihar Dat* v. *Mak Sud Ali.*

7. (1921) 1921 Sind 105 (106) : 16 Sind L R 205 : 26 Cri L Jour 265, *Hamendas* v. *Ahmed Khan.*
(1931) 1931 All 355 (356): 53 All 461 : 32 Cri L Jour 670, *L. Shiam Lal* v. *Nand Ram.*
(1922) 1922 Mad 223 (223, 224): 45 Mad 29 : 23 Cri L Jour 232, *Mahajavan Venkatarayar* v. *Kodi Venkatarayar.*

7a (1930) 1930 All 280 (280): 31 Cri L Jour 563, *Balkishen* v. *Emperor.*

8. (1931) 1931 All 355 (356): 53 All 461 : 32 Cri

Where a particular Magistrate, however, has *no power* to try a case even though it is triable by a Magistrate, he cannot award compensation as he has not the power to try the case itself.[9]

6. Magistrate by whom the case is heard.

It is only the Magistrate by whom the "*case is heard*" that can pass an order under this Section.[1] It is not the intention of the Legislature that one Magistrate should deal with the case and call upon the complainant to show cause and that another Magistrate should pass an order for compensation.[2] Thus an appellate Court[3] or a District Magistrate on a reference[4] cannot, when reversing a sentence of conviction, act under this Section. It was even doubted in the undermentioned case[5] whether the High Court can pass an order for compensation when the matter comes up in revision.

The words "the Magistrate by whom the case is heard" does not, however, mean that the *evidence* must have been heard by him but mean "the Magistrate by whom the case is decided." So where *part* of the evidence is heard by one Magistrate and the rest of the evidence heard and the case *decided* by another, the latter is competent to order compensation under this Section.[6]

7. "Discharges or acquits."

Under the Codes of 1861 and 1872, compensation could be awarded only where the complaint was *dismissed* as being frivolous or vexatious. There was a divergence of opinion as to whether it could be awarded in cases of acquittal.[1]

The Code of 1882 provided for the award of compensation only in cases where the accused was *acquitted* under Section 245 or Section 247.[2] An

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L Jour 670, *L. Shiam Lal* v. *Nand Ram*

9. (1909) 9 Cri L Jour 502 (502) : 2 Ind Cas 159 (Mad), *In re Kesava Panda.*

Note 6.

1. (1906) 3 Cri L Jour 441 (442) (All), *Emperor* v. *Chittan.*
   (1924) 1924 All 224 (224) : 46 All 80 : 25 Cri L Jour 967, *Chedi* v. *Ram Lal.*
   (1911) 12 Cri L Jour 529 (531, 532): 39 Cal 157, *Mehi Singh* v. *Mangal Khanda.*
   (1929) 1929 Cal 762 (765) : 31 Cri L Jour 828, *Rajaram Majhi* v. *Panchanan Ghosh.*
   (1926) 1926 Lah 427 (427) : 7 Lah 152 : 27 Cri L Jour 570, *Notified Area Kharar* v. *Karta Ram.*
2. (1929) 1929 Cal 762 (765): 31 Cri L Jour 828, *Rajaram Manjhi* v. *Panchanan Ghosh.*
   (1892) 1892 All W N 58 (58), *In the matter of the petition of Mahadeo Tiwari.*
3. (1906) 3 Cri L Jour 441 (442) : 28 All 625, *Emperor* v. *Chittan.*
   (1924) 1924 All 224 (224) : 46 All 80 : 25 Cri L Jour 967, *Chedi* v. *Ram Lal.*
   (1901) 3 Bom L R Cri 841 (842), *Hari Chand* v. *Fakir Saduddin.*
   (1911) 12 Cri L Jour 529 (531, 532): 39 Cal 157, *Mehi Singh* v. *Mangai Khanda.* Overruling 11 Cri L Jour 46.
   (1926) 1926 Lah 427 (427) : 7 Lah 152 : 27 Cri L Jour 570, *Notified Area Kharar* v. *Karta Ram.*
   (1874-1875) 8 Mad H C App 7 (7), *H C Proceedidgs* 27 *Feb.* 1875, *No.* 488.
4. (1881) 1881 All W N 99 (99), *In the Complaint of Phullu.*
5. (1928) 1928 All 95 (96) : 29 Cri L Jour 274, *Aminullah* v. *Emperor.*
6. (1921) 1921 All 122 (122) : 22 Cri L Jour 406, *Ram Devi* v. *Govind Sahai.*

Note 7.

1. (1874) Ratanlal 83 (83, 84), *Reg.* v. *Jekison.* Section does not apply.
   (1881) 6 Cal 581 (582), *Mora Seikh* v. *Ishan Bardhan.* Section applies.
   (1882) 5 Mad 381 (382), *Number* v. *Ambu.* Section applies.
   (1881) 1881 All W N 155 (155), *Debi Sahai* v. *Dalsingher Rai.* Withdrawal of complaint—Section does not apply.
   (1889) Ratanlal 462 (463) *Moro Krishna* v. *Yeswantrao.* (Do.)
   (1870) 1870 Pun Re Cri No. 26, page 43 (44) *Crown* v. *Gujiur.* (Do.)
   (1871) 1871 Pun Re Cri No. 16, page 29 (30), *Crown* v. *Maiya.* (Do.)
2. (1886) 10 Bom 199 (200), *Queen Empress* v. *Pandu valad Gopala.*
   (1889) Ratanlal 462 (463), *Moro Krishna* v. *Yeswanta.*

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acquittal by reason of *withdrawal* of the complaint was not within the Section.[3]

After the amendment in 1891 (vide Note 1) the Magistrate can act under this Section when he either *discharges or acquits* an accused person. The acquittal may be either one under Section 245 or Section 247 or may be one passed on the withdrawal of the complaint. But the acquittal must be one *made by the Magistrate himself*. The composition of an offence under Section 345 *infra* has by itself the *effect of an acquittal* but there is no order by the Magistrate himself recording an acquittal. The Section is not applicable to such cases and no compensation can be awarded.[4]

Where the accused is neither *discharged* nor *acquitted* this Section does not apply and no compensation can be awarded to him.[5] Thus where a complaint is dismissed under Section 203, there is neither a discharge nor an acquittal of the accused as no process is at all issued to the accused; consequently no compensation can be awarded under this Section.[6]

This Section speaks of 'the case' as a whole and contemplates a trial or inquiry ending in an unqualified acquittal or discharge of the accused and the policy of the Legislature is to limit the jurisdiction of the Magistrate under this Section to simple cases in which the complainant is found to be wholly in the wrong and the accused is discharged or acquitted altogether. So where an accused is charged with two offences and convicted under one and acquitted under another, this Section will not apply.[7]

8. False and either frivolous or vexatious.

Before the amendment of 1923, an order under this Section could be passed if the case was either frivolous or vexatious.[1a] It was not necessary that the charge should be false as well. But it was held in some cases that neither of the two words excluded the element of falsehood in the charge and that a charge which is false must also be vexatious and is not outside the scope of the Section.[1]

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3. (1888) 1888 Pun Re Cri No. 19, page 35 (36, 37). *Empress* v. *Khusali Ram.* (Dissenting from 14 Pun Re Cri No. 1884).
(1887) 1887 Pun Re Cri No. 56, page 151 (151). *Sital Das* v. *Anokha.*
(1884) 1884 Pun Re Cri No. 14, page 19 (20), *Ali Ahmed* v. *Nathoo.*
[But see (1883) 1883 Pun Re Cri No. 24, page 57 (57): *Himmat Singh* v. *Bukhtiwar.* Not approved in 1888 Pun Re Cri No. 19.]

4. (1888) 1888 Pun Re Cri No. 19, page 35 (36, 37), *Empress* v. *Khushali Ram.*
(1910) 11 Cri L Jour 638 (639): 1910 Pun Re Cri No. 30, *Emperor* v. *Sunder Singh.*
(1898) Ratanlal 957 (957), *Queen Empress* v. *Sangappa.*
(1908) 9 Cri L Jour 186 (187) (Bom), *In re Harikisan Das Hari Das.*
(1894) Ratanlal 700 (700), *Queen Empress* v. *Raoji.*
(1892) 7 C P L R 2 (3), *Alopi* v. *Bhura.*

5. (1929) 1929 Lah 623 (624): 30 Cri L Jour 854, *Ram Lubhaya* v. *Jagan Nath*

6. (1927) 1927 Oudh 175 (175, 176): 28 Cri L Jour 450, *Paighambar* v. *Emperor.*
(1897) 1897 Pun Re Cri No. 8, page 19 (19, 20), *Basta Singh* v. *Kapuri Lal.*
(1906) 4 Cri L Jour 451 (451): 29 All 137, *Bhagwan Singh* v. *Harmukh.*
(1908) 7 Cri L Jour 297 (299) (All), *Bhagwan Din* v. *Dibba.*
(1897) 1897 Pun Re Cri No. 14, page 35 (35), *Azam* v. *Mir Abdulla.*
(1906) 1906 Pun L R No. 84, page 254 (255, 256): 4 Cri L Jour 36, *Harphul* v. *Manku.*

7. (1918) 1918 All 109 (109): 40 All 610: 19 Cri L Jour 670, *Mahomed Ali Khan* v. *Raja Ram Singh.*
(1918) 1918 Sind 24 (24): 12 Sind L R 87: 20 Cri L Jour 106, *Emperor* v. *Nadar.*
(1897) 24 Cal 53 (55), *Mukti* v. *Jhotu.*

Note 8.

1a (1883) 2 Weir 319 (320). *In re, Munisami Mudali.*

1. (1903) 30 Cal 123 (130, 131) (F B). Overruling 28 Cal 251, *Beni Madhab Kurmi* v. *Kumud Kumar Biswas.*
(1904) 1 Cri L Jour 433 (433, 434): 26 All 512, *Emperor* v. *Bindeshri Prasad.*

Sec. 250 Note 8

Under the present Code the case must *be false* and either frivolous or vexatious[2] and there must be a definite finding to that effect before an order for compensation can be passed.[3] The fact that a Magistrate has framed a charge, does not, of itself prevent him from holding after inquiry, that the charge is false and frivolous or vexatious.[4]

As qualifying an accusation the term "frivolous" indicates that the accusation is of a trivial nature[5] or is 'trifling,' 'silly' or "without due foundation."[6] The term vexatious implies that the accusation is one that ought not to have been made and is intended to "harass"[7] or "annoy"[8] the accused. For instance, where a criminal prosecution is launched on mere suspicion[9] or with a view to put pressure on an opponent in a civil suit,[10] the Magistrate is justified in acting under this Section.

But where the complainant's case is not an improbable one and he is merely unable to prove his case[11] or there is nothing to show that it is wilfully

(1903) 5 Bom L R 128 (128, 129), *Emperor* v. *Bai Asha*. Dissenting from 4 Bom L R 645).
(1913) 14 Cri L Jour 75 (75): 37 Bom 376, *Gopala Bhan Chan Gula, In re.*
(1869) 11 Suth W R Cri 10 (10), *In re, Mothoar Ghose.*
(1903) 1903 Pun Re Cri No. 18, page 47 (48, 49), *Crown* v. *Ismail.*
(1881) 2 Weir 313 (314), *In re, Ponnammal.*
(1902) 15 C P L R 194 (195, 196), *Pannalal* v. *Amrit Rao.*
(1920) 1920 Nag 78 (78): 21 Cri L Jour 41, *Mt. Jaina* v. *Santuk Das.*
(1918) 1918 Low Bur 48 (50): 19 Cri L Jour 172, *Shaik Dawood* v. *Mahomed Ibrahim.*
(1914) 1914 Upp Bur 29 (30): 2 Upp Bur R 31: 16 Cri L Jour 92, *Nga Myo* v. *Nga Kyan.*
(1920) 1920 Sind 41 (42): 14 Sind L R 168: 22 Cri L Jour 120, *Faiz Mahomed* v. *Emperor.*
[See also (1917) 1917 Pat 594 (595): 18 Cri L Jour 837, *Mangra Kharia* v. *Ram Dhari Singh.*]
[But see (1912) 13 Cri L Jour 247 (248): 34 All 354, *Ram Singh* v. *Mathura.*]
(1902) 4 Bom L R 645 (646, 647), *Emperor* v. *Asha.*
(1895) 22 Cal 583 (588), *Shib Nath Chong* v. *Sarat Chunder Sirkar.*
(1899) 26 Cal 181 (183, 184), *Bachu Lal* v. *Jagdam Satal.*
(1902) 29 Cal 479 (480), *Kinakarmarkar* v. *Preo Nath Dutt.*
(1915) 1915 Mad 940 (941): 16 Cri L Jour 128 (129): 38 Mad 1091, *Venkatarama Iyer* v. *Krishna Iyer.*
(1909) 9 Cri L Jour 268 (269): 1 Sind L R 28 (F B), *Crown* v. *Noto Walad Moladino.* Overruling 9 Cri L Jour 255.

2. (1926) 1926 Sind 19 (19): 19 Sind L R 66: 26 Cri L Jour 1295, *Assanmal Halumal* v. *Dibhar.*
(1926) 1926 All 141 (141, 142): 27 Cri L Jour 300, *Kashi Prasad* v. *Emperor.*
(1920) 1920 Nag 78 (78): 21 Cri L Jour 41, *Jaina* v. *Santuk Das.*

3. (1932) 1932 Lah 554 (554, 555): 34 Cri L Jour 80, *Ibrahim* v. *Anant Ram.*
(1926) 1926 Nag 31 (32, 33): 26 Cri L Jour 1033, *Bhan* v. *Syed Chand.*
(1933) 1933 Sind 226 (226): 27 Sind L R 78: 34 Cri L Jour 767, *Emperor* v. *Sarup Singh Phool Singh.*
(1929) 1929 Sind 113, (113 114): 30 Cri L Jour 458, *Pir Mahomed* v. *Yacoob.*
(1932) 1932 Sind 156 (157): 26 Sind L R 299: 33 Cri L Jour 644, *Saleb* v. *Emperor.*
(1934) 1934 Sind 18 (19): 35 Cri L Jour 1038, *Emperor* v. *Baloch Daryakhan.*

4. (1895) Ratanlal 734 (735), *Queen-Empress* v. *Abdulla Rahiman.*

5. (1903) 30 Cal 123 (129), *Beni Madhub Kurmi* v. *Kumud Kumar Biswas.*

6. (1920) 1920 Nag 78 (78): 21 Cri L Jour 41, *Mt. Jaina* v. *Santuk Das.*

7. (1903) 30 Cal 123 (129), *Beni Madhub Kurmi* v. *Kumud Kumar Biswas.*
(1920) 1920 Nag 108 (109): 21 Cri L Jour 226, *Bakaji* v. *Mukund Singh.*

8. (1923) 1926 Lah 365 (365): 27 Cri L Jour 607, *Municipal Committee, Simla* v. *Mukund Singh*
(1921) 1921 Lah 283 (284): 23 Cri L Jour 1, *Charan Singh* v. *Emperor.*
(1917) 1917 Sind 73 (1) (73): 18 Cri L Jour 1005 (1005, 1006): 11 Sind L R 55, *Emperor* v. *Kouro.*

9. (1932) 1932 Bom 177 (178): 33 Cri L Jour 392, *Din Shahji Hirjibhai, In re.*

10. (1933) 1933 Bom 233 (234): 34 Cri L Jour 878, *Dayabhai* v. *Tanganio.*
(1926) 1926 Bom 163 (164): 27 Cri L Jour 448, *Ravi Shankar* v. *Sarai Lal.*

11. (1906) 3 Cri L Jour 123 (124): 1905 Pun Re Cri No. 57, *Emperor* v. *Narpat Rai.*
(1921) 1921 Oudh 247 (247, 248): 24 Oudh Cas 261, *Emperor* v. *Chunni.*
(1934) 1934 Sind 18 (19): 35 Cri L Jour

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false or that there is any perversion or exaggeration of evidence,[12] it is not proper to hold the complaint false and vexatious.

9. "By his order."

Before the amendment of 1923, the order to pay compensation was part of the order of discharge or acquittal, that is to say the order of discharge or acquittal and the order directing compensation had to be made simultaneously. An order for compensation made after such discharge or acquittal, in a separate proceeding was held to be illegal.[1] This is no longer law as after the amendment it is not necessary that the order for compensation should be embodied in the order of discharge. The two orders are made in separate proceedings. It is only the order calling upon the complainant to show cause which is to be contained in the order of discharge or acquittal. The actual order for compensation is necessarily a subsequent order.[2] But, where the order of compensation is made along with the order of discharge or acquittal the provision of law is complied with if the order calling upon the complainant to show cause is also made simultaneously with the order of discharge.[3] The order calling upon the complainant to show cause cannot either precede[4] or be made after[5] the order of discharge or acquittal. Although, the order to show cause, is not made part of the judgment of discharge or acquittal, if it is passed and signed immediately after the judgment, so that the order can be said to be a continuation of the

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1038, *Emperor* v. *Boloch Daryakhan*. [See also 27 Cri L Jour 633 (633): 94 Ind Cas 409 (Lah), *Sanwalya* v. *Baru*.]

12. (1929) 1929 Rang 14 (14): 30 Cri L Jour 539, *Ganguli* v. *Emperor*.

Note 9.

1. (1903) 25 All 315 (316), *In the matter of Sadur Husain*.
   (1912) 13 Cri L Jour 247 (248): 34 All 354, *Ram Singh* v. *Mathura*.
   (1919) 1919 All 398 (398): 20 Cri L Jour 774, *Chanthi Ahir* v. *Emperor*.
   (1911) 12 Cri L Jour 6 (6, 7): 38 Cal 302, *Haru Tanti* v. *Satish Roy*.
   (1914) 1914 Cal 548 (549): 15 Cri L Jour 150, *Lalit Mohan Roy* v. *Kunji Behari*.
   (1912) 16 Cal W N ccxcix (ccc).
   (1906) 3 Cri L Jour 123 (124): 1905 Pun Re Cri No. 57, *Emperor* v. *Narpat Rai*.
   (1906) 4 Cri L Jour 428 (429) (Lah), *Emperor* v. *Haji Sundhi Khan*.
   (1913) 14 Cri L Jour 48 (48): 18 Ind Cas 272 (Lah), *Imam Din* v. *Emperor*.
   (1921) 22 Cri L Jour 527 (528): 62 Ind Cas 415 (416) (Lah), *Karram Baksh* v. *Muhammad Said*.
   (1900) 14 C P L R 37 (38), *Kashi Nath Gopal* v. *Zincke*.
   (1914) 1914 Nag 68 (68): 10 Nag L R 8: 15 Cri L Jour 290, *Nanhey Lal* v. *Mt. Rani Bahu*.
   (1893-1900) 1893-1900 Vol. No. Low Bur Rul 528 (529), *Queen-Empress* v. *Abdul Karim*.
   (1892-1896) 1 Upp Bur Rul 35 (35, 36).

In the following cases it was held that it was a mere irregularity curable by S. 537:—

(1905) 2 Cri L Jour 523 (524) (All), *Jagat Kishore* v. *Abdul Karim*.
(1914) 1914 All 86 (88): 36 All 132: 15 Cri L Jour 193, *Ghurbin* v. *Emperor*.
(1906) 4 Cri L Jour 423 (424, 425) (All), *Emperor* v. *Punnam Chand*.
(1920) 1920 Bom 314 (314, 315): 21 Cri L Jour 371, *In re Nagindas Chanusa*.
(1918) 1918 Cal 436 (436): 18 Cri L Jour 1014, *Ram Narayan Acharjee* v. *Atul Chandra Das*.
(1918) 1918 Lah 58 (59): 1917 Pun Re Cri No. 31: 19 Cri L Jour 449, *Emperor* v. *Saudagar Ram*.
(1917) 1917 Mad 628 (629): 17 Cri L Jour 314 (315), *Dhanu Koli Asari* v. *Muthusamy Ayyar*.
(1914) 1914 Sind 25 (26): 7 Sind L R 123: 15 Cri L Jour 504, *Ghanumal Mawalmal* v. *Emperor*.

2. (1926) 1926 Lah 298 (299): 7 Lah 121: 27 Cri L Jour 752, *Achhru Mal* v. *Emperor*.
   (1928) 29 Cri L Jour 680 (680): 110 Ind Cas 232 (Lah), *Saudagar Singh* v. *Aroor Singh*.
   (1929) 1929 Bom 287 (288): 30 Cri L Jour 1112, *In re Vali Mahomed*.
3. (1929) 1929 Cal 332 (332, 333): 31 Cri L Jour 411, *Wahad Ali* v. *Sarajuddin*.
4. (1929) 1929 Mad W N 277 (278, 279), *Ramaswami* v. *Suryanarayana*.
5. (1933) 1933 Nag 296 (296, 297): 13 Nag L R 15: 34 Cri L Jour 1163, *Emperor* v. *Rangnath Koshti*.

original proceeding, or part of it, it is not illegal.[6]

Where there were two accused, and one of them was discharged on one day and the other acquitted on a later day, the Magistrate cannot call upon the discharged accused to show cause on the day of the acquittal of the other accused, as the case against that person was at an end on the date of his discharge and no order to show cause can be made subsequently.[7] But where the same accused is charged with two offences, and he is discharged on one charge first, and acquitted of other charges at a later date, it is not illegal to pass an order to show cause on the later date.[8]

10. "Call upon him to show cause."

When a Magistrate discharging or acquitting an accused intends to take action under this Section he has to call upon the complainant, forwith to show cause why he should not pay compensation to the accused or if he is not present direct the issue of a summons to him to appear and show cause.[1] An order for compensation made without giving the complainant an opportunity to show cause, is illegal and must be set aside.[1a] If the complainant is present, he is bound to show cause immediately. He cannot insist upon the grant of an

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6. (1926) 1926 All 165 (166) : 27 Cri L Jour 35, *Jairaj Singh* v. *Bansi.*
   (1927) 1927 Lah 515 (516) : 28 Cri L Jour 592, *Ghulam Muhammad* v. *Vir Bhan.*
   (1930) 1930 Pat 292 (293): 9 Pat 100: 31 Cri L Jour 875, *Mangal Chand* v. *Makhan Gola.*
7. (1925) 1925 Cal 264 (265): 26 Cri L Jour 449, *Suresh Chandra Gupta* v. *Abdul Jabbar.*
8. (1926) 1926 Bom 163 (164): 27 Cri L Jour 448, *Ravishankar* v. *Savai Lai.*

Note 10.

1. (1929) 1929 Bom 287 (288) : 30 Cri L Jour 1112, *In re Vali Mahomed.*
   (1933) 1933 Oudh 37 (37, 38): 34 Cri L Jour 44, *Municipal Board, Lucknow* v. *Abdul Aziz.*
   (1933) 1933 All 814 (816): 35 Cri L Jour 175, *M. H. Faruqi* v. *Municipal Board, Allahabad.*
   (1926) 1926 All 241 (242): 27 Cri L Jour 128, *Kalka* v. *Ranjit Singh.*
   (1929) 1929 Cal 762 (764): 31 Cri L Jour 828, *Rajaram Majhi* v. *Panchanan Ghose.*
   (1933) 1933 Sind 226 (226): 27 Sind L R 78: 34 Cri L Jour 767. *Emperor* v. *Sarup Singh Phool Singh.*
   (1914) 1914 All 86 (87): 36 All 132: 15 Cri L Jour 193, *Gurbin Koeri* v. *Khalil Khan.*

The following cases, decided before the Amendment of 1923, *holding that the complainant need not be called upon to show cause, are no longer good law:—*

(1923) 1923 All 548 (548, 549): 45 All 474 : 24 Cri L Jour 719, *Panchan* v. *Emperor.*
(1914) 1914 Cal 548 (549): 15 Cri L Jour 150, *Lalith Mohan* v. *Kunja Behari.*
(1884) 1884 All W N 114 (115), *In the matter of Musahib Khan.*

1a. (1926) 1926 All 241 (242): 27 Cri L Jour 128, *Kalka* v. *Ranjit Singh.*
   (1919) 1919 All 396 (398): 20 Cri L Jour 774: *Chanthi Ahir* v. *Emperor.*
   (1912) 13 Cri L Jour 268 (269) : 14 Ind Cas 652 (All), *Gulzari Lal* v. *Ganga Ram.*
   (1922) 1922 Bom 409 (410): 23 Cri L Jour 574, *Mahadev Ramkrishna Karkare, In re.*
   (1893) Ratanlal 634 (634), *Govinda* v. *Keshav Rao.*
   (1894) Ratanlal 725 (726), *Queen-Empress* v. *Manik.*
   (1915) 1915 Cal 225 (225): 15 Cri L Jour 707 (707, 708), *Subans Singh* v. *Prasad Singh.*
   (1906-07) 11 Cal W N 62 (62, 63) Notes, *Sekh Jonab Ali* v. *Hiralal Pasban.*
   (1911) 12 Cri L Jour 6 (7) : 38 Cal 302 : 13 Cri L Jour 425, *Haru Tanti* v. *Satish Roy.*
   (1923) 1923 Lah 458 (458) : 25 Cri L Jour 1312, *Mughla* v. *Mahomed.*
   (1933) 1933 Oudh 37 (38): 34 Cri L Jour 44, *Municipal Board, Lucknow* v. *Abdul Aziz.*
   (1920) 1920 Pat 211 (211) : 21 Cri L Jour 751, *Akloo Mistri* v. *Nawbat Lal.*
   (1934) 1934 Sind 18 (19) : 35 Cri L J 1038, *Emperor* v. *Baloch Daryakhan.*
   (1909) 10 Cri L Jour 220 (220): 2 Sind L R 4, *Imperator* v. *Achar.*
   (1909) 10 Cr L Jour 229 (230) : 2 Sind L R 14, *Emperor* v. *Jetho.*
   [See also (1921) 1921 Mad 597 (597): 44 Mad 51: 22 Cri L Jour 161, *Appala Narasayya, In re.*]

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adjournment for the purpose.[2]

It is only after the examination of all the evidence, which the complainant wants to adduce that a Magistrate can come to the conclusion that the case is false and frivolous or vexatious and can award compensation to the accused. Though he could discharge the accused at any stage, he is not entitled to order compensation without examining all such witnesses.[3] As to the effect of irregularities in the original hearing on the proceedings for compensation, *see* the undermentioned case.[4]

11. "Shall record and consider any cause."—Sub-section (2).

Before making an order for compensation the Magistrate should record and consider any objection the complainant makes or any cause he may show. An order without doing so is illegal and is not cured by Section 537 *infra*.[1] Cause may be shown with reference to the evidence already recorded, why complaint should not be held frivolous or vexatious.[2]

12. "For reasons to be recorded."

The Magistrate is bound to record his reasons for making an order for compensation. The record of reasons is almost a condition precedent to

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2. (1929) 1929 Bom 287 (288): 30 Cri L Jour 1112, *In re Valid Mahomed.*
(1926) 1926 Bom 225 (225): 27 Cri L Jour 430, *Ishwarlal Maneklal, In re.*
(1914) 1914 All 86 (87): 36 All 132: 15 Cri L Jour 193, *Ghurbin* v. *Emperor.*
(1929) 1929 Cal 762 (763): 31 Cri L Jour 828, *Rajaram Manjhi* v. *Panchanan Ghose.*

3. (1928) 1928 Mad 169 (169): 51 Mad 337: 29 Cri L Jour 114, *Parthasarathi Naicker* v. *Krishnaswami Aiyar.*
(1933) 1933 Mad W N 900 (902), *Maruthathal* v. *Ramaswami Chetty.*
(1921) 1921 Mad 597 (597): 44 Mad 51: 22 Cri L Jour 161, *Appalanarasayya Bhukta* v. *Emperor.*
(1923) 1923 Lah 194 (195): 24 Cri L Jour 251, *Dewa Singh* v. *Emperor.*
(1924) 1924 Rang 293 (293): 25 Cri L Jour 1280, *Sya Kaw* v. *Emperor.*
(1872-92) 1872-92 Low Bur Rul 44 (44), *Queen-Empress* v. *Maung Tun.*
(1891) 1891 All W N 63 (63), *Abdul Ghafur* v. *Lallu.*
(1882) 1882 All W N 115 (116), *Jagmohan* v. *Sheobalak.*
(1872) 17 Suth W R Cr 6 (6), *Ram Churan Dey* v. *Sheikh Jannue.*
(1868) 10 Suth W R Cr 61 (61), *Bisash* v. *Makroo.*
(1935) 1935 Pesh 178 (179), *Gul Din* v. *Abdul Khalik.*

4. (1934) 1934 Bom 157 (158): 58 Bom 298: 35 Cri L Jour 841, *Tippanna Koutya Mannavaddar, In re. Held* that failure to record evidence in summary trial did not affect the validity of the proceedings for compensation.

Note 11.

1. (1929) 1929 Sind 113 (113): 30 Cri L Jour 458, *Pir Mahomed* v. *Yacoob.*
(1929) 1929 Bom 287 (288): 30 Cri L Jour 1112, *In re Vali Mahomed.*
(1901) 3 Bom L R 777 (778), *Pandurang Narayan* v. *Luxman Babaji.*
(1901) 5 Cal W N 214 (215), *Susanchi Kolitani* v. *Don Kolita.*
(1902) 2 Weir 310 (311), *Narayansami* v. *Bukee Reddy.*
(1900) 14 C P L R 37 (38), *Kashinath Gopal* v. *Zincke.*
(1922) 1922 Pat 157 (158): 23 Cri L Jour 261, *Deo Narain Mahto* v. *Chhattoo Raut.*
(1907) 5 Cri L Jour 298 (298, 299): 1906 Upp Bur Rul Cr (P C) 51, *Emperor* v. *Nya Pwe.*
(1909) 10 Cri L Jour 229 (230): 2 Sind L R 14, *Emperor* v. *Jatho.*
(1914) 1914 Sind 69 (69): 8 Sind L R 25: 15 Cri L Jour 666, *Minhomal* v. *Emperor.*
(1932) 1932 Sind 156 (156): 26 Sind L R 299: 33 Cri L Jour 644, *Saleb* v. *Emperor.*
(1933) 1933 Sind 226 (226): 27 Sind L R 78: 34 Cri L Jour 767, *Emperor* v. *Sarupsing Phoolsingh.*
[but see (1895) 2 Weir 711 (711), *Kalta Ramudu* v. *Ravipali Ramayya.*]

2. (1914) 1914 All 86 (87): 36 All 132: 15 Cri L Jour 193, *Ghurbin* v. *Emperor.*
(1898) 1898 All W N 198 (199), *Queen Empress* v. *Chiragh Ali.*

the proper exercise of the power.[1] This is so even in summary cases.[2]

The reasons must go to show why it is that the Magistrate considers the accusation against the accused, to be frivolous or vexatious and why, in his opinion it is a fit case for awarding compensation. While Magistrates should be on their guard against frivolous and vexatious complaints, they should also at the same time be careful not to deny the protection and redress provided by law against wrong-doers.[2a] The policy of the Legislature in requiring reasons to be recorded is to afford an opportunity to an Appellate or revising tribunal to consider the sufficiency of the reasons.[3] The mere statement in the order that "in his opinion, the evidence is highly unsatisfactory"[4] or that he "finds nothing in the explanation to justify that the complaint was not false and either frivolous or vexatious"[5] or "that no case is made out against the accused and some of the accused were added vexatiously"[6] are not good reasons for making an order under this Section. The reasons must be in addition to and apart from the finding of the Magistrate that the accusation was either frivolous or vexatious,[7] such as that the object of the complainant was to harass the accused.[8]

13. Amount and nature of compensation.

The compensation awarded to *each* accused should not exceed one hundred rupees. The Section does not mean that if there are a number of accused, the total amount awarded to all must not exceed one hundred rupees.[1]

Money ordered to be paid as compensation under this Section, is not a *fine*[2] though it is made recoverable under Section 547 *infra as if* it were a

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Note 12.

1. (1925) 1925 Mad 1139 (1139, 1140) : 26 Cri L Jour 1501, *Thadiappan* v. *Veera Perumal Thevan.*
   (1914) 1914 All 86 (87) : 36 All 132 : 15 Cri L Jour 193, *Ghurbin* v. *Emperor.*
   (1894) Ratanlal 725 (726), *Queen Empress* v. *Nanik*
   (1906) 3 Cri L Jour 390 (391) (Cal), *Amjad Ali* v. *Ashraf Ali.*
   (1906) 3 Cri L Jour 123 (124) : 1905 Pun Re Cri No. 57, *Emperor* v. *Narpat Rai.*
   (1913) 14 Cri L Jour 48 (48) : 18 Ind Cas 272 (Lah), *Imam Din* v. *Emperor.*
   (1900) 14 C P L R 37 (38), *Kashinath Gopal* v. *Zincke.*
   (1932) 1932 Sind 156 (156) : 26 Sind L R 299 : 33 Cri L Jour 644, *Saleh* v. *Emperor.*
   (1933) 1933 Sind 226 (226) : 27 Sind L R 78 : 34 Cri L Jour 767, *Emperor* v. *Sarupsng Phoolsing.*
   (1934) 1934 Sind 18 (19) : 35 Cri L Jour 1038, *Emperor* v. *Baloch Darya Khan.*
2. (1930) 1930 Mad 929 (929) : 32 Cri L Jour 207, *Palani Goundan* v. *Krishnappa Goundan.*
   (1929) 1929 Sind 113 (113) : 30 Cri L Jour 458 *Pir Mahomed* v. *Yacoob.*
   (1914) 1914 Sind 69 (69) : 8 Sind L R 25 : 15 Cri L Jour 666, *Ninhomal* v. *Emperor.*

2a (1892-96) 1892-96 Upp Bur Rul 290 (292), *Queen Empress* v. *Mi Te.*

3. (1925) 1925 Mad 1139 (1139, 1140) : 26 Cri L Jour 1501, *Thadiappan* v. *Veera Perumal.*
   (1906) 3 Cri L Jour 390 (391) (Cal), *Amjad Ali* v. *Ashraf Ali.*
4. (1906) 3 Cri L Jour 390 (391) (Cal), *Amjad Ali* v. *Ashraf Ali.*
5. (1932) 1932 Sind 156 (156, 157) : 26 Sind L R 299 : 33 Cri L Jour 644, *Saleh* v. *Emperor.*
6. (1925) 1925 Mad 1139 (1139, 1140) : 26 Cri L Jour 1501, *Thadiappan* v. *Veera Perumal.*
7. (1925) 1925 Mad 1139 (1140) : 26 Cri L Jour 1501, *Thadiappan* v. *Veera Perumal.*
8. (1930) 1930 Mad 929 (930) : 32 Cri L Jour 207, *Palani Goundan* v. *Krishnappa Goundan.*

Note 13.

1. (1926) 1926 All 295 (296) : 27 Cri L Jour 702, *Fariduddin* v. *Emperor.*
2. (1903) 26 Mad 127 (129 130), *In the matter of Byravalu Naidu.*
   (1870) 2 N W P H C R 430 (431), *The Queen* v. *Gopal.*
   (1885) 1885 All W N 44 (44), *In the matter of Behari.*
   (1862-65) 1 Bom H C R Cri 181 (181), *Reg* v. *Vellappa Bin Mudakappa.*
   (1869) 1869 Pun Re Cri No. 26, page 53 (53), *Praboo Dayal* v. *Mookha.*

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fine.[3] The sum awarded as compensation is by way of amends or compensation to the accused and should not be credited to the Government.[4] As to the method of recovery of fines, *see* Section 386 *infra*.

The Section should not be used as a punitive measure and in awarding compensation, the Magistrate should be strictly guided by the loss or inconvenience which the accused has sustained.[5] Any misconduct of the accused may also disentitle him to any compensation.[6]

The powers under this Section are to be exercised only in fit and proper cases and not indiscriminately in every case in which the accused is discharged.[7]

14. Who can be ordered to pay compensation.

Compensation under this Section can only be awarded against a person upon whose complaint or information the accusation was made, and not against a person who did not institute the proceedings but was only examined as a witness.[1a] Where a judicial officer makes a complaint under Section 476 acting in his judicial capacity, it is not to be lightly presumed that his conduct is vexatious or frivolous and no compensation should be awarded against him under this Section.[1]

Public officers are not exempted from liability under this Section when they make a complaint.[2] A police officer making a report in a *non-cognizable* case must be taken to be only making a complaint and is not exempt from liability under the Section.[3]

The word 'person' includes also a 'juristic person' like a Corporation. So a Municipal Committee may be ordered to pay compensation under this Section.[4] An *obiter dictum* has been expressed in the undermentioned case[5] to the effect that there is nothing in the Section to make it non-applicable to the case of even the Crown.

A master has no *'locus standi'* to file a complaint on behalf of his servant and cannot therefore be ordered to pay compensation.[6] But the question

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(1894) 8 C P L R 13 (14), *Empress* v. *Batra Koshti.*

3. (1932) 1932 Pat 301 (301, 302) : 33 Cri L Jour 958 (F B), *Ramchander Pandey* v. *Emperor.*
(1894) 21 Cal 979 (985), *Ramjeevan Koodni* v. *Durgacharan Sadhu Khan.*
(1901) 28 Cal 164 (166), *Lal Mahomad Shaik* v. *Satcowari Biswas.*

4. (1866) 1866 Pun Re Cri No. 102, page 101 (101), *Jumna Dass* v. *Ramla.*
(1869) 1869 Pun Re Cri No. 1, page 1 (1), *Jhoola* v. *Ameer Singh.*
(1869) 1869 Pun Re Cri No. 26, page 53, (53, 54), *Prabhoo Dyall* v. *Mookha.*
(1933) 1933 Nag 296 (296) : 30 Nag L R 15 : 34 Cri L Jour 1163, *Emperor* v. *Ranganath Koshti.*

5. (1881) 1881 All W N 167 (168), *In the matter of Sadnam.*

6. (1901) 1901 Pun L R No. 22, page 65 (66), *The Crown* v. *Ishar Singh.*

7. (1932) 1932 Sind 156 (157) : 26 Sind L R 299 : 33 Cri L Jour 644, *Saleh* v. *Emperor.*

Note 14.

1a. (1893-1900) 1893-1900 Low Bur Rul 443 (443), *Ma Pwo Yon* v. *Maung Po.*

1. (1871) 15 Suth W R Cri 506 (507), *Anonymous.*
(1875) 1 Bom 175 (176), *In re Keshav Lakshman.*

2. (1899) 2 Weir 317 (317), *Narasayya* v. *Ramdas Naidu.*
(1927) 1927 Cal 405 (406) : 54 Cal 371 : 28 Cri L Jour 316, *Radhika Mohan Das* v. *Hamid Ali.* Sub-Inspector of Excise is not a police officer.

3. (1902) 26 Bom 150 (157, 158), *Emperor* v. *Sada.*
(1912) 13 Cri L Jour 752 (753) : 6 Sind L R 82, *Imperator* v. *Khushal Das.*

4. (1923) 1923 Lah 31 (31) : 24 Cri L Jour 463, *Municipal Committee, Lahore* v. *Rattanchand.*

5. (1930) 1930 All 206 (209) : 52 All 263 : 31 Cri L Jour 485 (F B), *Emperor* v. *Kanver Sen.*

6. (1869) 1869 Pun Re Cri No. 24, page 51 (51), *Chorbyn* v. *Ameer Khan.*

whether a servant is responsible under this Section for an information lodged on behalf of his master is one of fact and depends on the question whether the servant is merely the mouth-piece of the master or whether he also joins the master in the accusation. In the latter case he is liable.[7]

A guardian or next friend of a minor complainant[8] or a person who only instigates the giving of false information but who does not *himself* make the complaint or give the information[9] cannot be ordered to pay compensation.

15. To whom compensation can be awarded.

A complaint may be well-founded as regards some of the accused and yet vexatious and frivolous as regards others. So where a Magistrate discharges one of the accused, and convicts the other accused, he can award compensation to the accused who is discharged.[1]

16. Imprisonment in default of compensation—Sub-sections 2-A and 2-B.

Before the amendment in 1923, a Magistrate had no power to order imprisonment in default of payment of compensation *alternatively* in the order of payment of compensation itself. He could order imprisonment only *after the failure* to recover the compensation.[1] But now such an order can be made in the order itself.

The Magistrate has no power to order that the sentence of imprisonment in default shall take effect after a term of civil detention which the complainant

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7. (1910) 11 Cri L Jour 201 (201) : 5 Ind Cas 693 (Cal), *Jagdami Pershad* v. *Mahadeo Kandoo.*
[See also (1886) Ratanlal 309 (309), *Queen Empress* v. *Bhima*].
(1899) 2 Weir 318, *Khashim Sahib* v. *Dasari Ramudu.*
(1911) 12 Cri L Jour 482 (482) : 12 Ind Cas 90 (Mad), *Subramania Pillai* v. *Pakia Nadatchi.*

8. (1912) 13 Cri L Jour 136 (137) : 13 Ind Cas 824 (Lah), *Isa* v. *Ranon.*

9. (1918) 1918 Sind 25 (25) : 12 Sind L R 76 : 20 Cri L Jour 100, *Emperor* v. *Sumar.*

Note 15.

1. (1882) 5 Mad 381 (382), *Number* v. *Ambu.*
(1877) 1877 Pun Re Cri No. 15, page 31 (32), *Gohra Shaha* v. *Amira.*

Note 16.

1. (1870) 2 N W P H C R 430 (431), *Queen* v. *Gopal.*
(1896) 18 All 96 (97), *Queen-Empress* v. *Punna.*
(1897) 19 All 73 (74), *Manjhli* v. *Manik Chand.*
(1892) Ratanlal 611 (611), *Queen-Empress* v. *Hari.*
(1875) 23 Suth W R Cri 64 (65), *Bisheshwar* v *Bishwambar.*
(1894) 21 Cal 979 (985), *Ramjivan Koodin* v. *Durga Charan Sadhukhan.*
(1895) 22 Cal 586 (588), *Shib Nath Chong* v. *Sarat Chunder Sarkar.*
(1901) 28 Cal 164 (166), *Lal Mahmud* v. *Satcowri.*
(1901) 28 Cal 251 (252, 253), *Parshi Hajra* v. *Bandhi Dhanuk.* Overruled by 30 Cal 123 on another point.
(1900-1901) 5 Cal W N 213 (214), *Priya Nath Bose* v. *Roy Basant Kumar Singh.*
(1900-1901) 5 Cal W N 214 (215), *Suchanchi Kolitani* v. *Dom Kolita.*
(1914) 1914 Cal 548 (549) : 15 Cri L Jour 150, *Lalit Mohan Roy* v. *Kunja Behari Ghosh.*
(1918) 1918 Cal 436 (437) : 18 Cri L Jour 1014, *Ram Narayan Acharjee* v. *Atul Chandra Das.*
(1913) 17 Cal W N 68 (68) (Note).
(1917) 21 Cal W N 132 (132) (Note).
(1869) 1869 Pun Re Cri No. 26, page 53 (54), *Praboo Dayal* v. *Mookha.*
(1896) 1896 Pun Re Cri No. 13, page 36 (36), *Queen-Empress* v. *Asa Nand.*
(1902) 1902 Pun Re Cri No. 14, page 39 (40), *Crown* v. *Hamir Chand.*
(1903) 26 Mad 127 (129, 130), *In the matter of Byravalu Naidu.*
(1895) 2 Weir 320 (320, 321), *In re, Venkatarayappa.*
(1917) 1917 Mad 628 (629) : 17 Cri L Jour 314 (315), *Dhanukodi Asari* v. *Muthuswami Aiyer.*
(1904) 1 Cri L Jour 762 (762) : 17 C P L R 104, *Bhiwa Kunbi* v. *Ramji.*
(1920) 1920 Nag 108 (109) : 21 Cri L Jour 226, *Bakaji* v. *Mukund Singh.*
(1920) 1920 Pat 211 (211) : 21 Cri L Jour 751, *Akloo Mistri* v. *Nawbat Lal.*
(1897-1901) 1 Upp Bur Rul 71 (71), *Queen-Empress* v. *Nga Myit.*
(1905) 2 Cri L Jour 724 (724, 725) : 3 Low Bur Rul 32, *King-Emperor* v. *Pan Aung.*

Sec. 250 Notes 16—17

was undergoing at the time.[2] The term of thirty days' imprisonment can be imposed in respect of each of several accused in whose favour payment of compensation has been ordered though the aggregate term of imprisonment exceeds thirty days.[3] Where a portion of the compensation is recovered, the person ordered to pay compensation is liable to imprisonment only for a proportionate part of the period of one month mentioned in this Section.[4] (Sub-section 2-B).

17. No exemption from civil or criminal liability—Sub-section 2-C.

The compensation awarded under this Section does not deprive the person compensated, of his right to further redress, either by a regular civil suit or a criminal prosecution against the person ordered to pay compensation under this Section.[1]

An order for payment of compensation does not bar the Magistrate from taking proceedings against the complainant under Section 211 of the Penal Code.[2] Nor does the starting of the prosecution of the complainant bar an order for compensation under the Section.[3] The question whether a Magistrate, is to act under this Section, or prosecute the complainant under Section 211, Penal Code, or to do both is in the discretion of the Magistrate himself and depends upon the facts of each particular case. If prosecution is necessary on grounds of public policy, it would be a wrong exercise of his discretion, if he were to act under this Section instead of instituting a prosecution. If prosecution, on the other hand, is unnecessary on grounds of public policy, an order under this Section, instead of a prosecution will not be wrong.[4] The fact that the Magistrate did not desire to act under this Section, cannot also preclude the Magistrate from directing the prosecution of the complainant.[5]

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2. (1925) 1925 Rang 202 (203) : 3 Rang 93 : 26 Cri L Jour 821, *Emperor* v. *Ma Kha Gyi.*
3. (1925) 1925 Rang 202 (202, 203) : 3 Rang 93 : 26 Cri L Jour 821, *Emperor* v. *Ma Kha Gyi.*
4. (1893-1900) 1893-1900 Low Bur Rul 320 (320). *Queen-Empress* v. *Ma Ka Va.*

Note 17.

1. (1903) 30 Cal 123 (129) (F B), *Beni Madhub Kurmi* v. *Kumud Kumar Biswas.*
   (1870) 2 N W P H C R 58 (58, 59), *Adram* v. *Harbullab.*
2. (1925) 1925 Oudh 558 (558) : 26 Cri L Jour 527, *Hafiz Khan* v. *Emperor.*
   (1898) 21 Mad 237 (239), *Adikkhan* v. *Allagan.*
   (1867) 2 Weir 311 (311), *H. C. Proceedings. 29th April* 1867.
   (1875) Weir 3rd Edn. 908 (908), *H. C. Proceedings, 12th November* 1875, *No.* 2766.
   (1917) 1917 Sind 19 (20) : 18 Cri L Jour 414 (414, 415) : 10 Sind L R 162, *Alla Bux* v. *Emperor.*
   (1911) 12 Cri L Jour 529 (531) (F B) : 39 Cal 157, *Mehi Singh* v. *Mangal Khanda.* There is nothing illegal in proceeding both under S. 250 and S. 476 of the Code.
   [But see (1895) 22 Cal 586 (588), *Shib Nath Chong* v. *Sarat Chunder Sarkar.* It was never intended that recourse should be had to the provision of S. 560, (Code of 1882, corresponding to S. 250 in the present Code) in a case in which the trying Magistrate is of opinion that the complainant should be prosecuted for an offence under S. 211, I. P. C.]
3. (1871) 15 Suth W R Cri 9 (10), *Queen* v. *Rupon Rai.*
   (1901) 1901 Pun Re Cri No. 18, page 48 (48, 49), *Mathra Das* v. *Raja.*
   (1904) 1 Cri L Jour 597 (598) : 1904 Pun Re Cri No. 6, *Mulka* v. *Fatteh Muhammad.*
   (1908) 7 Cri L Jour 231 (232) (Lah), *Nanhe Khan* v. *Ghanhaya.*
   (1913) 14 Cri L Jour 437 (437) : 7 Sind L R 10, *Achar* v. *Piru Shah.*
4. (1903) 27 Mad 59 (60, 61) : 1 Cri L Jour 280, *In the matter of Tammi Reddi.*
   (1919) 1919 Pat 81 (83) : 20 Cri L Jour 226, *Lalji Hari* v. *Emperor.*
5. [See (1911) 12 Cri L Jour 521 (522) : 12 Ind Cas 289 (Rang), *Ma Ma* v. *Emperor.*]

The compensation awarded, will of course, be considered in passing sentence in the event of a conviction as the result of the prosecution.[6]

18. Abatement.

Where the *accused* to whom compensation has been ordered, dies just after the complainant has filed his revision in the High Court, no order can be passed on the petition as no notice can be served and no proceedings can be taken against a dead person.[1] But where the complainant dies, after filing a revision, against order of compensation the application does not abate but can be prosecuted by his legal representatives.[2]

19. Appeal—Sub-section 3.

Before the amendment of 1891, no appeal lay against the order for compensation.[1] Sub-Section 3 now provides for an appeal.

Before the amendment of 1923, no appeal lay against an order under this Section passed by a first class Magistrate.[2] Sub-Section 3 now provides for such an appeal if the amount awarded exceeds rupees fifty. No appeal lies against the order of a single judge of the High Court in revision of an order under this Section.[3] An appeal lies when the total amount ordered to be paid exceeds rupees fifty even though the amount to be paid to *each* of the accused where there are more than one, does not exceed that sum.[4] Where an order for compensation is appealed against, the accused is entitled on the principle of *audi alteram partem* to notice thereof and the Court hearing the appeal would be exercising a proper discretion to give notice to the accused in such cases.[5] *See also* Section 422 *infra*. An Appellate Court can go into all the facts of the case, in order to determine whether the case is false and vexatious.[6]

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6. (1904) 1 Cri L Jour 597 (598) : 1904 Pun Re Cri No. 6, *Mulka* v. *Fatteh Muhammad.*

Note 18.

1. (1893) Ratanlal 634 (634), *Govinda* v. *Keshava Rao.*
2. (1908) 9 Cri L Jour 103 (103) : 1908 Pun Re Cri No. 24, *Prem Singh* v. *Bhola.*

Note 19.

1. (1891) 1891 All W N 120 (121), *Queen-Empress* v. *Hardeo Singh.*
   (1888) Ratanlal 409 (410), *Queen-Empress* v. *Nagya.*
2. (1899) 1 Bom L R 350 (351), *Queen-Empress* v. *Biru.*
   (1905) 3 Cri L Jour 88 (88) (Bom), *In re, Pitambar Dwarkadas.*
   (1895) 8 C P L R Cr 13 (14), *Empress* v. *Balia Koshti.*
3. (1918) 1918 Mad 418 (418, 419) : 19 Cri L Jour 208, *Kandasami Pillai, In re.*
4. (1926) 1926 All 247 (248) : 27 Cri L Jour 146, *Mt. Sumaria* v. *Emperor.*
   (1925) 1925 Bom 129 (129) : 49 Bom 440 : 26 Cri L Jour 480, *Pereira* v. *Duming Pascol Demello.*
   (1928) 1928 Lah 638 (638) : 9 Lah 462 : 29 Cri L Jour 430, *Sarale Dial* v. *Bir Singh.*
   (1926) 1926 Pat 70 (70, 71) : 26 Cri L Jour 1504, *Sobhit Mallah* v. *Emperor.*
   (1926) 1926 Sind 19 (20) : 19 Sind L R 66 : 26 Cri L Jour 1295, *Assanwal Chatrumal* v. *Dilbhar.*
   (1929) 1929 Sind 176 (177) : 30 Cri L Jour 905, *Shafi Mahomed* v. *Kamruddin.*
5. (1926) 1926 Cal 1054 (1055) : 53 Cal 969 : 27 Cri L Jour 1086, *Bharasa Now* v. *Sukdeo.*
   (1924) 1924 Lah 675 (675, 676) : 25 Cri L Jour 209, *Ramchandra* v. *Jesa Ram.*
   (1933) 1933 Lah 545 (546) : 34 Cri L Jour 533, *Lachhman* v. *Babu.*
   (1905) 3 Cri L Jour 459 (459) : 29 Mad 187, *Emperor* v. *Palaniappa Velan.*
   (1908) 9 Cri L Jour 150 (150, 151) : 33 Mad 89, *Ambakkagari Nagi Reddi* v. *Bassappa.*
   (1915) 1915 Mad 940 (940, 942) : 16 Cri L Jour 128 (128, 129, 130): 38 Mad 1091, *Venkatarama Aiyar* v. *Krishna Aiyer.*
   (1921) 1921 Mad 281 (281) : 22 Cal L Jour 583, *Krishna Kone* v. *Narayana Dass.*
   (1926) 1926 Sind 143 (144) : 20 Sind L R 41: 27 Cri L Jour 248, *Momoon* v. *Ibrahim.*
   [But see (1927) 1927 Lah 357 (357) : 8 Lah 568 : 28 Cri L Jour 416, *Rashid Muhammad Khan* v. *Emperor.*]
6. (1932) 1932 Cal 120 (121) : 58 Cal 1436 : 33 Cri L Jour 269, *Surendra Nath* v. *Basanta Chandra.*

Sec. 250 Note 20

20. Revision.

The High Court has ample jurisdiction to revise and examine an order under this Section, in the exercise of its ordinary revisional powers and under Section 435[1] though it will not interfere when no prejudice is caused.[2]

The High Court can also entertain a revision petition in the first instance, though ordinarily it is the practice not to entertain it without its being presented to the Sessions Judge or the District Magistrate.[3]

An accused person after his acquittal is not an accused within Section 439 (2), and hence has no right to be heard in a revision petition against an order for compensation under this Section.[4]

CHAPTER XXI.

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

Sec. 251 **Procedure in warrant-cases.**

251.* The following procedure shall be observed by Magistrates in the trial of warrant cases.

Synopsis.

Other Topics.

Issue of summons instead of warrant. See Note 2, Pt. 1.
Order "filed." See Section 257, Note 3, F-N (1).
Procedure for summons cases, warrant cases and Sessions cases compared and contrasted. See Section 254, Notes 2 & 3; Sections 241, 206.
Splitting of warrant case into summons cases. See Note 2, Pt. 2.
Trial—Commencement. See Section 252, Note 2; Section 256, Note 3.
Trial of warrant case as a summons case. See Note 3, Pts. 1 & 2.

1. "Trial" meaning of.—*See* Notes on Section 4 (k) *ante*.

2. "Warrant case."

For definition of warrant case, *see* Section 4 (w) *ante*.

Where the offence is one triable as a warrant case, the fact that a summons instead of a warrant was issued under Section 204, *ante*, does not affect the character of the offence and it cannot be tried as a summons case.[1] Similarly, where an offence is triable as a warrant case, the Magistrate cannot

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* (**Code of 1882—S. 251** and **Code of 1872—S. 213**—*Same as that of* 1898 *Code*).

(**Code of 1861—Nil.**)

Note 20.

1. (1920) 1920 All 351 (351) : 21 Cri L Jour 767, *Harris* v. *Peal*.
2. (1924) 1924 All 674 (675), *Debi Prasad* v. *Emperor*.
3. (1912) 13 Cri L Jour 268 (269) : 14 Ind Cas 652 (All), *Gulzari Lal* v. *Gunga*.
4. (1888) 1888 Pun Re Cri No. 14, page 24 (26), *Empress* v. *Lal*. [Cf. Note 18, Pt. (1) above.]

Section 251—Note 2.

1. (1868) 10 Suth W R Cri 31 (31), *Nand Lal* v.

split it up into its component parts which constitute minor offences so as to be able to try the case as a summons case.[2]

3. Effect of non-compliance with provisions.

If a Magistrate tries a warrant case as a summons case, his procedure is illegal and the conviction (if any), of the accused is liable to be set aside.[1] If in such a case the accused is acquitted, the order of acquittal operates only as an order of discharge under Section 253 and not as an order of acquittal.[2]

4. Change of procedure subsequent to commencement of trial.

Where the offence charged at the commencement of proceedings against the accused is triable as a warrant case and the trial is commenced as a warrant case, it is not open to the Magistrate thereafter to abandon the procedure prescribed for the trial of warrant cases and adopt that of summons cases on the ground that the accused appears to have committed only an offence triable as a summons case when such course is likely to prejudice the accused in his defence.[1] Similarly, a Magistrate who has commenced a trial under this Chapter (Chapter 21) cannot subsequently change the procedure to one under Chapter 22 (Summary trials) as such a course would be prejudicial to the interests of the accused.[2] But where the irregularity has not in fact occasioned a failure of justice it will not invalidate the trial.[3]

5. Joint trial of offences triable as summons and warrant cases.—*See* Notes under Section 241 *ante*.

6. Presidency Magistrates, procedure of.

The provisions of this Chapter are applicable to trials before Presidency

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Bhagiratty.

2. (1921) 1921 All 282 (284): 22 Cri L Jour 146, *Ganga Saran* v. *Emperor.*

Note 3.

1. (1906) 4 Cri L Jour 231 (231) : 29 Mad 372, *Emperor* v. *Chinnapayan.*
   (1932) 1932 Nag 111 (112): 28 Nag L R 18: 33 Cri L Jour 573, *Gaya Prasad* v. *Emperor.*
   (1910) 11 Cri L Jour 191 (191): 4 Ind Cas 1116 (Mad), *In re Trousdell.*
2. (1888) 1888 All W N 96 (97), *Empress* v. *Lajja Ram.*
   (1886) 1886 All W N 260 (260), *Empress* v. *Jadu.*
   (1866) 5 Suth W R Cr 58 (58), *In re Shoodun Mundle.*
   (1869) 12 Suth W R Cr 65 (66), *In re Jagabandhu Myti* v. *Gobardhan Bera.*
   [See also (1898) 22 Bom 711 (713), *In re Samsudin.*]

Note 4.

1. (1921) 1921 All 282 (284): 22 Cri L Jour 146, *Ganga Saran* v. *Emperor.*
   (1927) 1927 All 270 (270): 28 Cri L Jour 227, *Govind* v. *Emperor.*
   (1887) 1887 Pun Re Cr No. 17, page (36), *Empress* v. *Ghulam Hosain.*
   (1916) 1916 Mad 610 (1) (610): 16 Cri L Jour 250 (251), *In re Appavu Padayachi.*
   (1928) 1928 Lah 294 (295): 29 Cri L Jour 235, *Devi Dayal* v. *Mt. Rattan Devi.*
   (1921) 22 Cri L Jour 683 (684) : 63 Ind Cas 619 (Pat), *Munshi Teli* v. *Emperor.*
   [See also (1925) 1925 Oudh 200 (200): 25 Cri L Jour 1271, *Ram Ratan* v. *Ram Sagar.* Summons case tried as warrant case—Procedure not to be changed to that of summons case.]
   [But compare (1923) 1923 Mad 439 (440): 24 Cri L Jour 469, *Venkatrama Iyer* v. *Sundaram Pillai.* Accused entitled to acquittal under S. 247 on complainant's failure to appear at hearing].
2. (1874) 21 Suth W R Cr 89 (91), *Dwarkanath Mazoomdar* v. *Nalu Das.*
   (1923) 1923 Cal 105 (106): 24 Cri L Jour 157, *Gosta Behary Basu* v. *Baisram Das Danre.*
   [But see (1899) 22 Mad 459 (460), *Empress* v. *Rangamani.* Commitment proceedings—Magistrate finding original charges not sustainable but charge of other offence triable summarily maintainable. He can try summarily for such offence instead of discharging accused.]
   (1904) 1 All L J 272 (273) (Notes), *Basudeo* v. *Emperor.*
3. (1917) 1917 Sind 69 (70) : 18 Cri L Jour 621 (621) : 10 Sind L R 185, *Adoo valad Chato* v. *Emperor.*

Sec. 251 Note 6

Magistrates except in so far as their applicability is otherwise specifically excluded.[1]

Sec. 252

252.* (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution:

Evidence for prosecution.

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

Synopsis.

*(Code of 1882—S. 252—*Same as that of* 1898 *Code.*)

(Code of 1872—Ss. 214, 190 and 362, Para 1.)

Sections 190 to 194 to apply.

214. The provisions of Sections 190 to 194 (both inclusive) shall apply to trials conducted under this Chapter.

Examination of complainant and witnesses for prosecution.

190. When the accused person appears or is brought before the Magistrate, or, if his personal attendance is dispensed with, when the Magistrate thinks fit, the Magistrate shall take the evidence of the complainant, and of such persons as are stated to have any knowledge of the facts which form the subject matter of the accusation and the attendant circumstances.

WARRANT CASES.

In cases tried upon warrant.

362. In warrant cases, the Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary.

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Note 6.

1. (1932) 1932 Cal 865 (865): 33 Cri L Jour 828, *Raghubir Kahir* v. *Emperor*. Presidency Magistrate bound to frame charge under S. 254 *infra*.

(1915) 1915 Bom 14 (15): 16 Cri L Jour 538 (539), *Dosabhai J. Dhondy* v. *Emperor*.

(1891) Ratanlal 539 (540): *Empress* v. *Abdul*.

Other Topics.

Duty confined to ready evidence. See Note 5, Pts. 1, 2
Duty of prosecution and inference from non-examination. See Note 5, Pts. 4 and 5.
Duty to summon witnesses. See Note 7, Pts. 1 to 3 and Note 7, F-N (1a).
Hearing—Not examination. See Note 4, Pt. 1.
Irregularity of arrest. See Note 3, Pt. 1.
Section mandatory. See Note 5, Pts. 1 and 2.
Subsequent list of witnesses. See Note 5, Pt. 2.
Vakil's admissions. See S. 205 and S. 255, Note 7, Pts. 1, 2 and 4.
Warrant to a witness. See Note 7, Pts. 4 and 5.

1. Legislative Changes.

(1) The proviso to sub-section 1 has been added by the amendments made in 1923 [*Cf.* Section 200 (aa) and Section 244, proviso.]

(2). The Code of 1861 did not contain any express provision entitling the accused to cross-examine the prosecution witnesses *before the framing of the charge*. The Code of 1872 contained such express provisions. (Sections 218, 191, 214). The express provisions were omitted in the later Codes.

2. Scope of the Section.

This Section requires that the trial of a warrant case must commence with the hearing of the complainant (if any) and the examination of the prosecution witnesses. The Magistrate has no power to forthwith require the accused to state his plea and on his admission of his guilt, convict him without taking any evidence as in a summons-case.[1] (*See* Sections 242 and 243).

3. "Appears or is brought."

This Section empowers the Magistrate to proceed with the trial of an accused person whenever he appears or is "brought before a Magistrate." The legality or otherwise of the arrest under which the accused is brought before the Magistrate does not affect the jurisdiction of the Magistrate to try the accused.[1]

(Code of 1861—Ss. 249, 186, and 193.)

249. Issue of process, &c. The provisions of Chapter XII relating to the issuing of process for causing the attendance of the accused person, the taking of bail, the summoning and enforcing the attendance of witnesses, the examination of parties and witnesses, the mode of recording evidence, correction, attestation, and interpretation thereof and the adjournment of a case, shall be applicable to cases tried under this Chapter.

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186. Summons to a witness to attend and give evidence. The Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall issue his summons to such persons, requiring them to appear at a time and place mentioned in the summons before such Magistrate to testify what they know concerning the compaint made against the accused person.

193. Examination of the complainant and witnesses for the prosecution. The Magistrate shall take the evidence of the complainant, and of such persons as are stated to have any knowledge of the fact which forms the subject matter of the accusation and the attendant circumstances.

Section 252— Note 2.

1. (1906) 4 Cri L Jour 231 (231, 232): 29 Mad 372, *Emperor* v. *Chinnapayan.*

Note 3.

1. (1911) 12 Cri L Jour 356 (356): 35 Bom 225, *Emperor* v. *Vinayak Damodar Savarkar.*
(1904) 1 Cri L Jour 535 (537): 31 Cal 557, *Emperor* v. *Madho Dhobi.*
(1899) 1899 Pun Re Cri No. 6, page 19, *Sobha and Baggu* v. *Empress.*
(1928) 1928 Sind 161 (163, 164): 29 Cri L

Sec. 252 Notes 3—5

As to the right of the accused to appear by pleader, *see* Section 205 *ante* and Notes thereunder.

4. "Shall proceed to hear the complainant."

This Section only requires that the complainant should be *heard*. It does not require the *examination* of the complainant on oath.[1]

The Magistrate must proceed to hear the case though the complainant wishes to withdraw his complaint.[2] The reason is that in warrant cases the complainant is not entitled to withdraw his complaint. *See* Section 248 and Notes thereunder.

5. "Take all such evidence as may be produced in support of the prosecution."

This Section casts upon the Magistrate the duty of taking *all* the evidence produced on behalf of the prosecution unless it is irrelevant.[1] But this duty applies only to the evidence which is ready when the case is taken up for hearing and the Magistrate is *not bound* to go on taking the evidence that may be offered subsequently from time to time.[2]

When witnesses are common to a number of cases before the Court, the evidence in each case should be taken separately. It is not proper to take the depositions in one case and have them copied and used in another case.[3] *See also* Notes under Section 356.

As to the right of the prosecution to lead evidence after the accused has entered on his defence, *see* Section 256 and Notes thereunder.

On general principles the duty of the prosecution is not to work for a conviction, but to see that justice is done and it is bound to produce all witnesses who are acquainted with the facts of the case although they may not favour the prosecution, unless their evidence is unnecessary or there is

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Jour 1089, *E. C. D. Wheeler* v. *Emperor*.
(1903) 26 Mad 124 (125), *The Public Prosecutor* v. *Ravalu Kasigadu*.

Note 4.

1. (1922) 1922 Mad 126 (128): 23 Cri L Jour 203, *In re Umayyathantagath Puthu Veetil Kunhi Kadir*.
(1929) 1929 Cal 229 (230): 30 Cri L Jour 942, *Santiram Mandal* v. *Emperor*. [See also (1935) 1935 Pat 515 (520): 36 Cri L Jour 1354, *Kewal Ram* v. *Emperor*. Conviction not vitiated by absence of examination of complainant.]
2. (1929) 1929 Mad 7 (8), *Narasimhalu Naidu* v. *Naina Pillai*.
(1927) 1927 Rang 174 (174, 175): 5 Rang 136: 28 Cri L Jour 649, *Maung Thu Daw* v. *U Po Nyun*. Public Prosecutor may however withdraw the prosecution.
(1889) 13 Bom 600 (603): *In re Ganesh Narain Sathe*.

Note 5.

1. (1908) 7 Cri L Jour 272 (273) (Lah), *Mt. Begam Bibi* v. *Ghulam Mohammad*.
(1913) 14 Cri L Jour 412 (412): 20 Ind Cas 236 (All), *Gokul Chand* v. *Mahabir Misir*.
(1869) Ratanlal 21 (22), *Reg* v. *Daya Kesur*.
(1915) 1915 Mad 825 (825): 16 Cri L Jour 156 (157), *Duggirala Venkatappayya* v. *Mulpuri Venkataramanayya*. Magistrates should always be chary of taking upon themselves the duties of deciding on behalf of the parties which witnesses should be examined.
[See (1933) 1933 Nag 374 (377): 30 Nag L R 76: 35 Cri L Jour 404, *Tulsidas Janglyadas* v. *Chetandas Domadas*. Whether witness is necessary or not should be determined by complainant and not by Magistrate.]
2. (1914) 1914 All 430 (431): 15 Cri L Jour 363, *Govind Sahai* v. *Emperor*.
(1926) 1926 Mad 989 (990): 49 Mad 978: 27 Cri L Jour 1123, *K. C. Menon* v. *Krishna Nayar*. Magistrate not bound to grant time for production of evidence.
3. (1923) 1923 Cal 196 (197): 50 Cal 223: 24 Cri L Jour 198, *MazahurAli* v. *Emperor*.
[See also (1871) 15 Suth W R Cr 23 (24), *Tukheya* v. *Tupseekoer*.]

reasonable ground for believing that they will not speak the truth.[4] Where a material witness is withheld by the prosecution without any sufficient cause, the Court can draw an inference that his evidence if produced will be against the prosecution. *See* Evidence Act, Section 114, Illustration (g).[5] *See also* Notes under Sections 208, 244 and 286.

6. Proviso to sub-section 1.

For cases where the complaint of a Court is necessary for taking cognizance of an offence, *See* Section 195.

7. "Shall ascertain"—Sub-section 2.

The Magistrate is *bound* under this Section, to ascertain from the complainant or otherwise the names of any persons who are likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and he may summon to give evidence before himself such of them as he thinks necessary.[1a] In discharge of this obligation the Magistrate must *specifically question* the complainant as to whether he knows of any witnesses who will have to be brought by process. The Magistrate is not bound or expected to exercise this duty of ascertaining more than once and the proper time for such ascertainment is when the evidence already "produced" in support of the prosecution has been taken.[1]

The Magistrate is not bound to summon *every* one of the witnesses named by the complainant, but must only summon such of the witnesses as he *thinks necessary*.[2] But he cannot arbitrarily refuse to summon any witness, but must issue summons to all witnesses named by the complainant who, he considers, are likely to give useful evidence.[3]

The Section only authorises the issue of a *summons* to a witness and a

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4. (1904) 1 Cri L Jour 305 (309) : 28 Bom 479, *Emperor* v. *Bal Gangadhar Tilak.*
(1905) 9 Cal W N 438 (439), *Munni Sonar* v. *Emperor.*
(1933) 1933 Cal 600 (602) : 60 Cal 1361 : 35 Cri L Jour 33, *Bhuban Bejoy* v. *Emperor.* Prosecution not bound to produce witnesses who are not likely to tell the truth.
(1914) 1914 Lah 565 (566) : 16 Cri L Jour 266, *Sardar Ahmad* v. *Emperor.*
(1918) 1918 Cal 314 (315) : 19 Cri L Jour 81, *Ashraf Ali* v. *Emperor.* If witness can on reasonable grounds, be regarded as an accomplice, prosecution need not produce and examine him.
(1928) 1928 Pat 46 (48) : 28 Cri L Jour 868, *Prabhu Dusadh* v *Emperor.* Unnecessary witnesses need not be produced.

5. (1919) 1919 Lah 158 (159) : 20 Cri L Jour 519, *Emperor* v. *Amolak Ram.*
(1928) 1928 Pat 98 (100) : 28 Cri L Jour 906, *Jogi Raut* v. *Emperor.*

Note 7.

1a (1926) 1926 Mad 989 (990, 991) : 49 Mad 978 : 27 Cri L Jour 1123, *K. C. Menon* v. *P. Krishna Nayar.*
(1913) 14 Cri L Jour 682 (682) (All), *Sital Singh* v. *Dalganjan Singh.*
(1925) 1925 Oudh 667 (667) : 26 Cri L Jour 1266, *Emperor* v. *Maiku Lal.* Duty of seeing that all evidence essential to the prosecution case is before the Court, is thrown by Cr. P. Code upon the Magistrate himself. Hence it is not open to a Magistrate to acquit on the ground that the prosecution has failed to produce a necessary witness.

1. (1926) 1926 Mad 989 (990, 991) : 49 Mad 978 : 27 Cri L Jour 1123, *K. C. Menon* v. *P. Krishna Nayar.*

2. (1914) 1914 All 526 (526) : 14 Cri L Jour 682 (682), *Sital Singh* v. *Dalganjan Singh.* Where a fresh list of witnesses is put in by the complainant after the first hearing, it is irregular on the Court to accept the list without scrutiny.
(1926) 1926 Mad 989 (990) : 49 Mad 978 : 27 Cri L Jour 1123, *K. C. Menon* v. *P. Krishna Nayar.*
(1914) 1914 All 430 (431) : 15 Cri L Jour 363, *Govind Sahai* v. *Emperor.*
(1875) 23 Suth W R Cri 9 (9), *Jaldhari Singh* v. *Shunkur Dayal.*

3. (1926) 1926 Mad 989 (991) : 49 Mad 978 : 27 Cri L Jour 1123, *K. C. Menon* v. *P. Krishna Nayar.*

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warrant for his arrest can be issued only if the conditions laid down in Section 90 *ante* are satisfied.[4] *See also* the undermentioned cases.[5]

8. Process-fee.

Section 244 *supra* which provides for the summoning of witnesses for the complainant in summons cases makes a provision for requiring the complainant to deposit the reasonable expenses of the witnesses before the issue of summons. But this Section which provides for the summoning of prosecution witnesses in warrant cases does not make any provision for demanding process-fee from the complainant. It was accordingly held by the High Courts of Madras[1] and Patna[1a] and the Judicial Commissioner's Court of Nagpur[2] that there is nothing in the Code enabling the Magistrate demanding from the complainant in warrant cases process-fees for witnesses to be summoned and that the dismissal of a warrant case for non-payment of process-fee for summoning witnesses was illegal. According to the High Court of Allahabad the Magistrate should realize the expenses of issuing summons before he issues summons.[3] The High Court of Rangoon also has held by a Full Bench that in a non-cognizable warrant case the Court is not bound to summon witnesses for the prosecution or the defence under this Section or under Section 257 *infra* if the party at whose instance or in whose interest the process is issued does not pay process-fees as required by Rules 17 and 18 of the Process-fees Rules made under Burma Process-fees Act. That Court holds that to that extent the Sections 252, 256 and 257 of the Code should be read subject to the rules made under the Burma Process-fees Act 1910.[4]

9. Production and inspection of documents.

Where during the examination of the complainant several documents were produced as evidence against the accused, which were admitted by the Magistrate and were marked as exhibits the accused is entitled to the inspection of all documents filed as exhibits in the case and such inspection should not be refused with the direction that he may apply for and obtain certified copies.[1]

10. Cross-examination of witnesses.

This Section does expressly refer to the right of the accused to cross-examine the prosecution witnesses. But on general principles and under

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4. (1907) 6 Cri L Jour 275 (275) (Lah), *Kala Singh* v. *Emperor*. In a case under S. 498, I. P. C., there is no legal sanction for the Magistrate to issue a warrant for compelling the complainant's wife to attend as a witness, without first requiring her to attend by a summons as laid down under S. 252, Criminal P. C.
5. (1873) 1873 Pun Re Cri No. 4, page 5 (5), *The Crown* v. *Ruttun Singh*.

Note 8.

1. (1883) 2 Weir 323 (323), *In re Palannagari Pitchivadu*. Though under the Code of 1882, still good law since there is no change in this respect in this Section.
1a (1924) 1924 Pat 695 (696): 25 Cri L Jour 458, *Nanda Kishore Misra* v. *Kalika Misra*.
2. (1912) 13 Cri L Jour 554 (555): 8 Nag L R 65, *Bridhichand* v. *Lakhmichand*.
3. (1914) 1914 All 430 (432): 15 Cri L Jour 363, *Govind Sahai* v. *Emperor*. Security proceedings under S. 110 to which warrant case procedure applies.
4. (1926) 1926 Rang 164 (168): 4 Rang 146: 27 Cri L Jour 1396 (FB), *Emperor* v. *Tha Shwe*.
[Contra (1926) 1926 Rang 13 (14): 27 Cri L Jour 415, *Emperor* v. *Mg. San Nyein*. This decision has been overruled later by the above Full Bench decision—So not good law.]

Note 9.

1. (1899) 1 Bom L R 433 (433), *In re Francis Domingo Fernandes*.
(1882) 10 Cal L R 54 (55), *In the matter of Abdul Gaffoor*.

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Note 10

Section 138 of the Evidence Act, the liability to cross-examination by the adverse party is part of the conception of legal evidence[1] and in Sections like Section 244 which also do not expressly confer a right of cross-examination, it has been held that such a right undoubtedly exists.[2] But Section 256 *infra* provides that after the *charge is framed* the accused must be required to state if he desires to cross-examine any of the prosecution witnesses and if he says he wishes to do so, the witnesses named by him should be re-called and he should be allowed to cross-examine them. The question has arisen as to what is the effect of this provision? Does it impliedly negative the rights of the accused to cross-examine at an earlier stage, *viz.*, before the charge is framed or does it confer on the accused an additional right to cross-examine the prosecution witnesses a second time after the charge is framed? On this question there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras[3] and Patna,[4] the Chief Court of Lower Burma,[4a] the Judicial Commissioner's Court of Upper Burma,[4b] the Judicial Commissioner's Court of Sind[4c] and the Judicial Commissioner's Court of Nagpur[4d] that the accused is entitled as of right to cross-examine prosecution witnesses before the charge is framed as well as afterwards. But it has been held by the Allahabad[5] and Calcutta[6] High Courts that the accused is not entitled as of right to cross-examine prosecution witnesses before the charge is framed, but is only entitled to do so afterwards under Section 256. At the same time the Allahabad[7] and Calcutta[8] High Courts have held that Section 256 does not *prohibit* cross-examination by the accused before the charge is framed and the Magistrate, can, as a matter of discretion, allow, and indeed, will be well-advised to allow the accused to cross-examine prosecution witnesses even before the charge is framed. The Punjab Chief Court also seems to hold

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Note 10.

1. (1932) 1932 Oudh 298 (299): 34 Cri L Jour 58; 8 Luck 135, *S. Mohammed Hossein* v. *Mirza Fakhrulla.* Per Srivastava J.
2. [See Notes under S. 244.]
3. (1920) 1920 Mad 201 (203): 43 Mad 411: 21 Cri L Jour 297, *W. H. Lockley* v. *Emperor.*
   (1923) 1923 Mad 609 (610): 46 Mad 449: 24 Cri L Jour 547, *Varisai Rowther* v. *Emperor.*
   (1924) 1924 Mad 735 (735): 25 Cri L Jour 556, *In re Muthiah Chetty.*
   (1926) 1926 Mad 989 (991): 49 Mad 978: 27 Cri L Jour 1123, *K. C. Menon* v. *P. Krishna Nayar.*
4. (1920) 1920 Pat 149 (150): 21 Cri L Jour 814: 5 Pat L Jour 94, *Ramyad Singh* v. *Emperor.*
   4a (1911) 12 Cri L Jour 277 (279): 10 Ind Cas 917 (L B), *Mohammed Ally* v. *Emperor.*
   4b (1897-1901) 1 Upp Bur Rul 74 (74), *Nga* v. *Empress.*
   4c (1935) 1935 Sind 13 (19): 29 Sind L R 92: 36 Cri L Jour 581 (F B), *Muhammad Rahim* v. *Emperor.* Evidence in S. 252 includes examination, cross-examination and re-examination of a witness.
   4d (1935) 1935 Nag 8 (11): 31 Nag L R 276: 36 Cri L Jour 576, *Gurudin* v. *Emperor.*
5. (1931) 1931 All 621 (623, 624): 54 All 212: 33 Cri L Jour 310, *Lachmi Narain* v. *Emperor.*
6. (1929) 1929 Cal 822 (824): 31 Cri L Jour 809, *Emperor* v. *C. A. Mathews.*
   (1872) 17 Suth W R Cri 51 (51), *In the matter of Thakoor Dyal Sen.* Case under Code of 1861 which did not expressly confer right of cross-examination. [But see (1923) 1923 Cal 727 (728): 50 Cal 939: 25 Cri L Jour 27, *Dibakanta Chatterjee* v. *Gour Gopal Mukerjee.*]
   (1873) 19 Suth W R Cri 53 (53), *J. R Belilious* v. *Queen.* Case under Code of 1872 which expressly conferred on accused the right of cross-examination.
7. (1931) 1931 All 621 (623, 624): 54 All 212: 33 Cri L Jour 310, *Lachminarain* v. *Emperor.*
8. (1929) 1929 Cal 822 (824): 31 Cri L Jour 809. *Emperor* v. *C. A. Mathews.* [See also (1904) 1 Cri L Jour 838 (839) (Cal), *Ashirbad Muchi* v. *Maju Muchini*, and (1894) 21 Cal 642 (663), *Empress* v. *Sagal Samba Sajad.*]

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the same view.[8a] The question came up for decision before a Bench of the Oudh Chief Court, but the judges constituting the Bench differed in their opinion, one of them expressing his concurrence with the Madras and Patna view and the other agreeing with the Allahabad and Calcutta view.[9]

An accused is entitled to decline to exercise his right of cross-examination (assuming that it is held that he has such a right).[10]

The fact that a certain evidence has not been tested by cross-examination does not affect its *admissibility* but only its probative *value*.[11]

11. Procedure under the Section—Trial or inquiry.—*See* Section 4 (*k*) *ante*.

12. Revision.

The Section leaves it to the discretion of the Magistrate as to what witnesses named by the prosecution should be summoned to give evidence before himself and a Court of revision will not interfere with this discretion unless there are strong and exceptional reasons for doing so.[1]

Sec. 253

Discharge of accused

253.* (1) If, upon taking all the evidence referred to in S. 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

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* **(Code of 1882—S. 253—*Same as that of* 1898 *Code.*)**

(Code of 1872—S. 215, Para. 1 and Expl. III.)

215. When the evidence of the complainant and of the witnesses for the prosecution and such examination of the accused person as the Magistrate considers necessary, have been taken, the Magistrate, if he finds that no offence has been proved against the accused person, shall discharge him.

Discharge of accused.

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Explanation III—An order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken.

8a (1916) 1916 Lah 445 (445): 17 Cri L Jour 278 (279), *Sher Singh* v. *Emperor*.

9. (1932) 1932 Oudh 298 (299, 305): 34 Cri L Jour 58: 8 Luck 135, *Mahomed Husain Agfar Mohani* v. *Mirza Fakhrullah Beg*.

10. (1923) 1923 Cal 727 (728): 50 Cal 939: 25 Cri L Jour 27, *Dibakanta Chatterjee* v. *Gour Gopal Mukerjee*.

(1873) 19 Suth W R Cr 53 (53, 54), *J. R. Belilious* v. *Queen*.

11. (1925) 1925 Mad 497 (537): 48 Mad 1: 93 Ind Cas 705, *Maharaja of Kolhapur* v. *Sundaram Iyer*.

(1929) 1929 Lah 840 (841): 30 Cri L Jour 951, *Mangal Sen* v. *Emperor*.

(1913) 14 Cri L Jour 70 (71): 18 Ind Cas 406 (Cal), *Ibrahim* v. *Emperor*.

(1903) 1903 Pun Re Cr No. 5, page 15 (16), *Gunga Ram* v. *Emperor*.

(1929) 1929 Lah 840 (842): 30 Cri L Jour 951, *Mangal Sen* v. *Emperor*.

(1910) 11 Cri L Jour 145 (145): 5 Ind Cas 512 (Mad), *Rosi* v. *Yadalu Pillamma*.

(1925) 1925 Oudh 726 (727): 26 Cri L Jour 1236, *Sarju Singh* v. *Emperor*.

(1923) 1923 Pat 53 (55): 24 Cri L Jour 595, *Moti Singh* v. *Dhanukdhari Singh*.

(1932) 1932 Oudh 298 (299): 34 Cri L Jour 58: 8 Luck 135, *Mohamad Husain Agfar Mohani* v. *Mirza Fakhrullah Beg*.

(1909) 3 Ind Cas 374 (377) (Cal), *Chhatu Kurmi* v. *Rajaram Tewari*.

(1914) 1914 Cal 834 (835): 41 Cal 299: 15 Cri L Jour 596, *Sadasiv Singh* v. *Emperor*.

Note 12.

1. (1928) 1928 All 684 (685): 30 Cri L Jour 631, *Inayat Husain* v. *Emperor*.

(2) Nothing in this Section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Sec. 253 Note 1

Synopsis.

Other Topics.

1. Legislative Changes.

1. The words "if he finds that no offence has been proved against the accused" which occurred in the corresponding Sections of the Codes of 1861 and 1872 have been replaced in the later Codes by the words "if he finds that no case against the accused has been made out which if unrebutted, would warrant his conviction."

2. The Codes of 1861 and 1872 did not contain any provision corresponding to Sub-Section 2. On the other hand, Explanation III to Section 215 of the Code of 1872 expressly declared that an order of discharge could not be passed till after the examination of the witnesses named for the prosecution. This provision was removed and the provision contained in Sub-Section 2 was introduced in the later Codes thus rendering obsolete the under-mentioned decisions under the prior Codes which held that a Magistrate could not discharge an accused before taking all the evidence for the prosecution.[1]

(Code of 1861—S. 250.)

250. When the evidence of the complainant and of the witnesses for the prosecution, and such examination of the accused person as the Magistrate shall consider necessary, have been taken, the Magistrate, if he finds that no offence has been proved against the accused person shall discharge him.

Charge.

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Section 253—Note 1.

1. (1875) 7 N W P H C R 230 (232), *In the matter of Newar.*
(1882) 1882 All W N 179 (179), *Empress* v. *Ajudhia.*
(1881) 1881 All W N 145 (145), *Empress* v. *Sheo Charan.*
(1879) 2 All 447 (448), *Empress* v. *Kashi.*

Sec. 253 Notes 2—3

2. "If upon taking all the evidence referred to in Section 252."

This Section makes it incumbent on the Magistrate to take *all* the evidence offered on behalf of the prosecution before he discharges the accused[1] unless he finds that the charge against the accused is groundless in which case he can discharge the accused even before he has taken all the prosecution evidence. (*See* Note 6 *infra*). It has been held that the Magistrate can discharge an accused on the basis of the evidence of a witness called at the instance of accused under Section 540 *infra*, though this Section refers only to the evidence for the prosecution.[2]

3. "Examination of accused (if any) as he thinks necessary."

This Section enables the Magistrate in a warrant case to examine the accused *before* the charge is framed.[1] But such an examination is entirely discretionary with the Magistrate and he is not *bound* to examine the accused before the charge is framed.[2]

As to whether the examination of an accused before the charge is framed dispenses with the examination of the accused under Section 342 after the charge is framed and the prosecution evidence is closed and before the

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(1877) Ratanlal 121 (121), *Kaladgi Magistrate's Letter No.* 597.
(1869) Ratanlal 21 (22), *Reg* v. *Daya Kesar.*
(1872) Ratanlal 73 (73), *Reg* v. *Sangapa.*
(1872) 3 Cal 389 (390), *Jehardi Sheikh* v. *Mematulla.*
(1873) 12 Ben L R 253*n* (254*n*), *Empress* v. *Ramkanu.*
(1878) 2 Cal L R 389 (390), *In the matter of Gangoo Singh.*
(1878) 2 Cal L R 374 (375), *Bepututta* v. *Nazim Sheikh.*
(1865) 2 Suth W R Cr 47 (48), *Queen* v. *Sheikh Edoo.*
(1867) 7 Suth W R Cr 47 (47), *Queen* v. *Hossein Ally.*
(1867) Suth W R Cr 45 (45), *Queen* v. *Sreenath Mookopadhia.*
(1870) 13 Suth W R Cr 37 (38), *Queen* v. *Heera Lall.*
(1871) 16 Suth W R Cr 18 (19), *Runnoo Singh* v. *Kali Charan.*
(1871) 16 Suth W R Cr 59 (59), *In re Ramdass.*
(1871) 16 Suth W R Cr 48 (49), *Kishore* v. *Mungeri.*
(1873) 20 Suth W R Cr 67 (67), *Soonder* v. *Ramkumar.*
(1874) 22 Suth W R Cr 25 (26), *Queen* v. *Japit Ahir.*
(1875) 24 Suth W R Cr 9 (10), *Meer Azeem Ali* v. *Hurnam Dass.*
(1875) 24 Suth W R Cr 62 (63), *Sreenath Mundle* v. *Sreeram Rajput.*
(1876) 25 Suth W R Cr 10 (10), *Syed Nissar Hossein* v. *Ramgolam Singh.*
(1880) 1880 Pun Re Cr No. 8, page 16, *Kudan* v. *Sonun.*
(1874) 1874 Pun Re Cr No. 17, page 30, *Nihal Singh* v. *Mohanda.*
(1881) 4 Mad 329 (329), *Queen* v. *Pursuram Naicker.*
(1874) 8 Mad H C R App 4 (5).

Note 2.

1. (1929) 1929 Cal 479 (480): 31 Cri L Jour 128, *Mukunda Patre* v. *Purushottam Shah.*
(1911) 12 Cri L Jour 412 (412, 413): 11 Ind Cas 596 (Lah), *Bhagwan Kaur* v. *Emperor.*
(1866) 5 Suth W R Cr 51 (51), *Lugkhim Molloo* v. *Gooroo Dass.*
(1913) 14 Cri L Jour 412 (412, 413): 20 I C 236 (All), *Gokul Chand* v. *Mahabir.*
(1930) 1930 Cal 515 (517): 31 Cri L Jour 1055: 58 Cal 346, *Fazlar Rahaman* v. *Emperor.*
(1920) 1920 Mad 131 (131): 21 Cri L Jour 478, *In re, Packianathan.*
(1908) 7 Cri L Jour 272 (273) (Lah), *Begam Bibi* v. *Ghulam Muhammad.*
(1929) 1929 Cal 479 (480): 31 Cri L Jour 128, *Mukunda Patre* v. *Purushottam Shah.*
2. (1933) 1933 Lah 561 (566): 34 Cri L Jour 735, *Diwan Singh* v. *Emperor.*

Note 3.

1. (1893-1900) 1893-1900 Low Bur Rul 642 (645), *Pat Tha U* v. *Empress.*
(1927) 1927 All 475 (475): 49 All 551: 28 Cri L Jour 399, *Sudaman* v. *Emperor.*
2. (1922) 1922 Mad 512 (512): 45 Mad 820: 24 Cri L Jour 124, *In re, Marudamuthu Vanian.*
(1926) 1926 Nag 459 (460): 27 Cri L Jour 830, *Deoji* v. *Emperor.*
(1920) 1920 Pat 471 (478): 21 Cri L Jour 705: 5 Pat L Jour 430, *Raghu Bhumij* v. *Emperor.*

accused is called on to enter upon his defence, *see* Section 342 and Notes thereunder.

As to the scope and effect of an examination of the accused in criminal cases, *see* Notes under Section 342.

4. "The Magistrate shall discharge him."

This Section contemplates an order *discharging* the accused. An order *dismissing a complaint* is not the proper order to be passed under the Section.[1] *A formal* and *express* order of discharge is, however, not necessary. It may be implied and presumed from the circumstances of a case.[2] Thus, where a person is accused of a major offence but the Magistrate frames only a charge for a minor offence, there is an implied discharge in respect of the major offence.[3] To determine whether a particular order is one of discharge, the *substance* of the order and not its *form* should be taken into consideration. Thus, where no charge has been drawn up and the prisoner has not been asked to make his defence, and the Magistrate finds that no case has been made out against the accused, his order is only one of discharge though he styles it as an order of acquittal.[4] Similarly if the defence of the accused is taken and witnesses are examined in support thereof, the order of the Magistrate where he finds the accused not guilty is one of acquittal though he styles it as one of discharge.[5]

A Magistrate need not record any reasons for his order of discharge under this Section[6] as such an order is not a final judgment within Section 367.

Note 4.

1. (1913) 14 Cri L Jour 412 (412): 20 Ind Cas 236 (All), *Gokulchand* v. *Mahabir Misir.*
   (1934) 1934 Pat 548 (549): 36 Cri L Jour 285, *Jotindra Nath Mukherji* v. *Radhakrishna Budhia.* Dismissal of complaint after issue of process not legal—When process has once been issued, an accused person can only be discharged under this Section or S. 259 *infra.*
2. (1875-77) 1 Bom 610 (619, 620), *Reg* v. *Hanmanta.*
3. (1933) 1933 Mad 65 (66): 33 Cri L Jour 825, *Pulikonda Venkatasubbayya* v. *Maddi Venkata Lakshmayya.*
   (1931) 1931 Lah 402 (403, 404): 32 Cri L Jour 1029, *Mahomed* v. *Emperor.* [But see (1926) 1926 Oudh 194 (195): 27 Cri L Jour 417: *Bilodar* v. *Emperor.*]
4. (1866) 6 Suth W R Cr 13 (14), *Queen* v. *Sheriff.*
   (1867) 8 Suth W R Cr 45 (46), *Queen* v. *Bipro Doss.*
   (1868) 1868 Pun Re Cr No. 32, page (100), *Queen* v. *Sakundar Khan.*
   (1868) 9 Suth W R Cr 15 (16), *Goonath Mudli* v. *Troylocko Chukrbuty.*
   (1869) 12 Suth W R Cr 65 (65, 66), *Queen* v. *S. C Goberdhan Bera.*
   (1871) 15 Suth W R Cr 55 (55), *Queen* v. *Rajkishore Roy.*
   [See also (1904) 1 Cri L Jour 355 (356) (Cal), *Nagendra Nath Sen* v. *Korb.*]
5. (1872) 18 Suth W R Cr 10 (10), *Ramjoy Surmah* v. *Mirza Ali.*
   (1873) 19 Suth W R Cr 55 (55), *Okhoy Teli* v. *Modhoo Sheikh.*
   (1874) 22 Suth W R Cr 12 (13, 14), *Radanath Panja* v. *Wooma Charan Chowdhry.*
   (1917) 1917 Low Bur 88 (90): 18 Cri L Jour 1006 (1006, 1007), *Orilal* v. *Kalu.*
   (1883) 1883 Pun Re Cr No. 29, page (76), *Tata* v. *Hira Singh.*
   (1925) 1925 Oudh 60 (60): 25 Cri L Jour 39, *Dal Chand* v. *Ram Lal.*
   (1879) 3 Cal L R 131 (132), *In the matter of Jeja Pashan.*
   (1903) 1903 Pun Re Cr No. 14, page (39), *Crown* v. *Nathu.* Evidence partly recorded by one Magistrate and partly by another.
   (1915) 1915 Mad 23 (24): 15 Cri L Jour 673 (674, 675): 38 Mad 585, (Do.), *Tanguturi Sriramulu* v. *Nalan Krishna Row.*
   (1935) 1935 All 834 (835): 36 Cri L Jour 912, *Raza Husain* v. *Emperor.* Magistrate by inadvertence referring to S. 253 and not S. 258; still, order is one of acquittal.
6. (1901) 28 Cal 652 (660, 674), *Dwarkanath Mandal* v. *Beni Madhab Banerjee.*

Sec. 253 Notes 5—6

5. Grounds of discharge.

Under Sub-Section 1 of this Section a Magistrate can discharge an accused when, upon considering the evidence for the prosecution, he comes to the conclusion that no case has been made out against the accused, which if unrebutted would warrant his conviction.[1] But where the Magistrate has not come to such a conclusion he has no power to discharge the accused under this Section. Thus an accused person cannot be discharged under this Sub-Section merely because a civil suit touching the same dispute is pending between the parties[2] or the *complaint* is vague[3] or because it is desirable to try the accused along with another co-accused whose attendance before the Court it has not so far been possible to procure.[4] Similarly except in cases falling under Section 259 *infra* the absence of the complainant at the hearing is no ground for discharging an accused (*See* Notes under Section 259). But in such a case the accused may be discharged for want of evidence against him.[5] It is not sufficient to enable a Magistrate to discharge an accused person under this Section that there can be no conviction for the particular offence which was originally alleged against the accused, but only in respect of some other offence[6] or that the accused appears to have committed the offence only in respect of a smaller sum than that alleged by the prosecution.[7] Where an accused person escapes into a foreign jurisdiction and the Magistrate holding the enquiry in connexion with the extradition proceedings reports that there is no sufficient ground for *extradition*, this is not by itself a sufficient ground for the discharge of the accused under this Section.[8] It is the absence of sufficient evidence for *conviction* that can justify a discharge under this Section.

6. Sub-section 2.

Although Sub-Section 1 of this Section requires the Magistrate to take all the evidence for the prosecution before discharging the accused, sub-section 2 empowers the Magistrate to discharge the accused at any *previous* stage of the case if he finds that the charge against the accused is a groundless

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(1907) 5 Cri L Jour 255 (256) (Bom), *Emperor* v. *Nabi Fakira.*

(1910) 11 Cri L Jour 190 (2) (191): 4 Ind Cas 1113 (Mad), *Emperor* v. *Maheshwara Kondaya.*

(1909) 9 Cri L Jour 80 (82): 31 Mad 543, *Maheshwara Kondaya* v. *Emperor.*

Note 5.

1. (1925) 1925 All 298 (299): 26 Cri L Jour 736, *Daya Nand* v. *Emperor.*

(1927) 1927 All 804 (805): 49 All 879: 28 Cri L Jour 601, *Alam* v. *Emperor.* If prosecution does not choose to put the correct version of facts before the Court and itself attempts to spoil a true case by adducing false and perjured evidence, a Magistrate cannot but discharge the accused.

(1909) 10 Cri L Jour 14 (16): 1908 Upp Bur Rul 15, *Nga Maung Gyi* v. *Nga Lugale.*

(1906) 3 Cri L Jour 102 (105) (Kathiawar), *Emperor* v. *Sherkhan Balochkhan.*

(1934) 1934 Oudh 321 (323): 35 Cri L Jour 939, *Emperor* v. *Chandewa Pasi.* If Magistrate considers that no case has been made out against the accused the proper procedure is to *discharge* the accused under this section and not to *acquit* him after framing the charge.

2. (1925) 1925 All 298 (299): 26 Cri L Jour 736, *Daya Nand* v. *Emperor.*

3. (1876) 25 Suth W R Cr 35 (39), *Queen* v. *Thakoor Ram.*

4. (1922) 1922 Cal 334 (335): 49 Cal 182: 22 Cri L Jour 465, *Billinghurst* v. *Meek.*

5. [See (1869) 11 Suth W R Cr 47 (48), *Queen* v. *Poorangolaha.*]

6. (1867) 8 Suth W R Cr 82 (82, 83), *Degumbar* v. *Kally Das Dutt.*

(1874) 1874 Pun Re Cr No. 17, page 29, *Nihal Singh* v. *Mohamda.*

7. (1883) 6 Mad 25 (26), *Queen* v. *Vengu Vayyangar.*

8. (1905) 2 Cri L Jour 211 (212) (Kathiawar), *Manilal Ajitrai* v. *Modi Musa Yakub.*

one.[1] Thus, the accused can be discharged even before any evidence for the prosecution is taken or in the course of such evidence being taken[2] or even before the date of hearing.[3] The Calcutta[4] and the Patna[5] High Courts have held that even an order refusing to issue process for the appearence of the accused may amount to an order of discharge though the Madras High Court has expressed the opinion that neither an order of discharge nor one of acquittal can be passed in a case where the accused has not been directed to appear at all.[6] But an order of discharge can be passed only after the Magistrate has taken *cognizance* of the offence. An order refusing to take cognizance of an offence is therefore not an order of discharge.[7]

Under this Sub-Section, the Magistrate can discharge the accused before he has taken the evidence for the prosecution if he finds that the charge against the accused is *groundless*. A finding that the *charge is groundless* is not the same as a finding under Sub-Section 1 that no case has been made out against the accused.[8]

7. "For reasons to be recorded."

Sub-Section 2 requires the Magistrate to record his reasons for holding that the charge is groundless. No hard and fast rule can be laid down as to when a Magistrate will be justified in holding a charge to be groundless. The Magistrate should arrive at his conclusion judicially and not capriciously. If, acting judicially, a Magistrate has come to the conclusion on grounds to be recorded, that the charge must fail either because the allegations are false or because they disclose a dispute of a civil nature which is distorted into a criminal case or for any other reason, he can discharge the accused without taking the evidence for the prosecution.[1] In arriving at his conclusion the Magistrate can take into account a police report[2] or a civil Court's judgment[3] touching the dispute. Where the story related by the prosecutor himself is of such a nature that it does not disclose a criminal offence, the Magistrate will

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Note 6.

1. (1911) 12 Cri L Jour 105 (106): 9 I C 606 (Mad), *Navanna Chinna Narasanna* v. *Suresetti Pedda Venkatarayadu.*
   (1926) 1926 Lah 213 (213): 27 Cri L Jour 388, *Harkishan Lal* v. *Khushabi Ram.*
2. (1930) 1930 Lah 158 (159): 31 Cri L Jour 239, *Hakim Singh* v. *Lal Singh.*
   (1926) 1926 All 461 (461, 462): 27 Cri L Jour 541, *Kunj Behari Lal* v. *Emperor.*
   (1930) 1930 Cal 515 (517, 518): 58 Cal 346: 31 Cri L Jour 1055, *Fazlar Rahman* v. *Emperor.*
   (1911) 12 Cri L Jour 105 (106): 9 I C 606 (Mad), *Navanna Chinna Narasanna* v. *Suresetti Peda Venkatarayadu.*
   (1916) 1916 Mad 1108 (1108): 17 Cri L Jour 193 (193), *In re, Mogambara Pattan.*
3. (1925) 1925 Pat 154 (155): 25 Cri L Jour 696, *W. J Watson* v. *P. H. Metcalfe.* [See also (1934) 1934 All 51 (52): 56 All 285: 35 Cri L Jour 418, *Bhagwan Das* v. *Emperor.* Complaint dismissed after summoning accused —Order is one of discharge under S. 253 (2)].
4. (1905) 2 Cri L Jour 524 (530): 32 Cal 783, *Agab Lal Khisher* v. *Emperor.*
5. (1921) 1921 Pat 474 (475), *Sheikh Mannat Hossain* v *Emperor.*
6. (1913) 14 Cri L Jour 559 (561): 36 Mad 315, *In re Muthia Moopan.*
7. [See (1904) 1 Cri L Jour 980 (982) (All), *Bhiku Bari* v. *Emperor.*]
8. (1928) 1928 Mad 129 (129): 51 Mad 185: 25 Cri L Jour 995, *Mahomed Sheriff Sahib* v. *Moulvi Abdul Karim Sahib.*
   (1930) 1930 Lah 461 (462): 31 Cri L Jour 481, *Mehtab* v. *Nathu.*
   [See also (1935) 1935 Pesh 23 (24): 36 Cri L Jour 632, *Saran Singh* v. *Kirpal Singh.* Distinction between the two clauses pointed out.]

Note 7.

1. (1929) 1929 Mad 754 (754, 755): 52 Mad 987: 31 Cri L Jour 275, *Kasinatha Pillai* v. *Shanmughan Pillai.*
2. (1926) 1926 All 461 (461): 27 Cri L Jour 541, *Kunj Behari Lal* v. *Emperor.*
   (1930) 1930 Cal 515 (518): 58 Cal 346: 31 Cri L Jour 1055, *Fazlar Rahman* v. *Emperor.*
3. (1916) 1916 Bom 163 (163): 17 Cri L Jour 153 (154): 41 Bom 1, *N. F. Markur, In re.*

Sec. 253 Note 7

be justified in discharging the accused under this Sub-Section without taking the evidence for the prosecution.[4]

But where the complaint discloses *prima facie* a case against the accused, the Magistrate cannot discharge the accused unless he knows what is the sort of evidence that is going to be adduced in support of the charge and unless he considers that even if such evidence were taken into consideration the charge would be groundless.[5]

The mere fact that the matter is one of rendition of accounts does not justify a Magistrate in holding a charge of criminal breach of trust to be groundless.[6] Similarly, it would not be a proper exercise of the discretion of the Magistrate under this Sub-Section to discharge an accused merely on a statement of a prosecution witness that the complainant had previously admitted that the case was a false one.[7]

Sec. 254

Charge to be framed when offence appears proved.

254.* If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

Synopsis.

	Note No.		Note No.
Legislative changes.	1	"Which in his opinion, could be adequately punished by him."	6
"When such evidence and examination have been taken and made."	2	Magistrate shall frame a charge.	7
"Or at any previous stage."	3	Charge—What it should contain.	8
"Ground for presuming."	4	Effect of the framing of the charge.	9
"Offence triable under this Chapter."	5		

* **(Code of 1882—S. 254.)**

Same as that of 1898 Code, except the addition noted in Note 1 above.

(Code of 1872—S. 216.)

Charge to be drawn when offence is apparently proved.

216. If the Magistrate finds that an offence is apparently proved against the accused person, which such Magistrate is competent to try, and which in his opinion could be adequately punished by him, he shall prepare in writing a charge against the accused person.

4. (1900) 1900 Pun L R Cri 68 (69), *Ramchand* v. *Empress.*
   (1884) Ratanlal 201 (201), *Empress* v. *Ramachandra.*
   (1928) 1928 Lah 945 (946): 30 Cri L Jour 162, *Amar Nath* v. *Emperor.*
5. (1928) 1928 Mad 129 (129): 51 Mad 185: 28 Cri L Jour 995, *Muhammad Sheriff* v. *Abdul Karim Sahib.*
   (1930) 1930 Lah 461 (462): 31 Cri L Jour 481, *Mehtab* v. *Nathu.*
6. (1930) 1930 Lah 461 (462): 31 Cri L Jour 481, *Mehtab* v. *Nathu.*
7. (1929) 1929 Lah 623 (624): 30 Cri L Jour 854, *Ram Lubhaya* v. *Jagannath.*

Other Topics.

Basis of charge — Evidence and not complaint. See Note 5, Pt. 5.
Charge—When not to be framed. See Note 4, Pts. 1 & 2.
Charge—When to be framed. See Note 6, Pt. 1; Note 7, Pt. 1,
Cross-examination before charge. See Sec. 252, Note 10, Pts 3 to 9.
Defence evidence and right of reply. See Sec. 257, Note 1, F-N (7).
Duty to frame charge on Court. See Note 7, Pt. 1.
Duty to summon witnesses. See Sec. 252, Note 7, Pts. 2 & 3.
Enquiry under Section 117. See Sec. 255, Note 2.
Failure to frame charges. See Sec. 255, Note 4, Pt. 1.
Framing charge—Acquittal without further evidence. See Note 4, Pt. 3.
Scope of the Section. See Notes 2 & 7.
Splitting up offences into summons cases. See Sec. 251, Note 2, Pt. 2.
Summons and warrant cases—Charges. See Note 5, Pts. 1 to 4.
Summons and warrant cases—Compared. See Note 2, Pt. 1.
Whole prosecution evidence need not be taken See Note 3, Pt. 1.

1. Legislative Changes.

Difference between the Codes of 1861 & 1872 *and the later Codes*:—

1. The Codes of 1861 (Section 250) and 1872 (S. 216) contained the words "if the Magistrate finds that an offence is apparently proved against the accused person" instead of the words "if ... ... the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence" which occurred in the later Codes.

2. The words "triable under this Chapter" qualifying the word "offence" did not occur in the Codes of 1861 and 1872 but were inserted in the later Codes.

3. The Code of 1872, Section 216, contained two explanations the provisions of which have now been transferred to Section 535.

Changes made in 1898:—

The words "or at any previous stage of the case" were first inserted in the Code of 1898.

2. "When such evidence and examination have been taken and made."

The Section contemplates that in warrant cases, the Magistrate should take the evidence for the prosecution before framing a charge. In this respect the procedure is different from that adopted in summons cases where at the very commencement of the proceedings the particulars of the offence are explained to the accused and he is required to state his plea.[1] This Section

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(Code of 1861—S. 250.)

250. * * * * * * *

Charge.

If the Magistrate finds that an offence is apparently proved against the accused person which falls within the definition in a certain Section of the I. P. C., or within one or other of the definitions in several sections of the said Code, he shall prepare in writing a charge against the accused person in the manner prescribed in Chapter XIII of this Act, all the provisions of which shall be applicable to charges prepared under this Section. In charges prepared under this Section the words 'within my cognizance' shall be substituted for the words "within the cognizance of Court of Session" at the end of the charge, and the words "by the said Court" omitted in the order.

Section 254—Note 2.

1. (1924) 1924 Cal 63 (64): 25 Cri L Jour 1270, *Natabar Khan* v. *Emperor*.

Sec. 254 Notes 2—4

authorises the Magistrate to take into consideration the statement of the accused person himself in framing a charge against him. Hence, in a proper case, the Magistrate will be within his powers in framing a charge on the mere statement of the accused himself.[2]

See also Notes under Section 253.

3. "Or at any previous stage."

Under this Section the Magistrate is not bound in every case to take the *whole* of the evidence for the prosecution before framing a charge. He is entitled to frame a charge, even before the evidence for the prosecution has been completely recorded, at any moment that he is satisfied that a *prima facie* case has been made out against the accused.[1] It may be noted in this connection that the procedure in this respect is different in enquiries before commitment to Sessions, in that it is obligatory in such enquiries for the Magistrate in every case to take the entirety of the evidence produced on either side before framing a charge.[2] *See* Section 208 and notes thereunder (*See also* Section 210).

4. "Ground for presuming."

The Section does not require the Magistrate to give reasons for holding that there are good grounds for framing a charge.[1a] In forming his opinion as to whether there is sufficient ground for presuming that the accused has committed an offence, it is open to the Magistrate to disbelieve the evidence given by the prosecution witnesses. Merely because the prosecution examines a number of witnesses who depose to the guilt of the accused, it is not obligatory on the Magistrate, if he disbelieves them, to frame a charge.[1] When the evidence recorded does not lead to a presumption that the accused has committed an offence but merely raises a *doubt*, the Magistrate should give the benefit of doubt to the accused and discharge him.[2] Although the Section contemplates the framing of a charge only when a *prima facie* case has been made out against the accused by the prosecution it is up to the Magistrate to consider the whole of the evidence and the probabilities of the case at the time of proceeding to judgment and he may acquit an accused against whom he has framed a charge though the accused has failed to adduce any satisfactory evidence to rebut the evidence for the prosecution.[3] The discretion of the Magis-

2. (1916) 1916 All 298 (299): 17 Cri L Jour 70 (71), *Jaun Bihar* v. *Emperor.*

Note 3.

1. (1900) 2 Bom L R 542 (544), *Empress* v. *Nasarvanji Edalji.*
   (1900) 1900 Pun L R Cr 63 (65), *Uttam Chand* v. *Empress.*
   (1911) 12 Cri L Jour 471 (472): 11 Ind Cas 1107 (All), *Mulua* v. *Sheoraj Singh.*
   (1927) 1927 All 660 (661, 662): 50 All 71: 28 Cri L Jour 792, *Tirlok* v. *Emperor.*
   (1900) 27 Cal 370 (372), *Zamuna* v. *Ram Tahal.*
   [See also (1866-67) 3 Mad H C R App 2 (3). Case under Code of 1861].
2. (1912) 13 Cri L Jour 443 (445): 15 Ind Cas 75 (All), *Durga Dutt* v. *Emperor.*

Note 4.

1a. (1935) 1935 Sind 223 (223), *Bagomal* v. *Emperor.*

1. (1930) 1930 Lah 543 (543): 32 Cri L Jour 302, *Mt. Mubarak Jan* v. *Mt. Rahat Jan.*
   [Compare (1910) 11 Cri L Jour 110 (111): 4 Ind Cas 990 (Lah), *Radhi* v. *Phul Chand.* Where the evidence if believed, justifies conviction, it is better to draw up a charge and dispose of a case finally.]
2. (1906) 3 Cri L Jour 345 (346): 1906 Pun Re Cr No. 2, page 6, *Mul Chand* v. *Emperor.*
   (1930) 1930 Lah 543 (544): 32 Cri L Jour 302, *Mt. Mubarak Jan* v. *Mt. Rahat Jan.*
3. (1896) Ratanlal 854 (854), *Queen* v. *Chabasapa Madiappa.*
   (1926) 1926 Nag 115 (116): 23 Nag L R 99: 26 Cri L Jour 1348, *Damodar* v. *Jujhar Singh.*

trate in framing a charge under this Section should not be lightly interfered with in revision.[4]

5. "Offence triable under this Chapter."

Although the Section contemplates the framing of a charge only when the offence disclosed is triable as a warrant case, it does not preclude the Magistrate in a case commenced as a warrant case, to convict the accused of an offence triable as a summons case where he finds only that such an offence has been committed.[1] It is not necessary in such a case to frame a charge as the Section requires a *charge* to be framed only when the offence disclosed is triable as a warrant case.[2] The contrary view taken in some decisions[3] cannot be supported. It has been seen in notes under Section 241 that in a joint trial of two offences one of which is triable as a warrant case and the other as a summons case the procedure prescribed in respect of the graver charge should be followed in regard to both the offences. Hence, in such a case a charge should be framed even in respect of the offence triable as a summons case.[4]

The Section does not restrict the power of the Magistrate to frame a charge to cases where the offence disclosed on the evidence is the same as the one mentioned in the complaint or Police report on which cognizance was taken. A Magistrate can and ought to frame a charge for the offence made out on the evidence though it may be different from the one alleged in the complaint or Police report provided that the other conditions mentioned in the Section are present.[5]

As to the procedure to be followed where the offence disclosed is exclusively triable by a Court of Session or is one which in the opinion of the Magistrate ought to be tried by such Court, *see* Section 347 and notes thereunder.

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4. (1935) 1935 Rang 292 (293) : 36 Cri L Jour 1293, *U Nyo Sein* v. *Emperor*.

Note 5.

1. (1901) 3 Bom L R 675 (676), *Emperor* v. *Luis Mingel Fonceca*.
   (1884) 7 Mad 454 (457): *Empress* v. *Papadu*.
   (1933) 1933 Sind 173 (174): 34 Cri L Jour 1044, *Sajjan* v. *Emperor*.
   (1909) 4 Ind Cas 1039 (1039): 32 Mad 532: 11 Cri L Jour 154, *Public Prosecutor* v. *Thawasalandi Thevan*.
2. (1931) 1931 All 7 (7): 53 All 205: 32 Cri L Jour 313, *Ambika Prasad* v. *Emperor*.
   (1931) 1931 Mad W N 1319 (1320), *Patani Goundan* v. *Emperor*.
3. (1921) 1921 All 282 (283): 22 Cri L Jour 146, *Ganga Saran* v. *Emperor*.
   (1927) 1927 All 270 (270): 28 Cri L Jour 227, *Govind* v. *Emperor*.
   (1887) 1887 Pun Re Cr No. 17, page 34 (35), *Emperor* v. *Ghulam Hussain*.
4. (1904) 3 Cri L Jour 350 (350): 3 Low Bur Rul 113, *Emperor* v. *Maung Gale*.
   (1915) 1915 Mad 1200 (1200): 16 Cri L Jour 540 (540): 39 Mad 503, *In re Rallabandi Sobhanadri*.
   (1902) 29 Cal 481 (482), *Hossein Sardar* v. *Kalu Sardar*.
   (1918) 1918 Pat 628 (630): 19 Cri L Jour 202, *Bhow Ananthi Singh* v. *Emperor*.
5. (1900-02) 1 Low Bur Rul 286 (287), *Mokun Maistry* v. *Valoo Maistry*.
   (1908) 11 C P L R 9 (10), *Local Government* v. *Sukha Musalman*.
   (1929) 1929 Lah 838 (839): 30 Cri L Jour 957, *Mangal Sen* v. *Emperor*.
   (1868-69) 5 Bom H C R 100 (102), *Reg* v. *Dhondu Ramachandra*.
   (1867) 8 Suth W R Cr 82 (83), *Degambur Paul* v. *Kally Doss Dutt*.
   (1895) 1895 Pun Re Cr No. 23, page 63 (65, 66), *Piran Ditta* v. *Empress*.
   (1925) 1925 Lah 631 (632): 6 Lah 375: 27 Cri L Jour 769, *Mt. Naurati* v *Emperor*.
   (1924) 1924 Lah 718 (718): 26 Cri L Jour 420, *Gokul* v. *Phuman Singh*. If a Magistrate finds that a girl is over 16 years and was enticed away, he should find out if some other cognate offence could have been charged and should not throw out the case because girl is not minor.

Sec. 254 Notes 6—7

6. "Which, in his opinion, could be adequately punished by him."

The Section contemplates that a charge should be framed under it only when the offence is one for which in the opinion of the Magistrate, he can award an *adequate punishment*. If, in his opinion, he cannot do so, he cannot frame a charge and try the case.[1] In such a case he must follow the procedure laid down in Section 346 or Section 347 *infra*. It has, however, been held in two Burma cases[2] that the provisions of this Section are subject to those of Section 349 *infra* and that under that Section it is competent to a Magistrate of the second or third class to frame a charge against the accused in a case which he has jurisdiction to try even though at the time of framing the charge he is of the opinion that he cannot award adequate punishment for the offence and intends, if the accused is proved to be guilty, to submit the proceedings under that Section to the District or Sub-Divisional Magistrate to pass sentence.

As to whether this Section precludes the Magistrate from committing a case to the Court of Session when he is not of the opinion that he cannot adequately punish the offence, *see* Notes under Section 207.

7. Magistrate shall frame a charge.

Unlike in summons cases, (*see* Section 242) in warrant cases it is obligatory on the Magistrate to draw up a formal charge[1] in every case where he holds that a *prima facie* case has been made out by the prosecution and the other conditions laid down in the Section are fulfilled. The duty is cast on the *Magistrate* to frame a charge and he must be careful to see that the charge, while it alleges all that is necessary to constitute the offence charged, does not contain any unnecessary allegation. Further, the charge ought not to allege positively any thing of which the allegation in a positive form is not justified by the materials before the Court. The prosecution is entitled to insist that the charge be so framed by the Court as not to cast on it any unnecessary burden.[2] In framing a charge the Magistrate must be solely guided by the offence disclosed on the evidence and should not be influenced by any other considerations.[3] As to the consequences of a failure to frame a formal charge *see* Section 535 *infra* and notes thereunder.

As to the procedure to be followed where the offence disclosed is exclusively triable by the Court of Session or for other reason the Magistrate considers the case to be a fit one for commitment to the Court of Session, *see* Section 347 *infra* and notes thereunder. *See also* Section 207 and notes thereunder.

Note 6.

1. (1892) 16 Bom 580 (584, 585), *Empress* v. *Abdul Rahiman.*
   (1890) Ratanlal 499 (499), *Empress* v. *Fakira.*
   (1929) 1929 Bom 313 (319): 53 Bom 611 : 30 Cri L Jour 1090, *Krishnaji Prabhakar* v. *Emperor.*
   (1897) 24 Cal 429 (431, 432), *Empress* v. *Kayamullah Mandal.*
2. (1904) 1 Cri L Jour 1010 (1013, 1014): 2 Low Bur Rul 285, *Emperor* v. *Hla Gyi.*
   (1905) 2 Cri L Jour 464 (465): 1905 Upp Bur Rul 33, *Emperor* v. *Nga Po Si.*

Note 7.

1. (1926) 1926 Cal 537 (538): 27 Cri L Jour 406, *Mahomed Rafique* v. *Emperor.*
   (1932) 1932 Cal 865 (865): 33 Cri L Jour 828, *Raghubir Kahar* v. *Emperor.*
   [See (1869) 3 Beng L R App 149 (150), *Empress* v. *Nand Kumar*].
   (1892-96) 1 Upp Bur Rul 37 (37), *Empress* v. *Nga Po Ku.*
2. (1889) 1889 Pun Re Cr No. 26, page 85 (89, 90), *Sant Singh* v. *Empress.*
3. (1901) 1901 Pun Re Cr No. 5, page 11 (15, 16), *Mukerji* v. *Emperor.*

Sec. 254 Notes 7—9

As to whether a charge need be drawn up in a warrant case tried summarily, *see* Sections 263 and 264 *infra* and notes thereunder.

As to the power of the Magistrate to discharge the accused where the complainant fails to appear on the date of hearing, *see* Section 259 and notes thereunder.

8. Charge—What it should contain.—*See* Sections 221 to 223 *ante*.

9. Effect of the framing of the charge.

As to whether the fact that a charge is framed in respect of a less serious offence amounts to a discharge of the accused in respect of a more serious offence alleged against the accused, *see* Notes under Section 253.

Sec. 255

255.* (1) The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.

Plea.

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.

Synopsis.

	Note No.
Legislative changes.	1
Applicability of the Section to security cases.	2
"Read and explained."	3
"Shall be asked"	4
Plea of guilty—What is.	5
Plea of guilty—Value to be attached to.	6
Admission by pleader.	7
Plea of guilty by one of several co-accused—Effect of such admission.	8
Shall be recorded.	9
"May in his discretion convict."	10
Effect of non-compliance with the Section.	11

Other Topics.

Accused's Vakil's plea. See Note 7, Pts. 1, 2 and 4.

Admission of facts but not of offence. See Note 10, Pt. 3.

Aggravating circumstances to be explained to accused. See Note 3, Pt. 4.

Confession to be taken as a whole. See Note 9, Pt. 3.

Conviction without evidence or charge on admission. See Note 4, Pt. 1.

Effect of plea for S. 30 Evidence Act, See Note 8.

Warrant Case — Subsequent conversion into summons case—Cross-examination. See Sec. 256, Note 2, Pt. 2.

* **(Code of 1882—S. 255.)**

Same as that of 1898 Code.

(Code of 1872—Ss. 217 and 324.)

Plea.

217. The charge shall then be read and explained to the accused person, and he shall be asked whether he is guilty or has any defence to make.

Accused may be convicted on his own plea.

324. If an accused person admits the commission of an offence before a Court competent to try him for such offence, such Court may convict him on his own admission.

(Code of 1861—S. 251.)

Plea.

251. The charge shall then be read to the accused person and he shall be asked whether he is guilty or has any defence to make.

Sec. 255 Notes 1—5

1. Legislative Changes.

The words "and explained" were first inserted in Section 217 of the Code of 1872.

2. Applicability of the Section to security cases.

This Section applies also to an inquiry under Section 117 where security proceedings are taken for good behaviour, except in so far as the framing of a charge and the reading of the same to the accused is concerned. In such an inquiry therefore the Magistrate may ask the accused if he pleads guilty.[1]

3. "Read and explained."

The charge must be read and explained by the *Magistrate* himself and not by his clerk or *amla*.[1] The accused is entitled to know with certainty and accuracy the charge brought against him.[2] It should therefore be so *explained* as to make the accused clearly understand the nature of the charge.[3]

The aggravating circumstances of the offence, if any, must also be made known to the accused.[4]

4. "Shall be asked."

The accused cannot be called upon to plead until a charge is framed upon the evidence recorded and the charge has been read and explained to him.

Where a Magistrate convicts the accused on his own admission without recording evidence and without framing a charge, the conviction is liable to be set aside.[1]

5. Plea of guilty—What is.

A plea of guilty is an admission of all the facts on which *the charge is founded*, as well as an admission of guilt in respect of them.[1] Where the accused pleads guilty to a particular offence, he cannot be convicted for a different offence.[2] The plea of guilty with qualifications does not amount to

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Section 255—Note 2.

1. (1927) 1927 All 660 (661) : 50 All 71 : 28 Cri L Jour 792, *Trilok* v. *Emperor*.
[See also (1928) 1928 All 270 (271, 272) : 30 Cri L Jour 6 : 50 All 599, *Emperor* v. *Kishan Narain*.]

Note 3.

1. (1871) 16 Suth W R Cr 43 (43), *Empress* v. *Jehangeer Buksh Khan*.
2. (1916) 1916 Cal 188 (192) : 16 Cri L Jour 497 (501) : 42 Cal 957, *Amritalal Hazra* v. *Emperor*.
(1923) 1923 Rang 141 (142) : 24 Cri L Jour 871, *Ah Lin* v. *Emperor*.
[See also (1893-1900) 1893-1900 Low Bur R 328 (328), *Nga Nye* v. *Empress*.]
3. (1880) 5 Cal 826 (827), *Empress* v. *Vaimbilee*.
[See also (1923) 1923 All 285 (286) : 25 Cri L Jour 592, *Jodha Singh* v. *Emperor*.]
4. (1871) Ratanlal 55 (56), *Reg.* v. *Mukta Manba*.

Note 4.

1. (1906) 4 Cri L Jour 231 (231) : 29 Mad 372, *Emperor* v. *China Payan*.[1]
[See also (1921) 1921 All 282 (283) : 22 Cri L Jour 146, *Ganga Charan* v. *Emperor*.]

Note 5.

1. (1906) 4 Cri L Jour 471 (475) : 3 Low Bur R 208, *Abbas Ali* v *Emperor*.
(1925) 1925 Lah 153 (155) : 25 Cri L Jour 707, *Emperor* v. *Ghulam Raza*. When the accused admitted that he obstructed the road under mistake without admitting that danger or injury was caused to any person, he cannot be convicted under S. 283, I. P. C.
[See also (1935) 1935 Cal 681 (682), *Hemchandra Chongdar* v. *Emperor*. *Held* that the so-called plea of guilty in the case was not a plea of guilty but an assertion of innocence.]
2. (1870) 13 Suth W R Cr 55 (56), *Empress* v. *Gobadur Bhooyan*. Plea of guilty to murder—Conviction for culpable homicide not amounting to murder—Conviction set aside.

a plea of guilty to the charge.[3] A plea of guilty refers not to any *section* of the Criminal statute, but to acts alleged against the accused.[4]

6. Plea of guilty—Value to be attached to.

A plea of guilty, no less than a confession, must be received with caution.[1] Where the accused belongs to a class of people ignorant of the most elementary principles of law it is extremely dangerous to admit a plea of guilty without the closest scrutiny of the meaning of the acknowledgment.[2]

7. Admission by pleader.

A plea of guilty must ordinarily be made by the accused himself and not by his pleader[1] except where the accused is permitted under Section 205 *ante* to appear by his pleader.[2]

A plea of self-defence is not inconsistent with a plea of not guilty and consequently where the accused pleads not guilty, and in the course of the argument his pleader advances the plea of self-defence, it is the duty of the Court to admit the plea and to say upon the facts of the case what offence, if any, has been committed.[3] In the undermentioned case, it was held that though the Court could not at the *trial* convict an accused merely upon the admission of his pleader, yet in an appeal the appellate Court could act upon an admission of fact made in the appeal by his pleader especially where it does not cause prejudice to the accused.[4]

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3. (1920) 1920 Cal 522 (523) : 21 Cri L Jour 547, *Emperor* v. *Akub Ali Mazumdar.*
(1869) 11 Suth W R Cr 6 (6), *Empress* v. *Jaipal Koiree.* Grievous hurt—Plea of anger.
(1920) 1920 All 203 (204) : 21 Cri L Jour 665, *Banwari Lal* v. *Emperor.* Admitted travelling without railway ticket, but pleaded no time.
(1897) 19 All 119 (120, 121), *Empress* v. *Bhadu.* Offence punishable under S. 302—Plea was "I killed my wife ; she called me '*ware*' "—*Held* that it was not an unqualified plea.
(1891) Ratanlal 532 (532, 533), *Empress* v. *Lakshman.* Admits killing—Pleaded provocation—Adultery.
(1894) Ratanlal 698 (698), *Empress* v. *Mhatarya.* Plea of guilty—But added he committed the homicide when he was subject to epileptic fits.
[See also (1928) 1928 Lah 827 (828) : 29 Cri L Jour 645, *Mt. Darkan* v. *Emperor.*]
(1876) 25 Suth W R Cr 23 (24), *Empress* v. *Sonavullah.* Plea that "Struck wife but did not intend to kill" is one of not guilty.
(1915) 1915 Cal 153 (153) : 15 Cri L Jour 703, *Gaya Roy* v. *Emperor.* All the elements of offence not admitted.
(1930) 1930 Bom 176 (176) : 31 Cri L Jour 926, *Emperor* v. *Mahadeo Gobind Nagarkar.* All the elements of offence not admitted.
(1919) 1919 Bom 160 (160) : 43 Bom 842 : 20 Cri L Jour 681, *Murarji Raghunath* v. *Emperor.* Admitted facts did not disclose deceit, a necessary element of the charge—Conviction set aside.
4. (1932) 1932 Lah 363 (364) : 33 Cri L Jour 646, *Bahadur Singh* v. *Emperor.*
(1926) 1926 Lah 406 (406) : 7 Lah 359 : 27 Cri L Jour 907, *Basant Singh* v. *Crown.*

Note 6.

1. (1866) 1866 Pun Re Cr No. 47, page 56, *Crown* v. *Zoolfoo.*
(1935) 1935 Rang 49 (51) : 12 Rang 616 : 36 Cri L Jour 336, *Nga Ywa* v. *Emperor.* Court should carefully consider if the accused understood the nature of the charge to which he pleaded guilty.
2. (1897-1901) 1 Upp Bur R 72, *Mi Nyein* v. *Empress.*

Note 7.

1. (1871) 15 Suth W R Cr 42 (42), *Empress* v. *Roopa Gowalla.*
(1904) 1 Cri L Jour 939 (939) (Bom), *Emperor* v. *Sursingh Mathurdas.*
[See (1925) 1925 Oudh 305 (306) : 26 Cri L Jour 179, *The Municipal Board, Lucknow* v. *Messrs. Tulsi. Ram & Sons.* Case relating to offence triable as summons case.]
2. (1913) 14 Cri L Jour 272 (272) : 6 Sind L R 206, *Mt. Jamal Katun* v. *Emperor.*
(1926) 1926 Bom 218 (221) : 50 Bom 250 : 27 Cri L Jour 440, *Dorab Shah* v. *Emperor.* Summons case.
3. (1896-97) 1 Cal W N 515 (517), *Pasupat Gope* v. *Ram Bhajan Ojha.*
4. (1928) 1928 Bom 241 (242, 243) : 52 Bom 686 : 29 Cri L Jour 990, *Bansilal*

Sec. 255 Notes 8—10

8. Plea of guilty by one of several co-accused—Effect of such admission.

A plea of guilty by one of several co-accused may be taken into consideration against the other accused, only where the latter are "tried jointly" with the former within the meaning of Section 30 of the Evidence Act. In a warrant case, it is only after the prosecution evidence is over that a charge is framed and the accused pleads guilty. In such a case, all the accused may be said to be tried jointly and the plea of one accused may be considered against the others also.[1] The case is, however, different in the Sessions trial where the accused's plea of guilty is recorded at the *outset* of the trial. A prisoner who then pleads guilty and is convicted on his plea cannot be held to be "tried jointly" with the others against whom the case proceeds under Section 272.[2] Where some of the accused jointly tried plead guilty and are convicted and sentenced on their plea, they can be examined as witnesses against the other accused and it is not for the latter to object that the plea of guilty of the former should not have been accepted.[3]

9. Shall be recorded.

The proceedings must show that the plea of the accused has been *recorded*. A conviction based upon a plea not so recorded is bad.[1]

A plea of guilty must be so recorded as to avoid any misapprehension or mistake. As far as possible the very words used by the accused must be employed. Where there is an inculpatory statement before the charge, the exact words of a plea of guilty should be recorded by question and answer.[2] The *whole* and not *part* of the prisoner's statement accompanying the plea should be recorded.[3] Where the plea of the accused is interpreted to the Court, the language in which the plea should be recorded is the language in which it is conveyed to the Court by the interpreter.[4]

10. "May in his discretion convict."

Under this Section the Magistrate *may* convict the accused on his plea of guilty, without calling upon him to enter upon his defence. But he is not *bound* to do so.[1] In an ordinary criminal case, however, (to which possibly a charge of murder is the only exception) the Court should, as a

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Gangaram Vani v. *Emperor.*

Note 8.

1. (1914) 1914 Mad 45 (46) : 38 Mad 302 : 15 Cri L Jour 13, *Bali Reddy, In re.*
2. (1914) 1914 Mad 45 (46) : 38 Mad 302 : 15 Cri L Jour 13, *Bali Reddi, In re.*
   (1899) 22 Mad 491 (494), *Empress* v. *Lakshmayya Pandaram.*
3. (1935) 1935 Cal 580 (585) : 36 Cri L Jour 1322 (S B), *Emperor* v. *Pran Krishna Chakravarty.*

Note 9.

1. (1904-05) 9 Cal W N 76 (76) (Notes), *Shib Chandra Roy* v. *Nanda Rani Dasi.*
2. (1903) 5 Bom L R 999 (1000), *Emperor* v. *Abdul Hoosein Shamsuddin.*
   [See also (1890) 1890 Pun Re Cr No. 2, page (5), *Shib Ram* v. *Simla Municipal Committee.*]
3. (1920) 1920 Cal 522 (523) : 21 Cri L Jour 547, *Emperor* v. *Akul Ali Mazumdar.*
   [See also (1932) 33 Cri L Jour 570 (571) : 138 Ind Cas 217, *Faqir Muhammad* v. *Emperor.*]
4. (1880) 5 Cal 826 (829), *Vaimbilee* v. *Empress.*

Note 10.

1. (1907) 5 Cri L Jour 416 (416) : 3 Low Bur R 279, *Emperor* v. *Taw Pyu.*
   (1921) 1921 Cal 260 (260) : 22 Cri L Jour 574, *Emperor* v. *Rash Behari Ghose.*
   (1923) 1923 Mad 364 (365) : 46 Mad 476 : 24 Cri L Jour 358, *Crown Prosecutor* v. *Duraiswami.*
   (1915) 1915 All 221 (224) : 37 All 247 : 16 Cri L Jour 327, *Emperor* v. *Dip Narain.* Plea of guilty not accepted.
   (1933) 1933 Oudh 86 (89) : 8 Luck 286 : 34 Cri L Jour 124. *Kunwar Sen* v. *Emperor.*
   (1878) 3 Cal 756 (757), *In the matter of Chumman Shah.*

general rule accept the plea of guilty and act upon it. It would be a waste of public time to hold an elaborate inquiry in such cases.[2] But the plea of guilty must be clear and unambiguous and embrace all the elements of the offence charged. Where the accused admits some or all the facts alleged by the prosecution, but pleads 'not guilty,' the proper course for the Court is to proceed with the trial.[3]

Where the offence is not proved upon the evidence, the accused cannot be convicted, even though he does not deny the offence.[4]

11. Effect of non-compliance with the Section.

The record must show that the procedure laid down in the Section was followed. Where the record does not show that the charge was read and explained to the prisoner[1] or that the accused was asked to plead[2] the conviction is liable to be set aside on the ground of prejudice to the accused.

255-A.

Procedure in case of previous convictions.

In a case where a previous conviction is charged under the provisions of S. 221, sub-section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused under Sec. 255, sub-section (2), or Sec. 258, take evidence in respect of the alleged previous conviction, and shall record a finding thereon.

Synopsis.

Other Topics.

Conflict of decisions prior to enactment of this Section. See Note 1, Pts. 1 and 2.

Legislative Amendments. See Note 1.

1. Scope of the Section.

This Section is new and was introduced into the Code by the amendments of 1923. It provides that evidence of a previous conviction for the purpose of affecting the punishment to be awarded can be taken only *after* the Magistrate has convicted the accused. It gives effect to the undermentioned decisions[1] which held that it was illegal to take such evidence *before* the

2. (1928) 1928 All 270 (270) : 50 All 599 : 30 Cri L Jour 6, *Emperor* v. *Kishan Narain*, (Per Walsh, J.)
(1934) 1934 Lah 89 (90) : 35 Cri L Jour 1453, *R. Martin, Private Surrey Regiment, Lahore* v. *Emperor*. Ordinarily confession may be accepted and acted upon.
3. (1907) 6 Cri L Jour 424 (425) (Bom), *Emperor* v. *Somabhai Nathabhai*.
4. (1933) 1933 All 612 (613, 614) : 55 All 857 : 34 Cri L Jour 1053, *R. N. Basu* v. *Emperor*'

Note 11.

1. (1881) 7 Cal 96 (97), *Empress* v. *Gopal Dhanuk*.
(1886) 9 Mad 61 (63), *Aiyavu* v. *Empress*.
(1908) 7 Cri L Jour 295 (296) (All), *Emperor* v. *Deoki*.
2. (1915) 1915 Bom 14 (15) : 16 Cri L Jour 538, *Dosabhai J. Dhondi* v. *Emperor*. Accused not asked to plead—Conviction set aside.

Section 255-A—Note 1.

1. (1903) 5 Bom L R 1034 (1035), *Emperor* v. *Iturpedduming*.
(1892-1896) 1 Upp Bur R 82 (82), *Empress* v. *Nga Yan Gon*
[See also (1905-06) 10 Cal W N 195*n* *Golam Hossein* v. *Emperor*.]

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conviction. Other decisions which took a contrary view[2] are now obsolete.

2. Admission of previous conviction by accused.

The mere admission by the accused that he had been in jail once, is *not* sufficient to show that he pleaded guilty to a previous conviction for an offence rendering him liable to enhanced punishment.[1]

3. "May, after conviction."—*See* Note 1 *supra*.

4. Evidence of previous conviction.

Whenever it is required to prove a previous conviction against an accused for the purpose of enhancement of punishment, such previous conviction must be proved strictly and in accordance with law.[1] The accused must also be called upon to *plead* to the charge of previous conviction.[2] *See also* Sections 311 and 511 and notes thereunder.

Sec. 256

Defence.

256.* (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state, *at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith*, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

*** (Code of 1882—S. 256.)**

256. If the accused refuses to plead or does not plead, or claims to be tried, he shall be called upon to enter upon his defence and to produce his evidence, and shall, at any time while he is making his defence, be allowed to recall and cross-examine any witness for the prosecution present in the Court or its precincts.

Defence.

If the accused puts in any written statement, the Magistrate shall file it with the record.

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2. (1923) 1923 Cal 707 (707): 50 Cal 367: 25 Cri L Jour 527, *Dehri Sonar* v. *Emperor*.

Note 2.

1. (1902) 4 Bom L R 177 (177), *Emperor* v. *Govind*.

Note 4.

1. (1916) 1916 Cal 344 (345): 17 Cri L Jour 185 (186): 43 Cal 1128, *Emperor* v. *Sheikh Abdul*.
   (1917) 1917 Mad 186 (187): 17 Cri L Jour 179 (180), *Turimella Kivimanna*, *In re*.
   (1881) 2 Weir 266 (266), *Yippaka Daligadu*, *In re*.
2. (1902) 4 Bom L R 177 (177), *King-Emperor* v. *Govind Sakharam*.
   (1932) 1932 Sind 107 (111): 33 Cri L Jour 902, *Jethmal Parsram* v. *Emperor*. [See also (1930) 1930 Sind 58 (59): 31 Cri L Jour 763, *Murido* v. *Emperor*. Previous security proceedings against accused taken into consideration in awarding punishment, without questioning accused—Procedure held improper.]

Synopsis.

Other Topics.

Accused unrepresented. See Note 5, Pt. 10.
Adjournment for accused's evidence. See Note 10, Pts. 6 and 16 ; Note 2, F-N (6).
Adjournment for cross-examination. See Note 5, Pt. 2 ; Note 6, Pt. 5a.
Adjournment for prosecution witnesses. See Note 9, Pt. 2.
Commencement of trial. See Note 3.
Cross-examination after defence evidence. See Note 7, Pts. 3 and 4.
Defence by cross-examination. See Note 10, Pt. 7 ; Note 12, F-N (6).
Discretion and privilege of defence counsel. See Note 6, F-N (7).
Discharge of witnesses with or without consent of accused. See Note 7, F-N. (5) ; Note 8, F-N (3).
Duty of Magistrate. See Note 4, Pt. 3.
Fresh prosecution witneses. See Note 9, Pt. 1.
Inapplicability to disciplinary jurisdiction under Letters Patent. See Note 12, Pt. 10.
Joint trial of summons and warrant cases. See Note 2, Pt. 3.
Object. See Note 5, Pt. 2.
Reservation of cross-examination. See Note 2, Pt. 9.
Several accused—Right of each. See Note 6, Pt. 5.
Summary cases—Further cross-examination. See Note 2, Pts. 3a to 8.
Waiver by accused's counsel. See Note 7, Pt. 5.
Warrant case—Subsequent conversion into summons case. See Note 2, Pt. 2.
Written statement and examination of accused. See Note 12, Pt. 9.

1. Legislative changes.

A. *Difference between Codes of* 1861 *and* 1872:—

In 1872 a sub-clause was added by which the accused's written statement, if any, might be received and filed with the record. It ran thus "if the accused puts in any written statement, the Magistrate may file it with the record, but shall not be bound to do so."

B. *Differences beween Codes of* 1872 *and* 1882:—

(i) Instead of the clause "if the accused person have any defence to make to the charge, he shall be called upon to enter upon the same" the clause "if the accused refuses to plead, or does not plead, or claims to be tried, he shall be called upon to enter upon his defence" was inserted. Deci-

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(Code of 1872—S. 218.)

218. If the accused person have any defence to make to the charge he shall be called upon to enter upon the same and to produce his witnesses if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution.

Defence.

If the accused person puts in any written statement, the Magistrate may file it with the record, but shall not be bound to do so.

(Code of 1861, S. 252—Same as the first para. only of S. 218 of 1872 Code.)

Sec. 256 Notes 1—2

sions bearing on the interpretation of the former expression[1] are only of academic interest now.

(ii) For the words "to produce his witnesses if in attendance"[2] the words "to produce his evidence" were substituted in 1882.

(iii) The clause "and shall, *at any time while he is making his defence*, be allowed to recall and cross-examine the witnesses for the prosecution, *present in Court* or its *precincts*" was substituted for the clause "and shall be allowed to re-call and cross-examine the witnesses for the prosecution" occurring in the Code of 1872.

(iv) In the clause regarding the filing of the written statement of the accused the word "shall" was substituted for the word "may" and the words "but shall not be bound to do so" were omitted.

C. *Differences between Codes of* 1882 *and* 1898:—

In the 1898 Code after the words "if the accused refuses to plead, or does not plead, or claims to be tried" the words "he shall be required to state ... ... they shall also be discharged" were added. At the same time, the provision in the Code of 1882 by which the accused was given the right to "recall and cross-examine prosecution witnesses at any time while making his defence" was repealed and it was provided that the accused should be called upon to enter upon his defence *after* the examination, cross-examination, and re-examination of the prosecution witnesses.

D. *Changes made in* 1923:—

After the words "he shall be required to state" the words "at the commencement of the next hearing of the case ... ... forthwith" were added thereby requiring the Magistrate to ask the accused if he wished to cross-examine the prosecution witnesses already examined, not on the day on which a charge is framed, but at the next hearing only, unless for reasons to be recorded in writing the Magistrate thinks fit to put the question on the same day as he frames the charge.

2. Scope and applicability of the Section.

Section 255 *ante* provides that when the accused pleads guilty in a warrant case the Magistrate may convict him upon such plea. This Section provides for the procedure to be followed when the accused does not plead guilty. It provides *inter alia* that the accused should be asked to state whether he wishes to cross-examine any of the prosecution witnesses whose evidence has been taken and if he so wishes, the witnesses named by him should be recalled and he should be allowed to cross-examine them. It has been seen in the notes under Section 252 that in warrant cases the accused can be allowed to cross-examine the prosecution witnesses even before the charge is framed. The present Section confers on the accused an opportunity of cross-examining the prosecution witnesses a *second time* after the charge is framed. The reason for this provision is that in warrant cases the accused is in a position

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Section 256—Note 1.

1. (1873) 19 Suth W R Cr 53 (53, 54), *J. R. Belliss* v. *Empress.*

2. (1869) 11 Suth W R Cr 15 (15), *Empress* v. *Tolaram.* Witnesses not in attendance—Failure to ask accused to produce evidence not a flaw.

Sec. 256 Note 2

to know the exact case he has to meet only after the charge is framed.[1] As to whether the accused is entitled *as of right* to cross-examine the prosecution witnesses before the charge is framed, *see* Notes under Section 252 *ante*.

A second opportunity to cross-examine prosecution witnesses is vouchsafed to the accused only in warrant cases. The accused has no such right in summons cases. But where a case is commenced as a warrant case but subsequently it appears that only an offence triable as a summons case has been committed, it is not open to the Magistrate to suddenly revert to the procedure of summons cases and he is bound to allow the accused further opportunity of cross-examining the prosecution witnesses if he desires for it.[2] (*See* Notes under Section 251). Similarly, as has been seen in the notes under Section 241, where a summons case and a warrant case are tried together, the procedure prescribed for warrant cases should be followed. In such a case also if the Magistrate finds that, the charge in respect of the warrant case is unsustainable and decides to proceed with the other offence alone it is not open to him to deny to the accused the opportunity of further cross-examination of the prosecution witnesses provided for by this Section.[3]

Section 262 *infra* provides that in warrant cases tried summarily the procedure prescribed for the trial of warrant cases should be followed. Section 263 provides that in summary trials, in cases in which no appeal lies, a formal charge need not be drawn up. The question has arisen whether this Section (Section 256) applies to warrant cases tried summarily in which a charge is not framed. On this question there is a conflict of decisions. On the one hand it has been held by the High Courts of Calcutta,[3a] Madras[4] and Patna[5] and the Judicial Commissioner's Court of Sind[6] relying on the general provisions of Section 262, that the Section applies to such cases notwithstanding the absence of a formal charge. But on the other hand, it has been held by the High Court of Bombay[7] and the Chief Court of Oudh[8] that the Section does not apply to such cases as it only contemplates cases where a charge is framed.

Note 2.

1. (1874) 6 N W P H C R 284 (287), *Lall Mahomed* v. *Empress*.
   (1879) 2 All 253 (258), *Empress* v. *Baldeo*.
   (1916) 1916 Lah 295 (2) (296) : 17 Cri L Jour 84 (85) : 1916 Pun Re Cr No. 1, *Ahmad Baksh* v. *Emperor*.
   (1914) 1914 Lah 556 (557) : 1914 Pun Re Cr No. 11 : 16 Cri L Jour 146, *Moola* v. *Emperor*.
   (1933) 1933 Rang 29 (29, 30) : 34 Cri L Jour 468, *Zamin* v. *Emperor*.
2. (1916) 1916 Mad 610 (1) (610) : 16 Cri L Jour 250 (251), *In re Appavu Padayachi*.
   (1928) 1928 Lah 294 (295) : 29 Cri L Jour 235, *Devidial* v. *Mt. Rattan Devi*.
   (1925) 1925 Oudh 200 (1) (200) : 25 Cri L Jour 1271, *Ram Ratan* v. *Ram Sagar*.
   (1921) 22 Cri L Jour 683 (684) : 63 Ind Cas 619 (Pat), *Munshi Teli* v. *Emperor*.
3. (1915) 1915 Mad 1200 (1200) : 16 Cri L Jour 540 (540) : 39 Mad 503, *In re Rallabandi Sobhandari*.
   3a. (1920) 1920 Cal 769 (2) (770) : 22 Cri L Jour 671, *Nepal Bagdi* v. *Emperor*.
4. (1927) 1927 Mad 78 (80) : 50 Mad 740 : 28 Cri L Jour 12, *Raju Achari, In re*. Magistrate must record reasons for refusing to allow time to accused for saying if he wishes to cross-examine.
5. (1920) 1920 Pat 492 (493) : 21 Cri L Jour 630, *Tiltu Sahu* v. *Emperor*. Right to re-cross-examine.
6. (1930) 1930 Sind 146 (147) : 24 Sind L R 336 : 31 Cri L Jour 683, *Shidu* v. *Emperor*. Accused is entitled to have further time for producing his evidence.
7. (1926) 1926 Bom 226 (226, 227) : 27 Cri L Jour 431, *Umaji Krishnaji Sonavani* v. *Emperor*.
8. (1932) 1932 Oudh 242 (243, 244) : 7 Luck 699 : 33 Cri L Jour 506, *Gokaran* v. *Emperor*.

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As to the applicability of the Section to proceedings for the taking of security for good behaviour, *see* Section 117, Note 4.

As to the applicability of the Section to proceedings under Section 145, *see* notes under that Section.

As to whether the accused is entitled to cross-examine prosecution witnesses a second time after the charge is framed in preliminary inquiries before commitment to Sessions, *see* notes under Section 213 *ante*.

As a general rule, the cross-examination of a witness should be made immediately after his examination-in-chief is over and the cross-examination cannot be reserved till the other witnesses have been examined unless the Court, in its discretion, permits the cross-examination to be reserved. This Section provides an exception to this general rule because it entitles an accused person in a warrant case to defer the cross-examination of the prosecution witnesses till the witnesses have been examined in chief and a charge is framed.[9]

The Section applies not only to cases where the charge is framed before the prosecution has completed its evidence but also to cases where the charge is framed *after* all the prosecution witnesses have been examined-in-chief.[10]

3. "Refuses to plead, or does not plead or claims to be tried."

If the accused "refuses to plead or does not plead or claims to be tried" the procedure laid down therein should be followed. The expression "Claims to be tried" includes cases where the accused pleads not guilty. Where the accused denies the charge and pleads not guilty he is entitled to be dealt with under this Section although he may admit all or any of the allegations of the prosecution.[1] The procedure provided in the Section should be followed not only when the accused pleads not guilty or claims to be tried but also where he refuses to plead at all or does not plead.[2] The effect of this provision is that an accused is not bound to answer at all any question put to him and can, if he likes, decline to plead. Hence by declining to plead he does not commit any offence under Section 179 of the Penal Code.[3]

Does the expression "Claims to be *tried*" in this Section show that in warrant cases the "trial" does not begin till the charge is framed and the accused claims to be tried? For a discussion on this question, *see* notes under Section 4 (k).

4. "The accused shall be required to state."

This provision requiring the Magistrate to ask the accused if he wishes to cross-examine the prosecution witnesses examined before charge was introduced for the first time in the Code of 1898. In two old decisions, one of

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9. (1910) 11 Cri L Jour 156 (156) : 4 Ind Cas 1043 (Mad), *In re Asadull Hussain Khan*.
[See also (1906) 3 Cri L Jour 23 (25) : 3 Low Bur Rul 109, *Po Wa* v. *Emperor*].

10. (1932) 1932 Mad 559 (559) : 33 Cri L Jour 738, *Muthiah Pillai* v. *Emperor*.
[But see (1925) 1925 Nag 147 (151) : 25 Cri L Jour 1152, *Gangadhar* v. *Bhangi Sa*. Submitted not correct.]

Note 3.

1. (1907) 6 Cri L Jour 424 (425) (Bom), *Emperor* v. *Somabhai Nathabhai*.
2. (1869) Ratanlal 19 (19), *Reg* v. *Sattya*. Case under Code of 1861.
3. (1924) 1924 Mad 540 (540): 47 Mad 396: 25 Cri L Jour 374, *Tirumala Reddy, In re*.

the High Court of Calcutta decided in the year 1876[1] and the other of the High Court of Allahabad decided in 1874,[2] it was laid down that the Magistrate before discharging the prosecution witnesses should ask the accused if he required them for his further cross-examination. That was suggested only as a rule of convenience. Now, the Magistrate is bound to question the accused on that point; it has been made a statutory duty on the part of the Magistrate. It is of vital importance that the accused should in all cases be asked at the appropriate time if he wishes to cross-examine the prosecution witnesses.[3] But as to whether such an omission is a material irregularity or not, *see* Notes under Section 537.

The Code does not explicitly require the Magistrate to record the fact that he has observed the provisions of this Section. But it is a safe and sound rule that when the law requires anything to be done, the fact that this has been done should be recorded.[4] Hence, it is important that the record must show that the Magistrate has complied with the provisions of the Section by questioning the accused in the manner laid down therein.[5]

5. "At the commencement of the next hearing . . . . . ".

There was no provision in the Section as it stood originally in the Code of 1898 as to the *particular time* at which the accused was to be asked to state whether he wishes to cross-examine any and, if so, which of the prosecution witnesses.[1] Under these circumstances it was held in some cases that the Magistrate should ask the accused if he wished to cross-examine any of the prosecution witnesses, immediately after the charge was read and explained to him and he entered his plea.[1a] By the Amending Act XVIII of 1923, it was laid down that the question should be asked by the Magistrate not on the day when the charge is framed against the accused and he is asked to give his plea, but on the next hearing day only; and that if the Magistrate chose to put the question on the same day, he should record his reasons for so doing. The object of the rule requiring the Magistrate to ask the question on the next hearing is that *sufficient time* should be given to the accused to consider and decide whether it is necessary to cross-examine again the prosecution witnesses.[2]

If the Magistrate puts the question on the same date on which the

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Note 4.

1. (1876) 25 Suth W R Cri 48 (49), *Queen* v. *Ramkishen Halwai.*
2. (1874) 6 N W P H C R 284 (288), *Empress* v. *Lall Mahomed.*
3. (1914) 1914 Lah 556 (556): 1914 Pun Re Cri No. 11: 16 Cri L Jour 146, *Moola* v. *Emperor.*
4. (1900-02) 1 Low Bur Rul 238 (240), *Chit Tun* v. *Crown.*
5. (1911) 12 Cri L Jour 89 (1) (89): 9 Ind Cas 468 (L B), *Emperor* v. *Lansha.*
   (1901) 14 C P L R 137 (137), *Emperor* v. *Umrao Patel.*
   [But compare (1931) 1931 Oudh 73 (74): 32 Cri L Jour 330, *Sachchidanand* v. *Emperor.* Accused having refused to make any answer to any question—High Court declined to presume that the Magistrate had not complied with Section.]

Note 5.

1. (1910) 11 Cri L Jour 128 (128): 37 Cal 236, *Inder Rai* v *Emperor.*
   1a (1910) 12 Cri L Jour 471 (472): 11 Ind Cas 1007 (All), *Mulua* v. *Sheoraj Singh.*
2. (1925) 1925 Lah 339 (340): 26 Cri L Jour 1158, *Phuman Singh* v. *Emperor.*
   (1927) 1927 Mad 78 (79): 50 Mad 740: 28 Cri L Jour 12, *Raju Achari, In re.*
   (1928) 32 Cal W N 15 (15) (Notes).
   (1932) 1932 Oudh 298 (300): 34 Cri L Jour 58: 8 Luck 135, *Mohamed Hussain Afqar Mohani* v. *Mirza Fakhaullah Beg.*
   (1926) 1926 Pat 214 (215): 5 Pat 110: 27 Cri L Jour 499, *Ramchandra Modak* v. *Emperor.*

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charge is framed, he should record his reasons for doing so.[3] But it is not so much the recording of reasons as the adequacy thereof which should count in the determination of the question whether the provisions of the Section have been complied with. If no good reasons are forthcoming the mere fact that they have been recorded by the Magistrate in writing will not save the trial from the taint of irregularity. As a general rule sufficient time must be allowed to the accused to consider and decide whether he should cross-examine any of the prosecution witnesses and it is only in special cases that the Magistrate can require him to state forthwith if he wishes to do so.[4]

Good, adequate and cogent reasons should be given for putting the question on the same day.[5] That it is the usual practice of the Magistrate to ask the accused on the same day is not a sufficient reason.[6] That the Magistrate had to go out for urgent work or that the prosecution witnesses had to leave the place of trial immediately are not good reasons for requiring the accused to *state* forthwith if he wishes to cross-examine any of the prosecution witnesses.[7] But the fact that the prosecution witnesses come from a Native State it would take a long time to secure their attendance again was a sufficient reason.[8] The convenience of the Magistrate and the witnesses alone should not be considered. In a Madras case[9] the Magistrate put the question to the accused on the same day and recorded the reason "the accused is undefended," Pandalai, J., holding that the reason was good and sufficient, observed "the Magistrate might have considered that as the accused had not engaged a pleader, nor appeared desirous of doing so, it would simply be a waste of time to defer the question till the next hearing." But it is submitted that this reasoning is not sound as the fact that the accused is not represented by a lawyer is rather a reason for allowing him time for considering whether he should cross-examine any of the prosecution witnesses than for denying him such time.[10]

As to the consequence of the failure to record reasons, *see* notes under Section 537.

Though under this Section the accused is entitled to an adjournment to decide what witnesses, if any, he should cross-examine, it is open to his counsel to *waive* the right to such adjournment and where he does so, the failure to adjourn the case cannot be objected to later on.[11]

6. Right of accused to cross-examine the prosecution witnesses.

In warrant cases, an accused has three opportunities to cross-examine the prosecution witnesses: (a) before the charge is framed under Section 252,

3. (1927) 1927 All 217 (218): 49 All 316: 28 Cri L Jour 229, *Chhajju* v. *Emperor.*
(1929) 1929 Bom 309 (310, 312): 53 Bom 578: 31 Cri L Jour 309, *Emperor* v. *Lakshman Ram Shet.*
(1930) 1930 Mad 977 (978): 32 Cri L Jour 221, *Janardhanam* v. *Emperor.*
(1930) 1930 Bom 241 (241): 31 Cri L Jour 743 *Vikram Narayan Devli* v. *Emperor.*
4. (1930) 1930 Nag 255 (258): 31 Cri L Jour 705, *Girdhari* v. *Emperor.*
5. (1930) 1930 Nag 255 (257): 31 Cri L Jour 705, *Girdhari* v. *Emperor.*
6. (1929) 1929 Bom 309 (310, 312): 53 Bom 578: 31 Cri L Jour 309, *Emperor* v. *Lakshman Ram Shet Alwe.*
7. (1930) 1930 Nag 255 (258): 31 Cri L Jour 705, *Girdhari* v. *Emperor.*
8. (1926) 1926 Lah 434 (434): 27 Cri L Jour 720, *Kura* v. *Emperor.*
9. (1930) 1930 Mad 977 (978): 32 Cri L Jour 221, *Janardhanam* v. *Emperor.*
10. [See (1927) 1927 Mad 78 (79): 50 Mad 740: 28 Cri L Jour 12, *Raju Achari, In re.*]
11. (1934) 1934 Nag 209 (210): 36 Cri L Jour 41, *Sheikh Ibrahim* v. *Emperor.*

(b) after charge under this Section and (c) after the accused enters on his defence under Section 257.[1]

As regards (a) it has been seen in the Notes under Section 252 that there is a conflict of decisions as to whether the accused is entitled as of *right* to cross-examine prosecution witnesses before the charge is framed. (*See* notes under Section 252).

But as regards the right of cross-examination granted under this Section, it is an *absolute* right and the Magistrate has no power to disallow such cross-examination.[2] The accused is not bound to show that he has reasonable grounds for exercising his right under the Section.[2a] The fact that the witnesses have been already cross-examined by him before the charge, does not deprive him of his right to cross-examine them again under this Section.[3] It has been held that even if the previous cross-examination was on the distinct understanding that the accused would not require the witnesses to be re-called for further cross-examination after the charge, he cannot be deprived of his rights under this Section if he wishes to exercise them.[4] If there are more than one accused, each of them should be given an opportunity to cross-examine the witnesses.[5] The accused should be given a full and reasonable opportunity to exercise his right under the Section and he should be allowed sufficient time to engage a pleader to cross-examine the witnesses.[5a]

Note 6.

1. (1920) 1920 Mad 201 (203): 43 Mad 411: 21 Cri L Jour 297, *W. H. Lockley* v. *Emperor.*
   (1923) 1923 Mad 609 (613): 46 Mad 449: 24 Cri L Jour 547, *Verisai Rowther* v. *Emperor.*
2. (1920) 1920 Mad 201 (203): 43 Mad 411: 21 Cri L Jour 297, *W. H. Lockley* v. *Emperor.*
   (1924) 1924 Nag 114 (114): 25 Cri L Jour 912, *Radhakisan* v. *Rama Krishna.*
   (1929) 1929 Bom 309 (311): 53 Bom 578: 31 Cri L Jour 309, *Emperor* v. *Lakshman Ramshet.*
   (1909) 9 Cri L Jour 146 (147): 32 Mad 218, *Palaniandy Gounden* v. *Emperor.*
   (1895) 1895 All W N 40 (41), *Empress* v. *Ram Charan Lal.*
   (1910) 11 Cri L Jour 520 (520): 7 Ind Cas 712 (Mad), *In Re Krishnaswamy Udayan.*
2a (1874) 21 Suth W R Cri 29 (30), *Empress* v. *Amiruddin Fakeer.*
3. (1874) 6 N W P H C R 284 (287), *Empress* v. *Lall Mahomed.*
   (1872) 17 Suth W R Cri 51 (52), *In Re Thakoor Dayal Sen.*
   (1876) 25 Suth W R Cri 32 (33), *Empress* v. *Nobinchander Banerjee.*
   (1900) 27 Cal 370 (371, 372), *Mt. Zamunia* v. *Ram Tahal.*
   (1900) 2 Bom L R 512 (544), *Empress* v. *Nasarvanji Edalji.*
   (1901) 14 C P L R 137 (137): 20 Ind Cas 212 (Rang), *Emperor* v. *Um Rao Patel.*
   (1913) 14 Cri L Jour 388 (388), *Nga Pya* v. *Emperor.*
   [But see (1897) Ratanlal 930 (931), *Empress* v. *Govind.* Submitted not good law.]
   (1905) 2 All L J (Notes) 202 (202), *Sher Khan* v. *Emperor.* (Do).
4. (1902) 6 Cal W N 424 (425), *Kokil Ghose* v. *Casimuddi Malita.* Under circumstances accused made to pay expenses.
   [See also (1926) 1926 Pat 214 (215): 5 Pat 110: 27 Cri L Jour 499, *Ramchandra Modak* v. *Emperor.* Cross-examination by accused's pleader before charge—Statement by him at that time that he did not any longer require the attendance of the prosecution witnesses. Not sufficient to deprive accused of his right under this Section.]
   (1920) 1920 Mad 201 (202): 43 Mad 411: 21 Cri L Jour 297, *W. H. Lockley* v. *Emperor.*
   [But see (1874) 6 N W P H C R 284 (287), *Empress* v. *Lall Mahomed.*]
5. (1907) 11 Cal W N (Notes) 140 (140), *Lala Ram Thakur* v *Emperor.*
5a (1925) 1925 All 285 (286): 47 All 147: 26 Cri L Jour 575, *Pita* v. *Emperor.*
   (1916) 1916 Lah 445 (1) (445): 17 Cri L Jour 278 (279), *Sher Singh* v. *Emperor.*
   (1911) 12 Cri L Jour 548 (549): 12 Ind Cas 524 (Mad), *Arumugam Pillai* v. *Emperor.*
   (1916) 1916 Mad 933 (934): 16 Cri L Jour 785 (786), *Rangaswamy Padayachi* v. *Emperor.*

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This Section does not prescribe the order in which the accused should cross-examine the prosecution witnesses. In these circumstances, under Section 135, Evidence Act, the matter is left to the discretion of the Magistrate and in a proper case he may allow the accused to cross-examine the witnesses in any order he chooses.[6]

Where a witness for the prosecution is examined on commission under the provisions of Chapter 40 *infra* it is open to an accused person to refrain from putting in any interrogatories when the commission is first issued, and to apply, after the charge has been framed against him, for re-issue of the commission together with his cross-interrogatories for the purpose of the cross-examination of the witness.[6a]

As to the point of time up to which the accused can exercise his right to have prosecution witnesses re-called for cross-examination under this Section, *see* Note 7.

Below are given some decisions bearing on the extent to which cross-examination may be allowed.[7]

7. Waiver of the right under this Section.

Section 252 of the Code of 1861 and Section 218 of the Code of 1872 ran

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(1916) 1916 Mad 142 (142, 143) : 16 Cri L Jour 334 (336) (Mad), *In Re Murugesa Naidu.* [See (1926) 1926 Pat 214 (215) : 5 Pat 110 : 27 Cri L Jour 499, *Ramachandra Modak* v. *Emperor*]

6. (1933) 1933 Cal 189 (190): 34 Cri L Jour 347, *Mossa Haji Abdul Shakoor* v. *Emperor.*

6a (1934) 1934 Cal 698 (699) : 61 Cal 824 : 36 Cri L Jour 239, *Dombrain* v. *Someswar Chowdhury.*

7. (1871) 15 Suth W R Cr 34 (35), *Empress* v. *Ishan Dutt.* Cross-examination need not be confined to matters mentioned in examination.

(1929) 1929 Cal 1 (7) : 30 Cri L Jour 494, *Kazi Bazlur Rahman* v. *Emperor.* If the facts are already on record the skilful cross-examiner knows when not to make an unskilful use of cross-examination.

(1896) Ratanlal 861 (863), *In re Janus Fitzgerald.* Criminal Court has no right to tell the pleader to sit down in the middle of his cross-examination because he is asking irrelevant questions.

(1919) 1919 Pat 565 (565): 20 Cri L Jour 559, *Yusuf* v. *Bunilal Mandal.* Advocate has a large discretion as to the mode of conducting the defence and the cross-examination and Court should avoid unnecessary interference with it.

(1919) 1919 Pat 515 (516) : 20 Cri L Jour 566, *Mohomed Mian* v. *Emperor.* Court has no discretion to forbid even scandalous or indecent questions if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

(1911) 12 Cri L Jour 277 (279) : 10 Ind Cas 917 (Rang), *Mahomed Ally* v. *Emperor.* The cross-examination is not limited to matters raised in evidence elsewhere.

(1914) 1914 Lah 93 (95) : 15 Cri L Jour 148, *Lakha Singh* v. *Emperor.* There is no hard and fast rule as to the right of a counsel to demand in cross-examination the repetition of the whole story told in the examination-in-chief.

(1918) 1918 Low Bur 22 (23) : 17 Cri L Jour 500 (501), *Deya* v. *Emperor.* The judge has no power to shut out leading questions in cross-examination.

(1931) 1931 Sind 38 (38, 39) : 32 Cri L Jour 666, *Harnam Singh* v. *Emperor.* A counsel cannot be compelled to disclose the questions which he desires to put in cross-examination because one of the factors of successful cross-examination is that questions should be put suddenly to the witness.

(1892) 14 All 242 (256), *Empress* v. *Hargobind Singh.* It is illegal of a judge to threaten a witness with the penalties of the law.

(1886) 8 All 672 (675, 677), *Empress* v. *Ishri Singh.* (Do.)

(1916) 1916 Pat 236 (237) : 17 Cri L Jour 353 (354) : 1 Pat L Jour 317, *Eknath Sahay* v. *Emperor.* Court can restrict irrelevant cross-examination.

as follows:—"If the accused person has any defence to make he shall be called upon to enter upon the same and to produce his witnesses if in attendance and shall also be allowed to re-call and cross-examine the witnesses for the prosecution." There was then some conflict of opinion as to whether the right was exercisable at any time. One set of cases[1] holding that the accused could claim the right at any time before the trial closed or after the close of the examination of his own witnesses, unless he had previously expressly abandoned it, and another set of cases[2] holding that the right should be exercised at the time when the charge framed was read and explained to the accused and that if not exercised at that time, it could not afterwards be insisted on, though the Magistrate had a discretion to permit such cross-examination. But the Code of 1882 specifically laid down that the accused "shall be allowed *at any time while he is making his defence* to re-call and cross-examine any witness for the prosecution .. .."

The present Section has altered this procedure. It makes it quite clear that the accused is not entitled after he has entered upon his defence to insist upon re-calling and cross-examining any of the prosecution witnesses examined before the charge.[3] If he does not exercise his right at the proper time and begins to adduce his own evidence, he will be deemed to have waived his right and cannot thereafter claim to exercise it.[4] But as the right accrues only after the charge is framed it cannot be deemed to be waived by a statement by the accused or his pleader before the charge that he would not require any witnesses to be re-called for further cross-examination after the charge is framed.[5]

8. "Recalled . . . . and discharge the witnesses."

Under the Code of 1882, the accused was given the right to re-call and cross-examine the prosecution witnesses "*present in Court or its precincts.*"[1] But these words have been deleted in the Code of 1898. The question has arisen under this Code whether the right of cross-examination of the prosecution witnesses examined before the charge conferred by this Section applies

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Note 7.

1. (1874) 6 N W P H C R 270 (272), *Empress* v. *Lall Singh.*
   (1881) 4 Mad 130 (131), *Talluri Venkayya* v. *Empress.*
2. (1881) 7 Cal 28 (30), *Faiz Ali* v. *Koromdi.*
   (1874) 22 Suth W R Cr 44 (44), *Khurruckdharee Singh* v. *Pershadee Mundal.*
   (1878-80) 2 All 253 (258), *Empress* v. *Baldeo Sahai.*
3. [See (1910) 20 Mad L Jour Notes 337 (338).
   [But see (1910) 11 Cri L Jour 128 (128) : 37 Cal 236, *Inder Rai* v. *Emperor.* – Submitted not correct.]
4. (1929) 1929 Mad 201 (202, 203) : 52 Mad 355 : 30 Cri L Jour 908, *Public Prosecutor, Madras* v. *Chockalinga Ambalam.* Failure to cross-examine witness present in Court and beginning to examine defence witnesses—*Held* there was waiver.
   [See also (1935) 1935 All 627 (628) : 36 Cri L Jour 1260, *Deep Chand* v. *Emperor.* Prosecution witness summoned to appear for cross-examination—All accused represented by different counsels — One of them leading cross-examination and others helping him by suggesting questions to be asked—If no question is asked on behalf of one of accused who is present, inference is that he did not want to do so.]
5. (1926) 1926 Pat 214 (215) : 5 Pat 110 : 27 Cri L Jour 499, *Ramachandra Modak* v. *Emperor.*
   (1902) 6 Cal W N 424 (425), *Kokil Ghose* v. *Kasimuddi.*
   (1920) 1920 Mad 201 (202) : 43 Mad 411 : 21 Cri L Jour 297, *W. H. Lockley* v. *Emperor.*
   [But see (1874) 6 NWP HCR 284 (287), *Empress* v. *Lall Mahomed.* Where a prosecution witness is discharged before cross-examination with the consent of the accused he is not entitled to have him re-summoned.]

Note 8.

1. (1895) 1895 All W N 40 (41), *Empress* v. *Ramcharan.*

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only to witnesses who have not been discharged or applies also to witnesses who have been discharged. On this question there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras[2] and Allahabad[3] that this Section applies only to cases where the prosecution witnesses required for cross-examination have not been discharged and that where they have been discharged, the accused is not *entitled* to have them re-summoned under this Section but they can only be re-summoned in the *discretion of the Magistrate* under Section 257. But on the other hand, it has been held by the Calcutta High Court[4] that the right of the accused under this Section applies also to prosecution witnesses who have been discharged. It is submitted that the Calcutta view seems to be the better view as it is more consistent with the repeal of the words "present in Court or its precints" which occurred in the previous Code as there is no reason to restrict the meaning of the word "recalled" so as to exclude the sense of "re-summoning" as suggested by the Allahabad and Madras rulings cited above.

9. Examination of the remaining witnesses.

The words "remaining witnesses" do not necessarily refer only to those witnesses who have been named by the complainant as required by Section 252 Clause 2 and summoned by the Magistrate before the framing of the charge; the words are made now to include any witness who according to the prosecution is able to support its cause, though he has not been summoned.[1] The mere fact that certain witnesses are not present in Court does not prevent them from being included in the words "remaining witnesses" within the meaning of this Section. But the prosecution is not entitled to get an adjournment of the case as of right in order to secure the attendance of such witnesses.[2]

10. The accused shall then be called upon to enter on his defence and produce his evidence.

The accused can be called upon to enter upon his defence and produce his evidence only *after* the charge has been framed and his plea asked for and after the examination-in-chief, cross-examination and re-examination of all the prosecution witnesses including the re-cross-examination of such of them as were examined before the charge.[1] After the accused *enters on his defence*

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2. (1920) 1920 Mad 201 (203, 205) : 43 Mad 411 : 21 Cri L Jour 297, *W. H. Lockley* v. *Emperor.*
3. (1911) 12 Cri L Jour 471 (472) : 11 Ind Cas 1007 (All), *Mulva* v. *Sheoraj Singh.*
   (1930) 1930 All 495 (496) : 31 Cri L Jour 764, *Baqridee* v. *Emperor.*
   [See also (1874) 6 N W P H C R 284 (287), *Empress* v. *Lall Mahomed.* Magistrate not to discharge prosecution witnesses before cross-examination without consent of accused. Where he has been discharged before cross-examination with the consent of the accused he is not entitled to have him re-summoned after the charge is framed.]
4. (1900) 4 Cal W N 351 (351), *Iswar Chunder Raut* v. *Kali Kumar Dass.*

Note 9.

1. (1909) 10 Cri L Jour 530 (531) : 4 Ind Cas 268 (Bom), *Emperor* v. *P. H Burn.*
2. (1925) 1925 Sind 315 (315) : 26 Cri L Jour 958, *Ali Sher* v. *Mir Mohamed.*

Note 10.

1. (1924) 1924 All 320 (320): 25 Cri L Jour (1003), *Keshab Das* v. *Emperor.*
   (1927) 1927 All 475 (475): 49 All 551: 28 Cri L Jour 399, *Sudaman* v. *Emperor.*
   (1923) 1923 Cal 657 (657): 50 Cal 686: 24 Cri L Jour 849, *Makbul Ahmed* v. *A. J. L. Allen.*
   (1924) 1924 Lah 84 (88): 4 Lah 61: 25 Cri L Jour 801, *R A. Byrne* v. *Crown.*
   (1931) 1931 Mad 240 (240): 54 Mad 251: 132 Cri Jour 779, *In re Ramireddi.*
   (1912) 13 Cri L Jour 554 (555,: 8 Nag L R 65,

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Note 10

no further evidence can be admitted against him except under the provisions of Section 540 *infra*.[2] (*See* notes under Section 540).

The Section only requires the Magistrate to call upon the accused to enter upon his defence and to produce his evidence; it does not require him to ask the accused if he means to call witnesses or not.[3] It is a *right* of the accused to be called upon to enter upon his defence and produce his evidence and an omission to ask him to do so is a flaw in the trial.[4] The Magistrate is bound to hear the defence witnesses and a conviction without doing so is illegal.[5] The Magistrate should give every reasonable opportunity to the accused to produce his evidence.[6] The nature of the defence is to be gathered not only from the statement of the accused himself but also from the trend of the cross-examination of the prosecution witnesses and from the arguments of the accused's pleader at the close of the trial.[7]

But the accused is not bound to produce any evidence in his defence merely because a charge has been framed against him; and he cannot be convicted on the mere ground that he has failed to produce any evidence.[8]

Birdhi Chand v. *Lakshmi Chand.*
(1922) 1922 Pat 158 (159, 160): 6 Pat L Jour 644: 22 Cri L Jour 697, *Mitarjit Singh* v. *Emperor.*
(1926) 1926 Rang 13 (13): 27 Cri L Jour 415, *Emperor* v. *Mg San Nyein.*
(1917) 1917 L B 88 (89): 18 Cri L Jour 1006, *Orilal* v. *Kalu.*
[See also (1884) 1884 Pun Re No Cr. 28 page 49, *Gohar* v. *Empress* Accused can be called on to enter upon his defence only after charge —Case under old Code.]
(1895) Ratanlal 768 (769) *Empress* v. *Keru.* (Do).

2. (1912) 13 Cri L Jour 772 (772): 17 Ind Cas 404 (All), *Ganga Singh* v. *Emperor.*
(1920) 1920 Bom 339 (341): 22 Cri L Jour 58, *Alex Pimento* v. *Emperor.*
(1923) 1923 All 322 (323, 324): 45 All 323: 25 Cri L Jour 305, *Mahadeo Prasad* v. *Emperor.*
(1870) 13 Suth W R Cr 15 (15): *Empress* v. *Assanoolah.*
(1911) 12 Cri L Jour 7 (8): 9 Ind Cas 46 (Cal), *Radha Madhab Pakra* v. *Emperor.*
(1928) 1928 Lah 953 (953): 29 Cri L Jour 844, *Karam Chand* v. *Emperor.*
(1871) 3 N W P H C R 271 (272), *Empress* v. *Chotey Lal.*
(1881) 8 Cal 154 (156), *Empress* v. *Kalichuran Chunari.*

3. (1897) Ratanlal 938 (938), *Empress* v. *W. E. Lapprey.*

4. (1868) 10 Suth W R Cri 7 (7), *Bhagwan* v. *Doyal Gope.*

5. (1925) 1925 Cal 538 (538), *Budhu Koiri* v. *Emperor.* Conviction on doctor's report, without taking any evidence, illegal.
(1869) 12 Suth W R Cri 77 (79), *Empress* v. *Mahima Chandra Chukrabutty.*
(1867) 7 Suth W R Cr 45 (46), *Empress* v. *Ramnath.*
(1886) 6 Suth W R Cr 90 (91), *Omint Ram* v. *Nonao Ram.*
(1866) 5 Suth W R Cr 65 (65), *Empress* v. *Kalee Thakoor.*
(1865) 3 Suth W R Cr 35 (36), *Empress* v. *Abdul Satar.*
(1878) 3 Cal 573 (582), *Dinanath* v. *Rajcoomar Singh.*
(1865) 2 Suth W R Cr 6 (6), *Empress* v. *Bhooban Isher Gossamee.*
(1864) 1 Suth W R Cr 36 (36), *Empress* v. *Bunk Behary.*
(1869) 11 Suth W R Cr 9 (9), *Empress* v. *Bhugner Putwa.*
(1903) 7 Cal W N 521 (522), *Bellow* v. *Mrs. Parker.*
(1924) 1924 Lah 617 (618): 25 Cri L Jour 82, *Santa Singh* v. *Emperor.* Magistrate not empowered to order that a party should produce a certain witness and that in default, the party shall lose his case.

6. (1914) 1914 Lah 84 (84): 15 Cri L Jour 521, *Lal Singh* v. *Emperor.*
(1925) 1925 All 318 (318): 26 Cri L Jour 703, *Bhagwan Das* v. *Saddiq Ahmed.*
(1897) 1 Cal W N 313 (314), *Sheikh Ezmat Ali* v. *Jagat Chandra.* Accused entitled to adjournment to produce his evidence.
(1899) 1 Bom L R 856 (856), *Empress* v. *Vasudev.*
(1927) 28 Cri L Jour 167 (168): 99 Ind Cas 599 (Lah), *Hira Singh* v. *Emperor.*

7. (1930) 1930 Cal 442 (442): 31 Cri L Jour 1203, *Kunti* v. *Emperor.*

8. (1896) Ratanlal 854 (854), *Empress* v. *Chan Basapa Madiapa.*

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Similarly, where the prosecution has not established a *prima facie* case against the accused, the failure of the accused to produce any evidence in his defence, cannot give rise to any adverse inference against him.[9] But where the evidence for the prosecution established a *prima facie* case against the accused, the fact that he has not produced any evidence of rebuttal enhances the weight of the prosecution evidence.[10]

The accused is entitled to raise any defence technical or otherwise and *the Court is bound to pronounce judgment on it.*[11] An accused can raise inconsistent defences in the alternative and such defences though they make the accused's case weaker,[12] cannot be disallowed by the Court.[13] The burden of proving the guilt of the accused is on the prosecution and it cannot succeed merely because of the weakness[14] or falseness[15] of the case for the defence.

The right of the accused to produce evidence in his defence under this Section is one that can be waived and if the accused when asked to produce his evidence has said that he has no witnesses to examine, he will not afterwards be *entitled* to let in any evidence.[16]

See also the undermentioned case.[17]

11. Expenses of witnesses.

This Section contains no provision similar to those in Sections 244 and 257 which enables the Magistrate to order the accused to pay the expenses of the prosecution witnesses whom he wishes to be re-called for cross-examination. The right of the accused to re-call the witnesses is unqualified and the Magistrate has no power to order him to pay the expenses of the witnesses as a

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9. (1895) Ratanlal 779 (782), *Empress* v. *Narayan Nathan.*
   (1881) 8 Cal 121 (125), *Empress* v. *Dhunno Kazi.*
   (1884) 10 Cal 140 (149), *Hurry Churan Chukerbutty* v. *Empress.*
10. (1904) 6 Bom L R 481 (489), *Emperor* v. *Baji Krishna.*
   (1919) 1919 Oudh 160 (174): 20 Cri L Jour 465, *Susil Chandra Lahari* v. *Emperor.*
   (1928) 1928 Pat 100 (101): 6 Pat 627: 29 Cri L Jour 239, *Ghanshyam* v. *Emperor.*
   (1934) 1934 Oudh 401 (405): 35 Cri L Jour (1244), *Ganesh Bakhsh Singh* v. *Emperor.*
11. (1914) 1914 Cal 456 (459): 41 Cal 350: 15 Cri L Jour 385, *Romesh Chandra Bannerjee* v. *Emperor.*
12. (1933) 1933 Pat 481 (482, 483): 34 Cri L Jour 828, *Emperor* v. *Kameshwar Lal.*
13. (1920) 1920 Pat 843 (844): 5 Pat L Jour 64: 21 Cri L Jour 799: *Faudi Koet* v. *Emperor.*
   (1927) 1927 Lah 710 (712): 29 Cri L Jour 117, *Santa Singh* v. *Emperor.*
   (1924) 1924 Lah 733 (734): 25 Cri L Jour 1005, *Kakar Singh* v. *Emperor.*
   (1919) 1919 Cal 439 (441): 20 Cri L Jour 661, *Afiruddi Chakdar* v. *Emperor.*
   (1923) 1923 Cal 717 (718): 25 Cri L Jour 190, *Nagendra Chandra Dhar* v. *Emperor.*
14. (1925) 1925 Oudh 78 (88): 27 Oudh Cas 188: 26 Cri L Jour 225, *Hira Lal* v. *Emperor.*
   (1918) 1918 Oudh 71 (75): 19 Cri L Jour 689, *Emperor* v. *Saheb Din.*
15. (1923) 1923 Mad 365 (367): 24 Cri L Jour 426, *Ramudu Iyer* v. *Emperor.*
   (1866) 1866 Pun Re Cri No 57, page 64 (65), *Azeem* v. *Crown.*
   (1867) 1867 Pun Re Cr No 37, page (68), *Crown* v. *Shah Mahomed.*
   (1868) 1868 Pun Re Cri No 22, page (57), *Jehangeer Khan* v. *Crown.*
   (1872) 1872 Pun Re Cri No 5, page (9), *Crown* v. *Gulab.*
   (1890) 1890 Pun Re Cri No 21, page (49), *Empress* v. *Harjas Rai.*
   (1906) 3 Cri L Jour 299 (300) (Lah), *Emperor* v. *Muhammada.*
   (1921) 1921 Lah 89 (90): 22 Cri L Jour 595, *Hari Ram* v. *Emperor.*
   (1922) 1922 Lah 1 (25): 3 Lah 144: 23 Cri L Jour 513, *Mahant Narain Das* v. *Emperor.*
   (1911) 12 Cri L Jour 584 (584): 12 Ind Cas 848 (Rang), *Khaw Hla U.* v. *Emperor.*
16. (1924) 1924 All 673 (674), *Mustaq Hussain* v. *Emperor.*
17. (1935) 1935 Cal 513 (520): 62 Cal 238: 36 Cri L Jour 1115, *Emperor* v. *Nirmal Jiban Ghose.* Witness to prove *alibi* must be called by accused who takes such defence.

condition of their being re-called.[1] Nor can the complainant be ordered to pay the expenses.[2] The witnesses should presumably be re-called at the public expense.[2a] But the Code is subject to any other law in force for the time being [*see* Section 1 (2)] and where under such law any charges are leviable they may be ordered to be paid by the accused. Thus, it has been held by the Rangoon High Court that under the rules made by the Local Government of Burma under the Burma Process Fees Act, 1910, the accused may be ordered to pay process-fees for the attendance of the prosecution witnesses whom he desires to be re-called for cross-examination.[3] Similarly, it has been held that when the accused applies for adjournment after the prosecution witnesses have once been re-called for cross-examination under this Section, it is open to the Magistrate to require as a condition of granting the adjournment that the expenses of the witnesses for the prosecution must be paid by the accused.[4]

12. Written statement of accused.

This is the only Section in the Code which provides for the filing of a written statement by the accused.[1] There is no provision in the Code for the filing of a written statement in Sessions trials[2] or in preliminary inquiries before commitment to Sessions[3] or in summons cases.

Under this Section the Court is *bound* to receive and file the written statement submitted by the accused.[4] Though great weight is to be attached to the written statement filed by the accused,[5] it is not like a pleading in a civil suit and does not preclude the raising of any defence not mentioned in the written statement.[6]

Note 11.

1. (1920) 1920 Lah 466 (466) : 59 Ind Cas 416 (416): 22 Cri L Jour 112, *Taqui Shah* v. *Emperor.*
   (1905) 2 Cal L Jour (Notes) 17 (17, 18), *Rasik Chandra Chuckrabutty* v. *Emperor.*
   (1900) 4 Cal W N 351 (351), *Ishwar Chunder Raut* v. *Kali Kumar.*
   (1912) 13 Cri L Jour 554 (555) : 8 Nag L R 65, *Birdhi Chand* v. *Lakshmi Chand.*
   (1924) 1924 Nag 114 (114): 7 Nag L J 57: 25 Cri L Jour 912, *Radha Kishan* v. *Ram Krishna.*
   (1920) 1920 Pat 149 (150) : 5 Pat L Jour 94: 21 Cri L Jour 814, *Ramyad Singh* v. *Emperor.*
   (1907) 6 Cri L Jour 339 (340) : 1907 Pun Re Cri No. 12, *Amin Chand* v. *Emperor.*
   (1926) 1926 Pat 214 (216) : 5 Pat 110 : 27 Cri L Jour 499, *Ramachandra Modak* v. *Emperor.*
   [But see (1901) 6 Cal W N 424 (425), *Kokil Ghose* v. *Kasimuddi Mahita.* Witnesses cross-examined before charge on distinct understanding that they would not be re-called after charge for cross-examination. Accused asking for their re-call and willing to pay expenses. He may be ordered to pay.]
2. (1928) 1928 Lah 175 (176) : 29 Cri L Jour 20, *Faiz Mahomed* v. *Nabu.*
   (1929) 1929 Lah 766 (767) : 30 Cri L Jour 664, *Abdul Majid* v. *Mehr Chand.*
2a [See cases cited in foot-note (1) above.]
3. (1926) 1926 Rang 164 (168) : 4 Rang 146 : 27 Cri L Jour 1369, *Emperor* v. *Tha Shwe.*
4. (1934) 1934 Mad W N 100 (102), *Papi Naidu* v. *Gangu Naidu.*

Note 12.

1. (1900) 2 Weir 255 (257), *Chinnaswami Naidu* v. *Veeriah Naidu.*
2. (1926) 1926 Pat 566 (568) : 27 Cri L Jour 1041, *Emperor* v. *Loahir Haidar Bilgrami.*
3. (1900) 2 Weir 255 (257), *Chinnaswami* v. *Veeriah.*
4. (1928) 1928 Mad 1135 (1136) : 29 Cri L Jour 1041, *Muhammad Salia Rowther* v. *Emperor.*
   (1933) 1933 All 690 (695) : 55 All 1040 : 34 Cri L Jour 967, *Jhabwala* v. *Emperor.*
   [But see (1917) 1917 Cal 687 (687) : 17 Cri L Jour 9 (14, 15), *Deputy Legal Remembrancer, Behar* v. *Matukdhari Singh.* Submitted not correct.]
5. (1928) 1928 All 222 (228) : 30 Cri L Jour 530, *Emperor* v. *Jhaffar Mal.*
6. (1911) 12 Cri L Jour 585 (587) : 12 Ind Cas 961 (Mad), *Jeramiah* v. *Vas.* It is

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It has been held by the Madras High Court[7] that the right to file a written statement under this Section carries with it the right to file any documents to which the accused was a party and that as the accused cannot give evidence on oath the Court is bound to consider such documents, though not proved in the regular way.

The Section does not specify the point of time at which the written statement is to be filed under this Section. It has been said that the written statement is to be filed at the time of recording the accused's plea to the charge.[8]

There is a conflict of decisions as to whether the filing of a written statement by the accused under this Section dispenses with his oral examination after the close of the prosecution evidence, under Section 342, *infra*. (*See* Notes under Section 342). But, the fact that a written statement has been filed may be taken into consideration in determining whether the accused was prejudiced by the failure to comply with the provisions of Section 342.[9]

This Section does not apply to disciplinary proceedings against legal practitioners under the Letters Patent and the legal practitioner is not entitled to file any written statement in such proceedings.[10]

13. Effect of non-compliance with this Section.—*See* Notes under S. 537.

Sec. 257

Process for compelling production of evidence at instance of accused.

257.* (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing :

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* (Code of 1882—S. 257.)

257. If the accused applies to the Magistrate to issue any process for compelling the attendance of any witness (*whether he has or has not been previously examined in the case*) for the purposes of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice. Such ground shall be recorded by him in writing.

Process for compelling production of evidence at instance of accused.

The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

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for prosecution to prove its case—In a case of defamation, omission of accused to deny publication in his written statement does not relieve prosecution from proving publication.
[See also (1930) 1930 Cal 442 (442) : 31 Cri L Jour 1203, *Kuti* v. *Emperor*. Defence of accused is to be gathered not only from his statement but also from the trend of cross-examination of prosecution-witnesses, the arguments of accused's pleader, etc.]

7. (1928) 1928 Mad 1135 (1136) : 29 Cri L Jour 1041, *Muhammad Salia Rowther* v. *Emperor*.
8. (1925) 29 Cal W N 118 (118) (Notes).
9. (1928) 1928 All 222 (228) : 30 Cri L Jour 580, *Emperor* v. *Jhabhar Mal*.
10. (1924) 1924 Lah 123 (124) : 4 Lah 271 : 25 Cri L Jour 161, *In re, Abdul Rashid*.

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this Section, unless the Magistrate is satisfied that it is necessary for the purposes of justice. Sec. 257

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

Synopsis.

Other Topics.

Absence of defence evidence. See Note 1, Pts. 1 and 2.
Accused not letting in evidence—Prosecutor's right of reply. See Note 1, F-N (7).
Accused summoning prosecution witness and right of cross-examination. See Note 6, Pt. 3.
Accused's witnesses to rebut other evidence. See Note 2, Pt. 4.
Adjournment—Right of accused. See Note 2, Pt 2; Note 1, F-N (3).
Application for summons to be disposed and not to be "filed." See Note 3, F-N (1).
Application to summon witnesses—Each case to be specifically dealt with. See Note 4, Pt. 2.
Citing trying Magistrate as witness. See Note 3, Pt. 8.
Cross-examination of co-accused's witness. See Note 6, Pt. 4.
Cross-examination of Court-witness. See Note 6, F-N. (3).
Delay in application for summons. See Note 2, Pt. 3; Note 4, Pts. 10 and 11.
Duty of Magistrate to fix expenses of witness. See Note 8, Pts. 8 to 10.
Duty of Magistrate to issue process and his discretion. See Note 3, Pt. 1.
Duty to record reasons. See Note 4, Pts. 3 & 4.
Duty to secure attendance of witnesses. See Note 8, F-N. (6); Note 3, Pts. 5 to 7; Note 3, F-N. (1) and (5).
Evidence not available—Duty to consider merits. See Note 3 F-N (7).
Expenses of witnesses—Process fees not included. See Note 8, Pt. 1.
Inspection by Court before rejecting document. See Note 5, Pt. 1.
Inspection of complainant's documents. See Note 2, F-N. (1).
Magistrate to respect Sessions Court's judgments. See Note 1, F-N (7).
Power to restrict defence witnesses. See Note 4, Pts. 7 to 9.
Reservation of cross-examination of defence witness. See Note 1, F-N (7).
Restriction of cross-examination. See Note 6, F-N. (5).
Rules of High Courts as to witness's expenses. See Note 8, F-N. (2) and (3).
Witnesses summoned—Refusal to re-summon. See Note 3, F-N. (6).
Written statement—Legal value. See Sec. 256, Note 12, Pts. 5 and 6.
Wrong refusal—Illegality. See Note 3, Pts. 1a, 2 and 3.

(Code of 1872—Ss. 359, 362, Para. 2.)

359. If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, he may require the accused person to satisfy him that there are reasonable grounds, for believing that such witness is material.

Refusal to summon unnecessary witness unless deposit made.

If the Magistrate be not so satisfied, he shall not be bound to summon the witness; but, in doubtful cases, he may summon such witness, if such a sum is deposited with the Magistrate as he thinks necessary to defray the expense of obtaining the attendance of the witness.

Sec. 257 Note 1

1. Scope and applicability of the Section.

In criminal cases the prosecution must succeed on its own merits and an accused cannot be convicted *merely* by reason of his failure to produce any evidence in his defence.[1] But, where the prosecution has established a *prima facie* case against the accused, he is liable to be convicted unless he rebuts the presumption raised by the prosecution evidence.[2] He is entitled to a sufficient opportunity to defend himself and to prove his innocence.[3] The Court is bound to take the evidence which he offers in his defence,[4] subject

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WARRANT CASES.

362. * * * * *

In cases tried upon warrant.

The Magistrate shall also, subject to the provisions of S. 359, summon any witness and examine any evidence that may be offered on behalf of the accused person, to answer or disprove the evidence against him, and may, for that purpose, at his discretion, adjourn the trial from time to time. If the Magistrate refused to summon a witness named by the accused person, he shall record his reasons for such refusal, and the accused person shall be entitled to appeal to the Court of the Session against such refusal.

(Code of 1861—S. 253.)

253. The Magistrate shall summon any witness and examine any evidence that may be offered on behalf of the accused person to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time, as may be necessary.

Evidence for the defence.

Section 257—Note 1.

1. (1866) Ratanlal 5 (5), *Reg* v. *Jenko.*
2. (1928) 1928 Cal 27 (40): 29 Cri L Jour 49, *Hari Narain* v. *Emperor.* If *prima facie* case is made out against accused he should rebut it by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated statements from the dock.
   [See (1928) 1928 Pat 100 (101): 6 Pat 627: 29 Cri L Jour 239, *Ghanshyam Singh* v. *Emperor.* It will not avail the accused merely to rely upon a discrepancy here and a discrepancy there or upon the absence of motive or upon exaggerations in the prosecution story. He must lead evidence.]
   (1918) 1918 Cal 314 (315): 19 Cri L Jour 81, *Ashraf Ali* v. *Emperor.* Non-production of evidence will raise adverse presumption.
   (1871) 16 Suth W R Cr 59 (59), *Jungi Khan* v. *Hur Chunder.*
3. (1866) 1866 Pun Re Cr No. 62, p. 68 (69), *Municipal Committee* v. *Deen Mohamad.*
   (1909) 9 Cri L Jour 583 (584): 5 Low Bur R 20, *Ameer Batcha* v. *Emperor.* Accused entitled to adjournment to enable him to produce evidence.
   (1903) 7 Cal W N 714 (716), *Emperor* v. *Kesho Singh.* (Do).
   (1897) 1 Cal W N 313 (314), *Sheikh Emtaz Ali* v. *Jagat Chandra.* (Do).
   (1914) 1914 Lah 84 (84): 15 Cri L Jour 521, *Lal Singh* v. *Emperor.* (Do).
4. (1902) 4 Bom L R 461 (463), *Emperor* v. *Nagar.* It is not open to a Magistrate to refuse to examine a witness for the accused when he (the witness) is present in Court.
   (1915) 1915 Mad 825 (825): 16 Cri L Jour 156 (157), *Duggirala Venkatappaya* v. *Mulpuri Venkataramanayya.* Magistrates should always be chary of taking upon themselves the duty of deciding on behalf of the parties which witnesses should be examined.
   (1912) 13 Cri L Jour 523 (523): 15 Ind Cas 795 (Bom), *Emperor* v. *Nandbasappa Basappa.* Magistrate cannot arbitrarily decline to examine witnesses.
   (1869) 11 Suth W R Cr 9 (9), *Queen* v. *Bhugner Putwa.* Accused is entitled to have his witnesses examined; they cannot be dismissed on their mere allegation of knowing nothing in his favour.
   (1901) 3 Bom L R 562, *Emperor* v. *Bajya Anandrao.* Threatening by Court to report to the High Court the conduct of the pleader on calling witnesses, is improper.
   (1911) 12 Cri L Jour 465 (467): 11 Ind Cas 1001 (Rang), *Nga Po Kya* v. *Emperor.* It is improper to arrest a witness for the defence for giving false evidence while the defence evidence is being taken.

to the provisions of the Evidence Act. He is, further, entitled to call upon the Court to assist him in the production of evidence material for his defence. This Section deals with the last mentioned right of the accused in warrant cases and lays down under what circumstances he is entitled to apply to the Court for process to compel the production of evidence on his behalf. The Section applies also to warrant cases tried summarily.[5] It has been held that the principle of the Section applies to summons cases.[6]

See also the undermentioned cases.[7]

2. "After he has entered upon his defence."

This Section comes into play only after the accused has entered on his defence.[1] The accused is entitled to a reasonable interval for considering what evidence he should produce.[2] It is open to a Magistrate even after a case has been closed, at any time before judgment is pronounced to allow the accused to let in evidence; it depends on the circumstances of each case whether a belated application for the production of evidence should be granted or not.[3]

Where, after the close of the evidence for the defence, the Magistrate

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5. (1909) 9 Cri L Jour 583 (584): 5 Low Bur R 20, *Ameer Batcha* v. *Emperor*.
6. (1928) 1928 Pat 253 (255): 29 Cri L Jour 308, *Rameshwar Sahu* v. *Emperor*,
7. (1896) Ratanlal 854 (854), *Empress* v. *Chanbasapa Madiapa*. A Magistrate being subordinate to a Sessions Court must treat its judgments with respect and be guided by them on such matters of procedure as arise in S. 257.
(1897) Ratanlal 938 (938), *Empress* v. *Sadashiv*. Accused's pleader stating that he would examine witnesses but actually summoning no witnesses—Prosecutor has no right to reply.
(1926) 1926 Lah 627 (628): 27 Cri L Jour 1037, *Sammun* v. *Emperor*. Evidence of defence witnesses produced by one accused cannot be treated as prosecution evidence against other accused.
(1925) 1925 All 769 (769): 26 Cri L Jour 1018, *Bahoru* v. *Emperor*. (Do).
(1931) 1931 Lah 57 (58): 12 Lah 385: 32 Cri L Jour 672, *Naturbhuy* v. *Emperor*. (Do).
(1864) 1 Suth W R Cri Letters 12 (12).
(1906) 3 Cri L Jour 23 (24): 3 Low Bur R 109, *Po Wa* v. *Emperor*. Cross-examination of defence witnesses cannot be deferred. Deferring cross-examination of defence witnesses until the examination-in-chief of other defence witnesses is wrong.
(1919) 1919 Oudh 79 (80): 21 Cri L Jour 60, *Rohan* v. *Emperor*. Mere fact that some of accused's witnesses are his caste fellows is not by itself a sufficient reason for discrediting their testimony.
(1919) 1919 Oudh 310 (311): 22 Oudh cas 375: 20 Cri L Jour 748, *Rameshwar Tewari* v. *Emperor*. (Do).
(1925) 1925 Oudh 501 (501): 27 Oudh Cas 327: 26 Cri L Jour 530, *Bahadur* v. *Emperor*. Where number of respectable persons have given evidence in favour of accused, their evidence should not be rejected.

Note 2.

1. (1914) 1914 Sind 135 (135): 8 Sind L R 267: 16 Cri L Jour 245, *Tahilram Lilaram* v. *Pitamberdas Valabdas*. Accused not entitled to inspection of complainant's documents before charge is framed.
(1925) 1925 Nag 44 (47): 20 Nag L R 174: 26 Cri L Jour 971, *Local Government* v. *Maria*. Prosecution case does not close until all the prosecution witnesses are discharged and their discharge does not take place till they have been cross-examined after the charge, if the accused so desires.
(1884) 1884 Pun Re Cr No. 28, p. 48 (49), *Gohar* v. *Empress*. Accused is entitled to have an opportunity given to him, after he had been charged, of producing his witnesses or causing them to be produced with aid of Court, notwithstanding an order passed previously asking him to be ready with his witnesses on a particular date.
(1924) 1924 All 320 (320): 25 Cri L Jour 1003, *Keshabdeo* v. *Emperor*. (Do).
2. (1920) 1920 Pat 25 (28): 21 Cri L Jour 321, *Rameshwar Dusadh* v. *Emperor*. Demand of two days' time for this purpose not unreasonable.
3. (1911) 12 Cri L Jour 150 (151): 9 Ind Cas 897 (Mad), *In re Vyasa Rao*.

Sec. 257 Notes 2—3

examines witnesses on the side of the prosecution, the accused is entitled to an opportunity to rebut the new evidence.[4]

2a. Right of prosecution to lead evidence after accused has entered on his defence.

Where the accused leads evidence of good character by way of defence, the Code does not entitle the prosecution to lead rebutting evidence as a matter of *right*. But the Magistrate may, in his discretion, allow such evidence to be given.[1] (*See also* Section 256, Note 10).

3. Right of accused to apply for process for compelling attendance of witnesses.

This Section makes it obligatory on the part of the Magistrate, except in the cases specified therein, to issue process at the instance of the accused, to compel the attendance of the witnesses named by him.[1] A non-compliance

4. (1925) 1925 Lah 531 (532): 26 Cri L Jour 1035, *Shugan Chand* v. *Emperor*.
(1870) 13 Suth W R Cr 15 (15), *Queen* v. *Assanoolah*.
(1881) 6 Cal 714 (715), *Deela Mahton* v. *Sheo Dyal*. Fact that accused had declined to examine a witness previously is no ground for refusing to summon such witness when required to meet fresh evidence taken by Magistrate after close of defence arguments.

Note 2a.

1. (1930) 1930 Mad 448 (448): 31 Cri L Jour 1198, *Ramaswamy Mudaliar* v. *Ramalinga Udayar*.

Note 3.

1. (1897) 1 Cal W N 19 (21), *Mowla Bux* v. *Derasatulla*.
(1870) 14 Suth W R Cr 81 (82), *Boolakee, In re*.
(1870) 13 Suth W R Cr 56 (58), *Queen* v. *Siddhoo*.
(1904) 1 Cri L Jour 1002 (1002): 2 Low Bur Rul 270, *Shwe Bwin* v. *Emperor*.
(1875) 24 Suth W R Cr 60 (60), *Murli Prasad, In re*.
(1931) 1931 Lah 56 (56): 32 Cri L Jour 620, *Emperor* v. *Nand Lal*.
(1894) Ratanlal 723 (723), *Empress* v. *Purushotam*.
(1902) 26 Bom 418 (421), *Emperor* v. *Purushotam Kara*.
(1866) 5 Suth W R Cr 65 (65), *Empress* v. *Kalee Thakoor*.
(1865) 3 Suth W R Cr 35 (36), *Queen* v. *Abdul Satar*.
(1869) 11 Suth W R Cr 55 (55), *Queen* v. *Doorgagutty*.
(1933) 1933 Lah 1020 (1020): 35 Cri L Jour 396, *Baksha* v. *Emperor*.
(1905) 2 Cal L J 50 (50) (Notes), *Jassim Sheikh* v. *Jadub Chandra*.
(1870) 5 Mad H C R App xxvii. *Proceedings, 5th July* 1870.
(1909) 9 Cri L Jour 583 (584): 5 Low Bur R 20, *Ameer Batcha* v. *Emperor*.
(1909) 10 Cri L Jour 207 (207): 2 Sind L R 5, *Emperor* v. *Dabud*.
(1871) 3 N W P H C R 271 (272), *Queen* v. v. *Chotey Lal*.
(1870) 2 N W P H C R 148 (149), *Queen* v. *Mudsooddeen*.
(1881) 3 All 392 (394), *In the matter of the petition of Sat Narain Singh*.
(1881) 6 Cal 714 (715), *Deela Mahton* v. *Sheo Dyal Koeri*.
(1925) 1925 Cal 80 (80): 25 Cri L Jour 310, *Abdul Jabbar* v. *Emperor*.
(1929) 1929 All 914 (915): 30 Cri L Jour 1155, *Parbhu* v. *Emperor*.
(1931) 1931 Oudh 386 (387): 32 Cri L Jour 1176, *Bhuneshwari* v. *Emperor*.
(1926) 28 Cri L Jour 167 (168): 99 Ind Cas 599 (Lah), *Hira Singh* v. *Emperor*. Trial Magistrate must make all attempts to secure the evidence of defence witnesses either by procuring their attendance or by having their evidence taken on commission.
(1933) 1933 Rang 29 (30): 34 Cri L Jour 468, *Zamin* v. *Emperor*.
(1924) 1924 Pat 142 (143): 24 Cri L Jour 831, *Debi Singh* v. *Emperor*.
(1905) 9 Cal W N 254 (254) (Notes), *Ashutosh Mallick* v. *Emperor*. Application for process must be disposed of and not merely "filed."
(1924) 1924 All 320 (320): 25 Cri L Jour 1003, *Keshab Deo* v. *Emperor*. Order to the accused that he must be ready with his witnesses on a certain date is improper.
(1884) 1884 Pun Re Cr No. 28, page 48 (49), *Gohar* v. *Empress*. Accused entitled to aid of Court in producing witnesses notwithstanding order of Court passed prior to the charge that he should be ready with his witnesses on a particular date.
(1921) 22 Cri L Jour 683 (684): 63 I C 619 (620) (Pat), *Munshi Teli* v. *Emperor*. [See also (1917) 1917 All 81 (84): 18 Cri L Jour 317 (319), *Tapeshri Prasad* v. *Emperor*. Where accused does not press for further postpone-

with the Section in this respect is *prima facie* an illegality which will cause serious prejudice to the accused.[1a] It is not a mere irregularity curable by the application of Section 537 of the Code.[2] The conviction will be set aside in such cases.[3] But the Section does not compel the Magistrate to *ask* the accused if he means to call witnesses; it is his right to apply for process and if he fails to do so, he cannot afterwards complain that he was not given an opportunity to adduce evidence.[4]

The duty of the Magistrate under the Section is not exhausted with his issuing a summons for the attendance of a witness in the first instance. If the process first issued fails, the accused is entitled to call upon the Court to issue further processes to compel the attendance of the witness.[5] But in exceptional

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ment, on the Court's undertaking to assume what the witness would prove, the prosecution is bound by the undertaking though the Court may thereafter summon and examine the witness.]

1a [See (1925) 1925 Cal 80 (80) 25 Cri L Jour 310, *Abdul Jabbar* v. *Emperor*.]

2. (1911) 12 Cri L Jour 548 (549): 12 Ind Cas 524 (Mad), *Arumugam Pillai* v. *Emperor*.
(1908) 7 Cri L Jour 425 (427): 31 Mad 131, *Narayana Mudali* v. *Emperor*.
(1929) 1929 All 914 (916): 30 Cri L Jour 1155, *Parbhu* v. *Emperor*.
(1925) 1925 Cal 411 (411): 51 Cal 1044: 26 Cri L Jour 384, *Manmohan Dastidar* v. *Bankim Behari Chowdhury*.
(1909) 10 Cri L Jour 207 (207): 2 Sind L R 5, *Emperor* v. *Dabud*. Conviction arrived at in violation of the above Section cannot be supported.

3. (1925) 1925 Cal 80 (80): 25 Cri L Jour 310, *Abdul Jabbar* v. *Emperor*

4. (1912) 13 Cri L Jour 828 (829): 17 Ind Cas 572 (Mad), *Vaithinatha Iyer* v. *Kuppu Thevan*.
(1897) Ratanlal 938 (938), *Empress* v. *W. E. Lapprey*.

5. (1909) 9 Cri L Jour 72 (73): 35 Cal 1093, *Rohimuddi Howladar* v. *Emperor*.
(1865) 3 Suth W R Cr 21 (21), *Queen* v. *Nobo Coomar Banerjee*.
(1905) 9 Cal W N (Notes) 229 (229), *Kedarnath Das* v. *Bhaba Sankar Bhattacharjea*.
(1906) 10 Cal W N (Notes) 7 (7), *Jassem Sheik* v. *Emperor*.
(1932) 1932 Mad W N 1349 (1350), *Ramasamy Mudaliar* v. *Ramalinga Odayaw*.
(1922) 1922 Lah 71 (71): 22 Cri L Jour 497, *Muhammad Din* v *Emperor*.
(1922) 1922 Lah 143 (144): 22 Cri L Jour 501, *Sahara* v. *Emperor*.
(1924) 1924 Cal 196 (197): 25 Cri L Jour 293, *Peuthiram Joab* v. *Emperor*.
(1926) 1926 Cal 1088 (1088): 27 Cri L Jour 841, *Upendranath* v. *Jogendranath*.
(1920) 1920 All 59 (60): 21 Cri L Jour 340, *Jahabboo* v. *Emperor*.
(1902) 6 Cal W N 548 (550), *Bhomar Munshi* v. *Damodar Das*.
(1892) Ratanlal 594 (595), *Queen* v. *Shamsherka*.
(1878) 3 Cal 573 (583), *Dinonath* v. *Rajcoomar Singh*.
(1881) 4 All 53 (54), *Queen* v. *Ruku-uddin*.
(1884) 10 Cal 931 (931, 932), *Queen* v. *Dhananjoi Chowdhury*.
(1920) 1920 Pat 714 (714): 21 Cri L Jour 336, *Amrit Mander* v. *Emperor*.
(1918) 1918 Pat 272 (272): 19 Cri L Jour 902, *Mahomed Zamiruddin* v. *Emperor*.
(1931) 1931 Pat 207 (208): 32 Cri L Jour 613, *Dwaraka Singh* v. *Emperor*.
(1926) 1926 Pat 139 (140): 26 Cri L Jour 1627, *Ramsakal Rai* v. *Emperor*.
(1921) 1921 All 142 (142): 23 Cri L Jour 124, *Bissay* v. *Emperor*. It is the business of the Court to see that its summonses and warrants are duly executed.
[See also (1925) 1925 Pat 55 (56): 3 Pat 591: 25 Cri L Jour 1255, *Jamuna Singh* v. *Emperor*. If witness is unable to attend Court owing to illness the Court should ascertain whether it will be possible for the witness to attend within a reasonable time, if not, then his evidence should be taken on commission.]
(1934) 1934 Nag 39 (42): 35 Cri L Jour 411. *Samuel* v. *Emperor* District Magistrate cited as witness before a Subordinate Magistrate and the former issuing a memo to the latter to consider with reference to S. 257, Criminal P C., whether it is not a cause of vexation or annoyance and the Magistrate thereupon cancelling his previous order and the accused applying for transfer on the ground that he was apprehensive of not having a fair trial *Held* that the procedure adopted by the District Magistrate was irregular and that it was a proper case for *transfer*.
(1924) 1924 Cal 534 (534): 24 Cri L Jour 370, *Mihir Lal Roy* v. *Emperor*.

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cases the Magistrate can re-consider his decision to issue process and may refuse to compel the attendance of a witness if he finds that the application for process against him is made for purpose of vexation or delay.[6] *See also* the undermentioned case.[7]

Under this Section, the accused is entitled to compel the appearance of a witness even of the trying Magistrate himself and to enable the accused to do so, the case should be transferred to some other Court if he applies for such transfer.[8]

Only a Magistrate who is seized of the case and not any other Magistrate can issue process under this Section.[9]

Where an application is made under this Section for summoning witnesses, the Magistrate must deal with the application and pass an order either granting or refusing it; merely keeping it on the file is not proper.[10]

4. Reasons for refusal to issue process.

The right of the accused to claim the issue of process under this Section to compel the production of evidence on his behalf is not an absolute one. The Magistrate can refuse to issue process at his instance if he considers that the application for process has been made for the purpose of *vexation or delay or for defeating the ends of justice*.[1] But the Magistrate must con-

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When accused informs the Court that witness summoned by him was ill, and asks for adjournment to produce him, the application should not be refused on the ground that it was not accompanied by medical certificate.

[But compare (1926) 1926 All 298 (298) : 27 Cri L Jour 383, *Puran* v. *Emperor*. Where the application for summonses was made late and granted on the understanding that no adjournment would be allowed if the witnesses did not appear, the accused cannot insist on adjournment.]

6. (1930) 1930 Mad 632 (632) : 31 Cri L Jour 720, *In re Sadayan Chetty*. Section confers a large discretion and by the mere fact that a Magistrate has once subpœnæd witnesses under the Section, he is not bound to compel their attendance if he is satisfied that it is unnecessary for the purposes of justice.

(1926) 1926 Pat 139 (140) : 26 Cri L Jour 1627, *Ramsakal Rai* v. *Emperor*. As a general proposition it should be considered that once a Magistrate has given orders that a certain witness should be called, he should take such steps as may be necessary and possible to enforce his attendance but it cannot be suggested that in no case it is possible for the Magistrate, if he comes to the conclusion that the attendance of the witness is not really necessary, to dispense with that person's attendance.

(1928) 1928 Mad 652 (652) : 29 Cri L Jour 725, *Saminatha Nayinau* v. *Kuppusamy Ayyar*.

(1931) 1931 Pat 207 (208) : 32 Cri L Jour 613, *Dwaraka Singh* v. *Emperor*.

7. (1881) 1881 All W N 38 (38), *Empress* v. *Dhan Kishan*. Complainant, cited by accused, as his principal witness, being in a Native State, was not available as a witness. *Held*, that the Magistrate acted wrongly in having acquitted the accused on ground of the absence of the statement of the principal witness for the defence but he should have pronounced judgment upon the evidence on the record.

8. (1904) 1 Cri L Jour 338 (339) : 26 All 536, *Emperor* v. *Abdul Latif*.

[See also (1870) 13 Suth W R Cr 60 (62), *Queen* v. *Mookta Sing*.]

9. (1914) 1914 All 197 (198) : 36 All 13 : 15 Cri L Jour 164, *Mangal* v. *Emperor*.

10. (1935) 1935 Sind 69 (70) : 29 Sind L R 64 : 36 Cri L Jour 889, *Kundanlal* v. *Emperor*.

Note 4.

1. (1914) 1914 All 526 (526) : 14 Cri L Jour 682, *Sitab Singh* v. *Dalganjan Singh*.

(1914) 1914 All 382 (386) : 36 All 239 : 15 Cri L Jour 212, *Juggan* v. *Emperor*.

(1926) 1926 Lah 454 (454) : 27 Cri L Jour 543, *Yusuf Ali* v. *Emperor*.

(1934) 1934 Lah 136 (136) : 36 Cri L Jour 559, *Joty Parshad* v. *Amba Parshad*.

(1871) 16 Suth W R Cri 28 (30, 31), *Bholanath Mukerjee, in re*.

(1893) 20 Cal 469 (473), *Nilkanta Singh* v. *Queen*.

Sec. 257 Note 4

sider the case of each witness *individually* before deciding that the application with reference to him has been made for any of the purposes specified in the Section.[2] Further, the Section requires that the Magistrate must *record* his reasons for refusing to issue process in compliance with the accused's application.[3] But it has been held that the Magistrate's order need not expressly state that the application for process has been made for the purpose of vexation or delay and that it is sufficient if it states facts which lead to the conclusion that the application has been made for such a purpose.[4]

An application for process under this Section can be refused only on the ground of its having been made for the purpose of vexation or delay or for defeating the ends of justice. The mere fact that the Magistrate thinks that the evidence of the proposed witness will not be *material* is not sufficient for refusing the application for process.[5] Nor can the Magistrate take upon himself the responsibility of selecting the witnesses for the defence.[6] His duty is to issue process for the attendance of all the witnesses named by the accused unless the application for process is vitiated for the reason mentioned in the Section. But where an unduly large number of witnesses are asked to be summoned, it is open to the Magistrate to conclude, in the circumstances of a case, that the application for process is made for purposes of delay.[7] But where in spite of the largeness of the number of witnesses asked to be summoned, the Magistrate does not think that the application for process is made for purpose of delay or vexation, he has no option but to accede to the prayer for process.[8] Nor can he, in such a case, arbitrarily restrict the number of witnesses to be summoned.[9]

The mere fact that an application for process is made at a late stage of

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(1900) 27 Cal 370 (372), *Zamunia* v. *Ram Tahal.*
(1881) 7 Cal 28 (31), *Faiz Ali* v. *Koromdi.*
(1933) 1933 Rang 29 (30) : 34 Cri L Jour 468, *Zamin* v. *Emperor.*

2. (1902) 26 Bom 418 (421), *Emperor* v. *Purshottam.*

3. (1925) 1925 Cal 411 (411) : 51 Cal 1044 : 26 Cri L Jour 384, *Manomohan Dastidar* v. *Bankim Behari Choudhury.*
(1902) 26 Bom 418 (421), *Emperor* v. *Purushottam.*
(1909) 10 Cri L Jour 207 (207) : 2 Sind L R 5, *Emperor* v. *Dabud.*
(1929) 1929 All 914 (916) : 30 Cri L Jour 1155, *Parbhu* v. *Emperor.*
(1895) 1895 All W N 40 (41), *Queen* v. *Ram Charan Lal.*
(1900) 4 Cal W N 241 (242), *Sreenath* v. *Emperor.*

4. (1907) 6 Cri L Jour 1 (6) (Cal), *Wahid Ali Khan* v. *Emperor.*
(1925) 1925 Mad 106 (107) : 25 Cri L Jour 401, *In re, Narayana Menon.*

5. (1911) 12 Cri L Jour 548 (549) : 12 Ind Cas 524 (Mad), *Arumugam Pillai* v. *Emperor.*
(1882) 2 Weir 263 (264), *Marinagi Reddi, In re.*
(1923) 1923 Lah 420 (422) : 24 Cri L Jour 686, *Ganpat Rai* v. *Emperor.*
(1871) 15 Suth W R Cr 15 (16), *Mahim Chunder Shah, In re.*
[But see (1925) 1925 Mad 106 (110) : 25 Cri L Jour 401, *In re, Narayana Menon.* Holding that evidence is not going to be of any use is tantamount to holding that the application is vexatious.]
[See also (1932) 1932 All 125 (126) : 33 Cri L Jour 528 : 54 All 331, *Balkrishna Sharma* v. *Emperor.* Under rules of the Allahabad High Court, the Magistrate can ask for certificate from pleader of accused that witness is material.]

6. (1928) 1928 Lah 125 (131) : 29 Cri L Jour 212, *Taj Mohammad* v. *Emperor.*

7. (1932) 1932 All 125 (126) : 54 All 331 : 33 Cri L Jour 528, *Balkrishna Sharma* v. *Emperor.*
(1908) 7 Cri L Jour 146 (151, 153) : 35 Cal 243, *Chintoman Singh* v. *Emperor.* Demand to examine about 1000 witnesses was held to be vexatious.

8. (1932) 1932 All 125 (126) : 54 All 331 : 33 Cri L Jour 528, *Balkrishna Sharma* v. *Emperor.*

9. (1926) 1926 Lah 454 (454) : 27 Cri L Jour 543, *Yusuf Ali* v. *Emperor.*
(1919) 1919 Cal 69 (69) : 20 Cri L Jour 201, *Amirulla* v. *Emperor.*

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the proceeding is not by itself a ground for refusing it.[10] But an unduly belated application for process is liable to be construed as made for purpose of delay or vexation.[11]

Where an application for process is first made in respect of some witnesses and then in respect of others, that by itself is no ground for holding that the latter application is made for the purpose of delay or vexation.[12]

Where a Magistrate summons a number of witnesses under this Section, he must be presumed to have concluded that their production has not been sought for vexation or delay and the Magistrate cannot thereafter arbitrarily limit the number of witnesses to be examined.[12a]

See also the undermentioned cases.[13]

5. Production of documentary evidence by accused.

An accused is entitled to produce documentary as well as oral evidence in his defence. The Magistrate should inspect the documents offered by the accused before excluding them.[1] This Section also entitles the accused to apply for process to compel the production of documentary evidence in his favour. Before issuing process, the Magistrate should satisfy himself that the documents called for have some bearing on the issues in the case and are relevant.[2] (*See* Section 94). *See also* the undermentioned cases.[3]

This Section does not control the provisions of Section 94, *supra*. There-

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(1907) 17 Mad L Jour (Sh. N) 62 (62).

10. (1911) 12 Cri L Jour 150 (151) : 9 Ind Cas 897 (Mad), *In re, Vyasa Rao.*
(1923) 1923 Pat 536 (537) : 24 Cri L Jour 835, *Beni* v. *Emperor.* Mere fact that application for process is made not on same day on which the accused enters on his defence but on the next day is no ground for refusing the application.

11. (1912) 13 Cri L Jour 218 (221) : 39 Cal 781, *Kudrutullah* v. *Emperor.*
(1911) 12 Cri L Jour 150 (151) : 9 Ind Cas 897 (Mad), *In re Vyasa Rao.* It depends on the circumstances of each case whether a belated application for process is to be granted or not.

12. (1923) 1923 Pat 536 (537): 24 Cr L Jour 835 *Beni* v. *Emperor.*
(1931) 1931 Oudh 386 (387) : 32 Cri L Jour 1176, *Bhuneshwari Pershad* v. *Emperor.*
[But see (1914) 1914 All 197 (198) :15 Cri L Jour 164 : 36 All 13, *Mangal* v. *Emperor.* Right of the accused is restricted to have those mentioned in the list to be summoned. If once he has exhausted his right by putting in a list he can only move the Court under S. 540].

12a (1935) 1935 All 638 (639) : 36 Cri L Jour 1142, *Tekchand* v. *Emperor.* At least reasons for not hearing the witnesses should be recorded in writing.

13. (1911) 12 Cri L Jour 566 (567) : 12 Ind Cas 654 (Mad), *Lunmo of Mahalunma* v. *Emperor.* Accused charged with recruiting coolies from Agency tract—Application by him for summons to the persons alleged to have been recruited is not one for vexation or delay.
(1924) 1924 Mad 243 (244) : 24 Cri L Jour 840, *Arvali Pokkar, In re.* The inconvenience and expense to the State entailed by the conveyance of three convicts from Coimbatore to Calicut was held to be not so serious that application for the attendance of these witnesses should be deemed to be made for the purpose of vaxation or delay or defeating the ends of justice.
(1871) 15 Suth W R Cri 7 (7), *Ram Sahia Chowdhury* v. *Sunker Bahadur.* Magistrate cannot refuse to summon witnesses on the ground that they are implicated in the charge.

Note 5.

1. (1909) 10 Cri L Jour 492 (493): 4 Ind Cas 67 (Cal), *Brindaban* v. *Isha Quddin.*
2. (1914) 1914 Sind 135 (136): 8 Sind L R 267 : 16 Cr L Jour 245, *Tahilram Lilaram* v. *Pitambardas.*
3. (1923) 1923 Lah 420 (422) : 24 Cri L Jour 686, *Ganpat* v. *Emperor.* Accused is entitled to production of Court records instead of being put to the expense of obtaining copies.
(1870) 14 Suth W R Cri 77 (77), *In re ShiebPershad.* Application for copies should be granted irrespective of question of their being material or necessary—Question of admissibility is to be determined at the hearing of the case.

fore, even before the case has reached the stage indicated by this Section it is open to the Magistrate to summon the production of a document at the instance of the accused if the conditions laid down in Section 94 are satisfied.[4]

6. Right of accused to cross-examine prosecution witnesses.

It has been seen in the notes under Section 256 that an accused in warrant cases has three opportunities to cross-examine prosecution witnesses: (a) before the charge is framed; (b) after the charge is framed and before the accused is called upon to enter upon his defence and (c) under this Section, after the accused has entered upon his defence. Hence subject to the restrictions contained in this Section, an accused is entitled, even after he has entered upon his defence, to have re-summoned for cross-examination any prosecution witness that he may name.[1] The distinction between the right of the accused under this Section and his right under Section 256 is that while his right to re-call and cross-examine prosecution witnesses under Section 256 is an absolute one, his right under this Section is subject to the discretion of the Magistrate.[2] Where a prosecution witness is re-summoned under this Section at the instance of the accused, he does not thereby lose his character as a prosecution witness and can be cross-examined by him.[3] Where there are two accused in a case and their cases are adverse to each other, the witnesses called by one of the accused in his defence can be cross-examined by the other accused.[4] As to the extent to which cross-examination of prosecution witnesses can be allowed, *see* the undermentioned cases.[5]

See also Note 7 *infra.*

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4. (1935) 1935 Sind 13 (18): 29 Sind L R 92 : 36 Cri Jour 581 (F B), *Mohamed Rahim* v. *Emperor.*

Note 6.

1. (1920) 1920 Pat 149 (150): 21 Cri L Jour 814 : 5 Pat L Jour 94, *Ramyad Singh* v. *Emperor.*
   (1925) 1925 Cal 411 (411) : 51 Cal 1044 : 26 Cri L Jour 384, *Manomohan Dastidar* v. *Bankim Behari Choudhury.*
   (1933) 1933 Mad 609 (613) : 46 Mad 449 : 24 Cri L Jour 547 (FB), *Subbarayudu* v. *Satyanandan.*
   (1929) 1929 Lah 578 (579) : 30 Cri L Jour 380, *Emperor* v. *Sadhu Singh.*
   (1907) 11 Cal W N 303*n* (304) *Hemanta Kumar Sarkar* v. *Sayad Ali.*
   (1930) 1930 Mad 632 (632): 31 Cri L Jour 720, *Sadayan Chetti* v. *Emperor.*
2. (1920) 1920 Mad 201 (205) : 43 Mad 411 : 21 Cri L Jour 297, *W. H. Lockley* v. *Emperor.*
   (1900) 27 Cal 370 (372), *Zamunia* v. *Ram Tahal.*
   (1973) 19 Suth W R Cri 53 (54), *Belilios* v. *Queen.*
3. (1897) 1 Cal W N 19 (21), *Mowla Bux* v. *Derasatulla.*
   (1901) 28 Cal 594 (596), *Sheoprakash Singh* v. *W. D. Rawlins.*
   (1910) 11 Cri L Jour 598 (600) : 8 Ind Cas 239 (Lah), *Jahanna* v. *Emperor.*
   (1922) 1922 Mad 32 (32): 23 Cri L Jour 192, *Venku Reddy* v. *Emperor.*
   (1927) 1927 Mad 129 (129, 130) : 28 Cri L Jour 32, *In re Kalee Lakshmayya.* Accused need not state in his application for summons that he wants the witness for cross-examination.
   (1902) 29 Cal 387 (389), *Mohendra Nath Das* v. *Emperor.* Accused first obtaining process for attendance of witness but subsequently asking the Magistrate to countermand the process and on his refusing to do so declining to examine witness as his witness.—Witness examined as Court witness —He can be cross-examined by the accused.
4. (1894) 21 Cal 401 (403), *Ram Chand Chetterjee* v. *Hanif Sheikh.*
   [But see (1869) 12 Suth W R Cr 75 (76)*Queen* v. *Surroop Chunder Pal.*]
5. (1916) 1916 Pat 236 (237) : 17 Cri L Jour 353 : 1 Pat L Jour 317, *Eknath* v. *Emperor.* Trial Court can restrict the scope of the cross-examination of witnesses.
   (1919) 1919 Pat 515 (516) : 20 Cri L Jour 566, *Mahomed Mian* v. *Emperor.* Disallowing questions establishing a particular defence, and not excluded by the Evidence Act, and directing accused not to put more than six or eight questions are illegal.
   (1919) 1919 Pat 565 (565): 20 Cri L Jour 559, *Yusuf* v. *Bunilal Mandal.* Arbitrary

Sec. 257 Note 7

7. Proviso to Sub-section 1.

The first paragraph of sub-section 1 provides *inter alia* that the accused is entitled to the issue of process for compelling the attendance of prosecution witnesses for *cross-examination* subject to the discretion of the Magistrate to refuse his application for process on the ground of its being made for the purpose of vexation or delay or for defeating the ends of justice. The proviso enacts an exception to this rule. It embodies a prohibition to the effect that if the accused has already cross-examined or has had the opportunity of cross-examining any witness after the charge was framed, the attendance of such witness should not be compelled except where it is necessary for the purposes of justice.[1] But where the accused has not had a sufficient opportunity of cross-examining a prosecution witness after the framing of the charge his attendance may be compelled under this Section.[2]

The proviso restricts only the issue of *process* for compelling the attendance of witnesses. It does not restrict the cross-examination of witnesses who are *present in Court*.[3] The Magistrate is not required by the proviso to record his reasons for not being satisfied that it is necessary for the ends of justice that the attendance of any witness should be compelled.[4]

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limitation, e. g. because cross-examination has already been full and has lasted an hour, is illegal.

(1887) Ratanlal 344 (346, 347), *Empress* v. *Sayad Surfuddin*. Court should prevent gross abuse and protect witnesses under S. 152, Evidence Act, from being terrified or browbeaten.

(1933) 1933 Nag 136 (144) : 29 Nag L R 251 : 34 Cri L Jour 505, *Mrs. M. F. Rego* v. *Emperor*. Where the defence alleged, that certain statements made by certain witnesses before the Judge were not mentioned to the police, the defence has a right to cross-examine the witnesses as to such statements and seek their explanation.

Note 7.

1. (1929) 1929 Lah 578 (579) : 30 Cri L Jour 380, *Emperor* v. *Sadhu Singh*.

(1933) 1933 Pat 598 (599) : 35 Cri L Jour 95, *Mohamad Rafi* v. *Emperor*. Discretion exercised by Magistrate in disallowing further cross-examination of prosecution witness—Objection not taken in appeal before Sessions Judge—High Court will not entertain ground in revision.

(1893) 20 Cal 469 (473), *Nilkanta Singh* v. *Queen*. It lies upon the party who thinks himself aggrieved to show that the ends of justice would be frustrated in consequence of the refusal to show that the further cross-examination should be allowed.

(1925) 1925 Pat 696 (697): 27 Cri L Jour 353, *Ajo Mian* v. *Emperor*. Mere fact that an accused's lawyers decline to cross-examine such witnesses or the mere fact that such witnesses were not cross-examined does not compel Court to summon.

[But see (1899) 4 Cal W N 241 (242), *Sreenath* v. *Empress*. Submitted not good law].

2. (1931) 1931 Lah 186 (188) : 32 Cri L Jour 1202, *Chint Ram* v. *Emperor*.

(1932) 1932 Nag 71 (72) : 33 Cri L Jour 731, *Chamru* v. *Emperor*. Accused's pleader unable to appear and cross-examine on the previous occasion under S. 256—Held his application under S. 257 was improperly refused.

(1921) 22 Cri L Jour 572 (589) : 62 Ind Cas 588 (Pat), *Bisheshwar Singh* v. *Emperor*.

(1927) 1927 Nag 240 (240) : 28 Cri L Jour 425, *Jairam Kunbi* v. *Emperor*.

3. (1932) 1932 Nag 137 (137) : 28 Nag L R 254 : 33 Cri L Jour 940, *Ramachandra Wadhi* v. *Emperor*.

[See also (1928) 1928 Pat 253 (255) : 29 Cri L Jour 308, *Rameshwar Sahu* v. *Emperor*. Once a summons has been issued and the witness is before the Court, there is no jurisdiction in the Court to dictate to the accused the terms upon which the examination of the witness shall be conducted. If the accused wishes to put questions in cross-examination, Magistrate is bound to allow them.]

4. (1925) 1925 Pat 696 (700) : 27 Cri L Jour 353, *Ajo Mian* v. *Emperor*.

7a. Examination of witness present in Court though not summoned.

This Section does not apply to the examination of a witness who is present in Court though not summoned. Such a witness can be examined by the Court under Section 540 *infra,* but there is no *obligation* on the Court to examine him.[1]

8. Sub-section 2—Power to require deposit of expenses of witnesses before summoning them.

Sub-section 2 empowers the Magistrate to order the accused to deposit the reasonable expenses of the witnesses before summoning them. The "expenses" referred to, do not include *process-fees,*[1] But if such process-fees are payable under any other law for the time being in force, they must be paid.[2]

The sub-section is only an enabling provision. It does not make it obligatory on the Magistrate to demand the expenses of witnesses in every case. On the other hand, as an ordinary rule, witnesses for the accused in warrant cases should be called at the expense of the Government.[3] In exceptional cases, the Magistrate may, under this sub-section require the accused to deposit the expenses of the witnesses. Thus, it has been held that when the Magistrate doubts the *bona fides* of the application for summons, he can require the expenses to be deposited.[4] The sub-section does not require the Magistrate to record his reasons for demanding the deposit of expenses.[5]

It has been held that the power to call for expenses of witnesses under this Section is capable of being exercised only once and that, before the processes are first issued. Where the accused is ordered to deposit expenses and on his doing so, processes are issued for the attendance of certain witnesses on a certain date, but they are not examined on that day and their attendance is required for another date the accused cannot be again ordered to pay their expenses.[6] Similarly, where witnesses have been summoned at the expense of

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Note 7a

1. (1934) 1934 Mad W N 97 (98), *Marimuthu Padayachi* v. *Emperor.*

Note 8.

1. (1926) 1926 Rang 13 (14) : 27 Cri L Jour 415, *Emperor* v. *Mg Sau Nyein.*
2. (1926) 1926 Rang 164 (168) : 4 Rang 146 : 27 Cri L Jour 1396 (F B), *Emperor* v. *Tha Shwe.* Rules 17 and 18 of the Process Fees Rules made under the Burma Process Fees Act, 1910—Fees payable under, to be paid.
3. (1932) 1932 Lah 481 (483) : 33 Cri L Jour 761, *Ram Narain* v. *Emperor.*
   (1929) 1929 Lah 23 (24) : 30 Cri L Jour 814, *Saiyod Habib* v. *Emperor.* Rules and Orders of the Lahore High Court Vol. II, Chap. 6, para. 67.
   (1898) 1898 Pun Re Cr No. 7, page 19, *Qadu* v. *Queen.*
   (1924) 1924 Pat 142 (143) : 24 Cri L Jour 831, *Debi Singh* v. *Emperor.*
   (1928) 29 Cri L Jour 459 (460) : 108 Ind Cas 907 (Lah), *Habib* v. *Mehdi Hussain.*
   [See also (1865) 3 Suth W R Cr 16 (17), *Empress* v. *Keifa Singh.*]
   (1932) 1932 Lah 577 (578) : 33 Cri L Jour 679, *Pahalwan* v. *Emperor.*
   [But see (1923) 1923 Lah 420 (421) : 24 Cri L Jour 686, *Ganpat* v. *Emperor.*]
4. (1933) 1933 Pat 242 (244) : 12 Pat 234 : 34 Cri L Jour 1198, *Uma Singh* v. *Emperor.*
5. (1929) 1929 Lah 23 (24) : 30 Cri L Jour 814, *Sayad Habib* v. *Emperor.*
6. (1921) 22 Cri L Jour 711 (712): 63 Ind Cas 871 (872) (Lah), *Kishan Lal* v *Emperor.*
   (1920) 1920 Pat 149 (150) : 21 Cri L Jour 814 : 5 Pat L Jour 94, *Ramyad Singh* v. *Emperor.*
   [But see (1931) 1931 Pat 207 (208) : 32 Cri L Jour 613, *Dwarka Singh* v *Emperor.* Issue of process by Magistrate—Duty to compel attendance—Failure of witness to appear—Magistrate to take every step in his power to compel the attendance of the witness, subject to the provisions of sub-s. (2) of S. 257.]
   [See also (1923) 1923 Lah 420 (421) : 24 Cri L Jour 686, *Ganpat* v. *Emperor.* Magistrate should summon only so many witnesses for one hearing as he thinks he will be able to examine on that hearing, in order

Sec. 257 Note 8

the Government, it is not competent to the Magistrate to require the accused to deposit their expenses as condition precedent for his being allowed to cross-examine them.[7]

When ordering an accused to pay the expenses of a witness under this sub-section, it is the duty of the Magistrate to fix the fees, if any, payable to the witness and not leave it to the negotiation of the parties.[8] If an expert witness refuses to give evidence for a reasonable fee fixed by the Magistrate, the Magistrate can compel him to do so.[9] Where the Magistrate directs an accused to deposit the travelling expenses of a witness, he should specify the amount to be deposited.[10]

Sec. 258

258.* (1) If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

Acquittal.

(2) If in any such case the Magistrate finds the accused guilty, he shall pass sentence upon him according to law.[1]

Conviction.

(2) *Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of Sec. 349 or Sec. 562,* he shall, if he finds the accused guilty, pass sentence upon him according to law.[1]

Conviction.

Synopsis.

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* **(Code of 1882—S. 258**—Same as that of 1898 Code.)

(Code of 1872—S. 220.)

220. If the Magistrate finds the accused person not guilty, he shall record judgment of acquittal.

Acquittal.

If the accused person is convicted the Magistrate shall pass sentence upon him according to law.

Conviction.

Explanation.—If a charge is drawn up, the prisoner must either be acquitted or convicted. If no charge is drawn up, there can be no judgment of acquittal or conviction except in the case provided for in Explanation I to Section 216.

(Code of 1861—S. 255—Same as S. 220 of 1872 Code except that it had no explanation.)

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to save the expenses of parties.]

7. (1929) 1929 Lah 578 (579) : 30 Cri L Jour 380, *Emperor* v. *Sadhu Singh.*
8. (1932) 1932 Lah 481 (483) : 33 Cri L Jour 761, *Ram Narain Sharma* v. *Emperor.*
9. (1932) 1932 Lah 481 (483) : 33 Cri L Jour 761, *Ram Narain Sharma* v. *Emperor.*
10. (1925) 1925 Pat 553 (555) : 26 Cri L Jour 965, *Gouri Shankar* v. *Collector of Muzafferpur.*

Other Topics.

Absence of charge—Effect. See Note 2, Pts. 2 & 4 ; Note 2, F-N. (1).
Absence of complainant. See Note 3, Pt. 2 ; Note 4, F-N. (1).
Acquittal—Not discharge or dismissal. See Note 4, Pts. 1 & 2.
No evidence after charge — Conviction not necessary. See Note 3, Pt. 4.
Presumption of innocence. See Note 3, F-N. (5).
Sending co-accused under S. 349. See Note 4, Pt. 3.
Strength of prosecution and not weakness of defence. See S. 257, Note 1.
Withdrawal by complainant. See Note 3, Pt. 3.

1. Legislative changes.

Differences between the Codes of 1861 *and* 1872:—

The following explanation was added to Section 220 of the Code of 1872:

"If a charge is drawn up, the prisoner must either be acquitted or convicted. If no charge is drawn up, there can be no judgment of acquittal or conviction except in the case provided for in Explanation 1 to S. 216."

This gave legislative effect to the undermentioned decisions[1] under the Code of 1861.

Changes made in 1882:—

The explanation to Section 220 of the Code of 1872 was omitted and the words "if in any case....framed" were introduced into the Section.

Changes made in 1923:—

The words "Where in any case under this chapter the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562" were added in sub-section 2.

2. "In which a charge has been framed."

In warrant cases, an order of acquittal or conviction can be passed only after a charge has been framed.[1] But the mere fact that a charge has not been framed does not invalidate the proceedings unless a failure of justice has in fact been occasioned thereby.[2] *See* Section 535 *infra*.

Moreover, in warrant cases tried *summarily* Section 263 expressly dispenses with the framing of a formal charge and the absence of a charge is no bar to an order of acquittal or conviction.[3]

The law contemplates that where there is a *prima facie* case against the accused a charge should be framed and, if, after taking the evidence for the defence after such charge, it is found that the evidence is not sufficient to justify conviction the accused should be acquitted. Hence, it is most improper for a Magistrate to proceed without framing a charge and after taking all the evidence for the defence, *discharge* the accused on finding that he cannot be

Section 258—Note 1.

1. (1866) 5 Suth W R Cr 58 (58), *Queen* v. *Shoodhun Mundle*.
(1867) 8 Suth W R Cr 45 (46), *Queen* v. *Bipro Doss*.
(1868) 9 Suth W R Cr 15 (15), *Goorutt Mundle* v. *Troylocko*.
(1869) 12 Suth W R Cr 65 (65), *Queen* v. *Goburdhun Bera*.

Note 2.

1. (1874) 22 Suth W R Cr 25 (26), *Reg* v. *Japit Ahir*.
(1891) 1891 All W N 80 (81), *Queen* v. *Kallu*.
Fact that charge has not been framed lends corroboration to view that a certain order is one of discharge and not of acquittal.
[See also (1886) 1886 All W N 260 (260), *Empress* v. *Jadu*.]
2. (1879) 3 Cal L R 131 (133), *In the matter of Joja Pashan*.
(1881) 1881 All W N 142 (142), *Hanuman* v. *Ahmad Ali*.
(1917) 1917 Low Bur 88 (89) : 18 Cri L Jour 1006 (1007), *Orilal* v. *Kalu*.
3. (1900-1902) 1 Low Bur Rul 9 (10), *Queen* v. *Nga Po Lun*.

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convicted. Such a course is most unfair to the accused as it deprives him of the benefit of an acquittal to which he is rightfully entitled under the circumstances. The order of discharge in such a case virtually amounts to an acquittal and the Court of revision would not be justified in ordering further enquiry in such cases.[4] (*See* Notes under Section 436).

3. "The Magistrate finds the accused not guilty."

An order of acquittal can be recorded under this Section only when the Magistrate finds the accused not guilty.[1] Thus, he cannot acquit the accused merely because the complainant or his witnesses are absent on the date of hearing.[2] (*See* Section 259 and Notes thereunder) or because the complainant offers to withdraw his complaint.[3] Similarly, where the Court finds that it has no jurisdiction to try the case, the proper order to pass is one of discharge and not of acquittal.[3a] (*See* Sections 248 and 345 and Notes thereunder).

Under Section 254 *ante* a charge is to be framed only when the Magistrate finds that the prosecution has made out a *prima facie* case against the accused. But this does not mean that where a charge is framed, the Magistrate is bound to convict the accused merely because he fails to produce any evidence of rebuttal. At the time of proceeding to final judgment the Magistrate is bound to weigh the evidence if he finds that he is guilty.[4] As to appreciation of evidence in criminal cases, *see* the undermentioned cases.[5]

4. "He shall record an order of acquittal."

Once a charge is framed in a warrant case the Magistrate has no power to *discharge the accused*.[1] He must either acquit the accused or convict him unless he decides to proceed under Section 349 or Section 562.

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4. (1889) 2 C P L R 82 (84), *Empress* v. *Bhagwan Malee.*
[See also (1883) 1883 Pun Re Cr No. 29, page 77, *Taba* v. *Hira Singh*].

Note 3.

1. (1913) 14 Cri L Jour 77 77: 37 Bom 369, *Emperor* v. *Ranchhod Bawla.*
(1925) 1925 Oudh 314 (314): 26 Cri L Jour 400, *Emperor* v. *Godhan.*
[But see (1930) 1930 All 795 (796): 53 All 39: 32 Cri L Jour 366, *Emperor* v. *Nazir Husain.*]
2. (1933) 1933 Cal 358 (358): 34 Cri L Jour 498, *Natbehari Sarkar* v. *Saroda Prasad Chowdhury.*
(1890) Ratanlal 524 (525), *Queen* v. *Nanaji.*
(1925) 1925 Oudh 314 (314): 26 Cri L Jour 400, *Emperor* v. *Godhan.*
(1925) 1925 Oudh 306 (306): 27 Oudh Cas 316: 26 Cri L Jour 364, *Ram Baksh* v. *Jairam Das.*
(1921) 22 Cri L Jour 312 (312): 60 Ind Cas 1000 (1000) (Lah), *Narain Das* v. *Mewa Singh.*
[See also (1881) 1881 All W N 38 (38), *Empress* v. *Dhan Krishnan.* Accused citing complainant as his principal witness—Magistrate finding it difficult to procure the attendance of the complainant—He cannot acquit the accused merely on this ground.]
[But see (1930) 1930 All 795 (796): 53 All 39: 32 Cri L Jour 366, *Emperor* v. *Nazir Husain.*]
3. (1913) 14 Cri L Jour 77 (77): 37 Bom 369, *Emperor* v. *Ranchhod Bawla.*
3a. (1910) 11 Cri L Jour 253 (254): 1910 Pun Re Cr No. 7, *Gokul Chand* v. *Phulchand.*
4. (1896) Ratanlal 854 (854), *Queen* v. *Chanbasappa Madiappa.*
5. (1934) 1934 Sind 6 (7): 35 Cri L Jour 736, *Emperor* v. *Mahomed Khabar.* Absence of ascertainable motives comes to nothing if crime is proved to have been committed by a sane person.
(1934) 1934 Oudh 124 (129): 35 Cri L Jour 804: 9 Luck 517, *Gaya Din* v. *Emperor.* Where major portion of prosecution evidence is found to be false it is impossible to build up a case of an offence.
(1934) 1934 Sind 22 (26): 28 Sind L R 84, *Bikchand Gangaram* v. *Emperor.* Presumption of innocence in favour of accused is not lost or rebutted merely because accused makes a false defence or makes use of false testimony.
(1921) 1921 Lah 89 (90): 22 Cri L Jour 595, *Hari Ram* v. *Emperor.* No inference of guilt can be drawn from a false statement of accused.

Note 4.

1. (1891) 1891 All W N 80 (81), *Queen* v. *Kallu.*

Sec. 258 Notes 4—6

The proper order to pass under the Section if the Magistrate finds the accused not guilty is to acquit the accused. An order dismissing the complaint or discharging the accused is not a proper order. But where such an order is passed and the meaning of the Magistrate is clear, the effect of the order is only that of acquittal.[2]

Under this Section the Magistrate is *bound* to acquit the accused if he finds him not guilty. He cannot refer his case under Section 349 merely because there are other accused tried along with him who are, in the opinion of the Magistrate, guilty and whose case he decides to refer under Section 349.[3]

5. Sub-section 2—Procedure under Section 349.

Under Section 349 the Magistrate who decides to proceed under that Section has merely to record his opinion that the accused is guilty but cannot *convict* him. Sub-section 2 of this Section as now worded, can, however, be read as not necessarily prohibiting the Magistrate from finding the accused guilty, i. e., convicting him. The conviction will not, however, have any legality.[1]

6. Sentence.

The provisions of sub-section 2 are mandatory. The Magistrate is *bound* to pass some sentence on the accused when he records a verdict of guilty, however light the sentence may be[1] unless he proceeds under Section 562, *infra*.

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259.* When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, *or is not a cognizable offence*, the Magistrate may, in his discretion,

Absence of complainant.

*(Code of 1882—S. 259—*Same as that of* 1898 *Code.*)

(Code of 1872— S. 215.)

Discharge of accused. **215.** * * * * * * *

Explanation. I :—The absence of the complainant, except where the offence may be lawfully compounded, shall not be deemed sufficient ground for a discharge, if there appears other evidence sufficient to substantiate the offence.

* * * * * *

(Code of 1861—Nil.)

(1903) 1903 Pun Re Cr No. 14, page 38, *Crown* v. *Nathu.*

(1930) 1930 All 795 (796): 53 All 39: 32 Cri L Jour 366, *Emperor* v. *Nazir Husain.* Charge framed—Complainant absent on date of hearing—Accused cannot be discharged.

2. (1875) 24 Suth W R Cr 62 (63), *Sreenath Mundle* v. *Sreenath Rajput.*
(1880) 5 Cal L R 359 (360), *In the matter of Jadubar Mookerjee.*
[See also (1935) 1935 All 834 (835): 36 Cri L Jour 912, *Raza Hussain* v. *Emperor.* Magistrate finding accused not guilty but inadvertently referring to S. 253 instead of S. 258—Order is one of acquittal and not of discharge.]

3. (1926) 1926 All 176 (176): 26 Cri L Jour 1630, *Mohammad Khan* v. *Emperor.*

Note 5.

1. (1928) 1928 Bom 240 (240): 52 Bom 456: 29 Cri L Jour 904, *Emperor* v. *Nayaran Dhaku Bhil.*

Note 6.

1. (1872-1892) 1872-1892 Low Bur Rul 409 (409), *Queen* v. *Mi Bank.*
(1868-1869) 4 Mad H C Rul App 66 (67).
(1865) 3 Suth W R Cr L 15 (15).
(1884) 1884 All W N 219 (220), *Empress* v. *Kulua.*
(1934) 1934 Rang 338 (339, 340): 12 Rang 419: 36 Cri L Jour 460 (F. B.), *Emperor* v. *Mi Hlwa.*
[But see (1928) 1928 Nag 188 (189): 24 Nag L R 110: 29 Cri L Jour 506, *Sitaram Kunbh* v. *Emperor.* Submitted not correct.]

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notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

Synopsis.

Other Topics.

Absence after framing of charge. See Note 9, Pts. 1 and 2.

Absence of complainant is sufficient cause for revival. See Note 8, F-N. (6).

Adjournment of Trial. See Note 9, Pt. 2.

After charge—Costs of adjournment by complainant—Incorrect. See Note 9, F-N. (1).

Comparison with Ss. 203, 204 and 209. See Note 10.

Comparison with S. 247. See Note 2.

Comparison with S. 253. See Notes 2 and 10.

Dismissal owing to absence of complainant—Not correct. See Note 1, F-N. (1).

Issue of summons in warrant cases. See Note 1, F-N. (1) and S. 251, Note 2, Pt. 1.

Joint trial of summons and warrant cases. See Note 2.

Non-applicability to cases on police-report. See Note 3, Pt. 1.

"Striking off." See Note 10, Pt. 1 and Note 7, F-N. 1.

Sufficient cause for absence. See Note 8, Pt. 6.

1. Legislative changes.

Difference between the Codes of 1861 *and* 1872:—

There was no corresponding provision in the Code of 1861.[1]

But in practice it was held that if owing to the absence of the complainant the Magistrate was satisfied that no evidence was forthcoming against the accused, he might discharge him.[2]

The following Explanation was added to Section 215 of the Code of 1872:—

"*Explanation I*:—The absence of the complainant, except where the offence may be lawfully compounded, shall not be deemed sufficient ground for a discharge, if there appears other evidence sufficient to substantiate the offence."

Changes made in 1882:—

Instead of the Explanation I to Section 215 of the Code of 1872 a separate substantive Section, *viz.*, Section 259 was inserted in the Code. This Section was in the same terms as that in the present Code.

Section 259—Note 1.

1. (1864) 1 Suth W R Cr 25 (25), *Queen* v. *Jodoo Paharao.*
[See (1868) 10 Suth W R Cr 31 (31), *Nand Lall Sootorodhor* v. *Bhagirutty.* There is no provision for dismissal of complaint for non-attendance of complainant as in summons cases. Mere fact that summons is issued in the first instance does not make a warrant case a summons case.
(1869) Ratanlal 16 (16), *Reg* v. *Goolabchand.*
(1869) 12 Suth W R Cr 27 (28), *Queen* v. *Bedoor Ghose.*
(1871) 3 N W P H C R 341 (341), *Queen* v. *Jugroop Ugrabee.*]

2. (1867) 8 Suth W R Cr Letters 12 (2). Accused may be discharged if the Magistrate considers it unnecessary to carry on the enquiry in the absence of the complainant.
(1869) 11 Suth W R Cr 39 (40), *Queen* v. *Dassoo Manjee.*
(1870) 6 Mad H C Rul App 8 (8).
(1865) 3 Suth W R Cr 36 (36), *Queen* v. *Chandria Sikdar.*
(1869) 4 Mad H C Rul App 41 (42).
(1870) 13 Suth W R Cr 35 (36), *Santoo Mundle* v. *Abdool Biswas.*
(1869) 11 Suth W R Cr 47 (47, 48), *Queen* v. *Pooran Jolaha.*
(1871) 15 Suth W R Cr 53 (53), *Tuki Mahomed* v. *Kistonath Roy.*

Changes made in 1923:— The words "or is not a cognizable offence" were added.

2. Scope and applicability of the Section.

This Section is analogous to Section 247 *ante*. Both Sections provide for the procedure to be followed in case of the absence of the complainant on the date of hearing. Section 247 applies to *summons cases* while this Section applies to *warrant cases*. The points of distinction between the two Sections are as follows:—

1. Section 247 provides for the *acquittal* of the accused, while this Section provides only for the *discharge* of the accused.[1]
2. Section 247 makes it *obligatory* on the Magistrate to acquit the accused unless for some reason he thinks proper to adjourn the hearing to some other day, while this Section leaves it to the *discretion of* the Magistrate to decide whether the accused should be discharged.
3. Section 247 applies to *all* offences triable as summons cases, while this Section applies only to such warrant case offences as are *either compoundable or non-cognizable*.

As said already, Section 247 applies to summons cases while, this Section applies to warrant cases. The question arises as to what Section applies to cases of a composite character involving both summons-case and warrant-case offences. In such cases, it has already been seen in Notes under Section 241, the procedure prescribed for warrant cases should be followed and hence, it is this Section and not Section 247 that will apply. Hence, in such cases the Magistrate cannot acquit the accused on the ground of the absence of the complainant on the date of hearing but must only discharge the accused under this Section if the conditions laid down therein are present. (*See also* Notes under Section 247).

Section 253 *ante* also provides for the discharge of the accused in warrant cases. But the grounds of discharge under that Section are confined to cases where the Magistrate finds that the evidence for the prosecution does not make out a *prima facie* case against the accused or that the charge against the accused is groundless. There is no power under that Section to discharge an accused on the ground that the complainant is absent on the date of hearing. An accused can be discharged on this ground only under this Section provided the other conditions for its applicability are fulfilled.[2]

The scope of the Section has been enlarged by the insertion of the words "or is not a cognizable offence" by the amendments of 1923. The Section as it stands, applies not only to compoundable offences but also to offences which though not compoundable are non-cognizable.

Note 2.

1. (1934) 1934 All 340 (341): 56 All 750: 36 Cri L Jour 65, *Suraj Bali* v. *Emperor*.
2. (1917) 1917 Cal 525 (525): 17 Cri L Jour 193 (193), *Umar Ali* v. *Jadu Ram Kapali*.
   (1884) 10 Cal 67 (67, 68), *Govinda Das* v. *Dulall Das*.
   (1891) 1891 All W N 116 (116), *Empress* v. *Kura*.
   (1890) Ratanlal 524 (524), *Empress* v. *Nanaji*.
   (1900) 4 Cal W N 26 (27), *Ram Coomar* v. *Ramjee*.
   [See also (1923) 1923 Cal 403 (404), *Hrishikesh Sen* v. *Paresh Nath*.]

Sec. 259 Notes 3—8

3. "Instituted on a complaint."

The Section applies only to cases where the proceedings have been instituted upon *complaint*. Hence, where the proceedings have not been instituted upon *complaint*, the Magistrate cannot invoke the provisions of this Section for discharging the accused on the ground of the absence of the prosecuting officer on the date of hearing.[1]

4. "Complainant is absent."—*See* Notes under Section 247.

5. Death of complainant.—*See* Notes under Section 247, *ante*.

6. Withdrawal of complaint.—*See* Notes under Section 248.

7. "And the offence may be lawfully compounded or is not a cognizable offence."

As the Section stood prior to the amendments of 1923, it applied only to cases where the offence charged was a *compoundable* one.[1] The scope of the Section has now been enlarged by the addition of the words "or is not a cognizable offence" after the words "the offence may be lawfully compounded" in the Section. The Section therefore applies not only to cases where the offence is a compoundable one but also where though it is not compoundable, it is *non-cognizable*. Where the offence is neither compoundable nor non-cognizable, the Section does not apply.[2] Where several offences are charged against the accused it is necessary that *all* of them should be compoundable or non-cognizable in order that the Section may apply.[3]

For the meaning of "cognizable," *see* Section 4 Clauses (*f*) and (*n*).

8. "May in his discretion."

Under this Section the Magistrate is not *bound* to discharge the accused on the absence of the complainant on the date of hearing.[1] It only confers a *discretion* on the Magistrate to discharge the accused in the circumstances specified in it[2] and Magistrate should exercise such discretion only sparingly and discharge the accused.[3] Where the presence of the complainant is not at all necessary for proceeding with the case, the Magistrate ought not to discharge the accused merely because of his absence.[4] The Magistrate is bound to consider

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Note 3.

1. (1927) 1927 Oudh 352 (352): 1 Luck 337: 28 Cri L Jour 816, *Emperor* v. *Mannu Singh*.

Note 7.

1. (1884) 10 Cal 67 (68), *Govinda* v. *Dulail*.
   (1917) 1917 Cal 525 (1) (525): 17 Cri L Jour 193 (193), *V. R. Alexander* v. *R. W. Cannor*.
   (1903-04) 2 Low Bur Rul 165 (165), *Emperor* v. *Nga Aung Nyang*.
   (1920) 1920 Low Bur 137 (137): 10 Low Bur Rul 375: 22 Cri L Jour 753, *Emperor* v. *A. Yankaya*.
   (1914) 1914 Oudh 264 (264): 17 Oudh Cas 18: 15 Cri L Jour 230, *Ramphal* v. *Emperor*. In such a case the case cannot also be struck off as the Code does not provide for such a course.
   (1900) 4 Cal W N 26 (27), *Ram Coomar* v. *Ramjee*.
2. (1924) 1924 Lah 627 (627): 25 Cri L Jour 87, *Nabi Baksh* v. *Emperor*.
   (1935) 1935 Bom 76 (78): 59 Bom 171: 36 Cri L Jour 483, *Emperor* v. *Murarji Jivraj*.
3. [See (1927) 1927 Oudh 352 (352): 1 Luck 337: 28 Cri L Jour 816, *Emperor* v. *Mannu Singh*.]
   [See also (1891) 1891 All W N 116 (116), *Empress* v. *Kura*.]

Note 8.

1. (1926) 1926 Bom 178 (179): 27 Cri L Jour 491. *Mahomed Azam* v. *Emperor*.
2. (1929) 1929 Rang 14 (15): 6 Rang 664: 30 Cri L Jour 345, *U Mo Gaung* v. *U Po Sin*. Discretion not to be lightly interfered with by High Court.
3. [See (1881) 6 Cal 523 (528), *Empress* v. *Thompson*. Case under S. 124 of the Presidency Magistrates Act 4 of 1877.]
4. (1896) Ratanlal 847 (848), *Queen* v. *Mhatarji Darku*. Case ripe for charge

whether there is a *prima facie* case against the accused and where there is no *prima facie* case he will be justified in discharging the accused if the complainant absents himself on the date of hearing. But at the same time it must be remembered that the primary reason for a discharge under this Section is the absence of the complainant which raises a presumption of his wish not to proceed with the case. Hence, where, despite the absence of the complainant, the circumstances are such as do not give rise to the inference that he did not wish to proceed with the case, the Magistrate ought not to discharge the accused under this Section.[5] Thus, where the absence of the complainant is due to a reasonable cause, the Magistrate ought not to discharge the accused under this Section.[6]

9. "At any time before a charge is framed."

This Section only applies to cases where the absence of the complainant is at a hearing *before the charge is framed*. If the complainant absents himself *after* the charge is framed, the Magistrate has no power to discharge the accused on the ground of the absence of the complainant.[1] Nor can the accused be acquitted under Section 258 *ante* in such a case as an order of acquittal under that Section can only be based on a finding of "Not guilty" (*see* Notes under Section 258). The only course open to the Magistrate in such circumstances is to proceed with the case in the absence of the complainant[2] unless he decides to adjourn the case.

10. Discharge the accused.

The procedure laid down in this Section is to *discharge* the accused. Similarly there are other provisions in the Code under which the accused may be discharged. (*See* Sections 209 and 253). Under Sections 203 and 204 the Magistrate can *dismiss a complaint*. But the Code nowhere provides for the passing of an order *striking off* a case, though such an order may, in suitable circumstances be construed and treated as an order of discharge.[1]

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being framed—Accused ought not to be discharged merely because of complainant's absence.
[See (1881) 6 Cal 523 (528), *Queen* v. *Thomson*. Dismissal of case under S. 124, Presidency Magistrates Act 4 of 1877.]
(1869) 12 Suth W R Cr 27 (28), *Queen* v. *Bedoor*.

5. (1911) 12 Cri L Jour 184 (184) (Sind), *Harun* v. *Abdul Satar*.

6. (1923) 1923 Cal 403 (404), *Hrishi Kesh Sen* v. *Paresh Nath Mukerji*. Complainant absent as he had to attend as a witness in another Court but his pleader present and applying for adjournment—Accused not to be discharged.
(1911) 12 Cri L Jour 184 (184): 9 Ind Cas 1007 (Sind), *Harun* v. *Abdul Satar*. Prevented from attending by floods. [See also (1871) Ratanlal 59 (59), *Reg* v. *Virabhadra*. Incarceration of complainant in jail, after he had preferred his complaint is a sufficient cause and complaint may be revived —Case under Code of 1861, S. 259 (now S. 247).]

Note 9.

1. (1925) 1925 Oudh 306 (306): 27 Oudh Cas 316: 26 Cri L Jour 264, *Ram Baksh* v. *Jairam Das*.
(1925) 1925 Oudh 314 (314): 26 Cri L Jour 400, *Emperor* v. *Godhan*.
(1933) 1933 Pesh 78 (78): 35 Cri L Jour 170, *Abdul Hakim* v. *Haji Abdul Aziz*.
(1890) Ratanlal 524 (524), *Queen* v. *Nanaji*.
(1918) 1918 Nag 76 (76): 20 Cri L Jour 763, *Rai Singh* v. *Patia*.
(1924) 1924 Lah 627 (627): 25 Cri L Jour 87, *Nabi Baksh* v. *Emperor*. After charge, complainant's position is reduced to that of witness—He cannot be ordered to pay costs of adjournment.
(1930) 1930 All 795 (796): 53 All 39: 32 Cri L J 366, *Emperor* v. *Nazi Husain*.

2. (1933) 1933 Cal 358 (358): 34 Cri L Jour 498, *Nutbehari Sarkar* v. *Saroda Prosad Chowdhury*.
(1924) 1924 Lah 627 (627): 25 Cri L Jour 87, *Nabi Baksh* v. *Emperor*.

Note 10.

1. (1914) 1914 Oudh 264 (264): 17 Oudh Cas 18: 15 Cri L Jour 230, *Ramphal* v. *Emperor*.

Sec. 259 Notes 11—12

11. Revival of case after discharge.—*See* Section 403 and Notes thereunder.
See also Section 436 and Notes thereunder.

12. Revision.—*See* Notes under Section 439.

CHAPTER XXII.

OF SUMMARY TRIALS.

Sec. 260 **Power to try summarily.**

260.* (1) Notwithstanding anything contained in this Code,—

(a) the District Magistrate,

(b) any Magistrate of the first class specially empowered in this behalf by the Local Government, and

(c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and specially empowered in this behalf by the Local Government,

may, if he or they think fit, try in a summary way all or any of the following offences:—

(a) offences not punishable with death, transportation or imprisonment for a term exceeding six months;

(b) offences relating to weights and measures under Ss. 264, 265 and 266, I. P. C.;

(c) hurt, under S. 323 of the same Code;

(d) theft, under Ss. 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed Rs. 50;

(e) dishonest misappropriation of property under S. 403 of the same Code, where the value of the property misappropriated does not exceed Rs. 50;

(f) receiving or retaining stolen property under S. 411 of the same Code, where the value of such property does not exceed Rs. 50;

*** (Code of 1882—S. 260.)**

Except for the additions noted in Note 1 the Section was the same as that of 1898 Code.

(Code of 1872—Ss. 222, 223 and 224.)

What offences may be tried summarily.

222. The Magistrate of the District may try the following offences in a summary way, and on conviction of the offender, may pass such sentence as may be lawfully inflicted under S. 20 of this Code:—

(1) Offences referred to in S. 148 of this Code;
(2) Offences relating to weights and measures under Ss. 264, 265 and 266, I. P. C.
(3) Hurt, under S. 323, I. P. C.
(4) Theft, under S. 379, I. P. C., where the value of the property stolen does not exceed Rs. 50.
(5) Theft, under S. 380, I. P. C., where the value of the property stolen does not exceed Rs. 50.
(6) Theft, under S. 381, I. P. C., where the value of the property stolen does not exceed Rs. 50.

(g) assisting in the concealment or disposal of stolen property, under S. 414 of the same Code, where the value of such property does not exceed Rs. 50 ; Sec. 260

(h) mischief, under S. 427 of the same Code ;

(i) house-trespass, under S. 448, and offences under Ss. 451, 453, 454, 456 and 457 of the same Code ;

(j) insult with intent to provoke a breach of the peace, under S. 504, and criminal intimidation, under S. 506 of the same Code ;

(k) abetment of any of the foregoing offences ;

(l) an attempt to commit any of the foregoing offences, when such attempt is an offence ;

(m) offences under S. 20, Cattle-Trespass Act, 1871 :

Provided that no case in which a Magistrate exercises the special powers conferred by S. 34 shall be tried in a summary way.

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall re-call any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code.

Synopsis.

Other Topics.

Allegations in complaint and sworn statement to decide summary trials. See Note 5, Pts. 11 and 12.

Allegations of informant to Police. See Note 5, Pt. 13.

Cattle-Trespass Act, Clause (m). See Note 5.

Clause (a) independent of Clauses (b) to (k) See Note 5, Pt. 9.

Compensation. See S. 262, Note 2, F-N. (5).

Complicated questions. See Note 4, Pts. 2 and 6a.

(7) Receiving stolen property, under S. 411, I. P. C.

(8) Mischief, under S. 427, I. P. C.

(9) House-trespass, under S. 448, I. P. C.

(10) Criminal intimidation under Ss. 504 and 506, I. P. C.

(11) Abetment of, or attempt to commit (when such attempt is an offence), any of the foregoing offences.

Power to invest Magistrate with power to try summarily.

223. The Local Government may invest any Magistrate of the first class with power to try summarily all or any of the offences mentioned in S. 222.

Power to invest Bench of Magistrates invested with first class Magisterial powers.

224. The Local Government may invest any Bench of Magistrates invested with the powers of a Magistrate of the first class with power to try summarily all or any of the offences mentioned in S. 222.

(Code of 1861—Nil.)

Sec. 260 Note 1

1. Legislative changes.

Difference between Codes of 1861 *and* 1872:—

There was no Section corresponding to this in the Code of 1861. The corresponding Sections in the Code of 1872 were Sections 222, 223 and 224.

Changes made in 1882:—

(1) The offence referred to in clause (g) of the present Section was added to the list of offences triable summarily under the Section.

(2) The proviso to sub-section 1 of the present Section was added, giving legislative effect to the undermentioned decision.[1]

(3) The words "and on conviction of the offender, may pass such sentence as may be lawfully inflicted under Section 20 (corresponding to the Section 32 of the present Code) of this Code" which occurred in Section 222 of the prior Code were omitted and the second paragraph of Section 262 *infra* providing that in summary trials no sentence of imprisonment for a term exceeding three months can be passed was added.

Changes made in 1898:—

The following additions were made:

1. The words "if he or they think fit."
2. Clause (e).
3. Clause (m). This gave legislative effect to the undermentioned decision[2] and rendered obsolete decision noted below.[3]
4. The words and figures "and offences under Sections 451, 456 and 457 of the same Code" in Clause (i).
5. Sub-section 2.

Section 260—Note 1.

1. (1879) 1879 Pun Re Cr No. 25 page 75, *Empress* v *Fazlu.*
2. (1896) 1896 All W N 136 (136), *Empress* v. *Jawahir.*
3. (1896) 23 Cal 248 (248), *Nedaram Thakur* v. *Joonab.*

Changes made after 1898:—

By the Repealing and Amending Act I of 1903 the offences under Sections 453 and 454 of the Penal Code were added to the offences enumerated in Clause (i) of sub-section 1 thus rendering obsolete the undermentioned decision.[4]

2. Scope of the Section.

This Section and the next lay down the offences that can be tried summarily and the Magistrates by whom they can be so tried. While this Section lays down the offences that can be tried in a summary way by District Magistrates, Magistrates of the first class and Benches of Magistrates with *first class* powers, the next Section lays down the offences that can be tried summarily by Benches of Magistrates with *second or third class* powers. The procedure to be followed in summary trials is laid down in Sections 262 to 265.

Under Section 262, sub-section 2, it is provided that in case of conviction in summary trials the Magistrate cannot pass any sentence of imprisonment for a term exceeding three months. Under Section 414 a person convicted at a summary trial by a Magistrate empowered to try cases summarily has no right of appeal in any case where the sentence is one of fine not exceeding two hundred rupees only.

These Sections apply to trials before Magistrates and Benches of Magistrates other than Presidency Magistrates. As regards summary procedure in trials before the latter, *see* Section 362, sub-section 4, Sections 370 and 441.

3. Magistrates empowered to try cases summarily.

The power to try cases summarily is confined to the Magistrates and Benches of Magistrates mentioned in this Section and the next Section. While the offences mentioned in this Section can be tried by District Magistrates, Magistrates of the first class specially empowered in this behalf by the Local Government and Benches of Magistrates with first class powers specially empowered in this behalf by the Local Government; the offences mentioned in Section 261 can be tried by Benches of Magistrates with second or third class powers, specially empowered in this behalf by the Local Government.

As to the power of the District Magistrate of the Civil and Military Station of Bangalore to try European British subjects summarily, *see* the undermentioned case.[1] As to Presidency Magistrates, *see* Section 362, sub-section 4, Sections 370 and 441.

4. "May, if he or they think fit."

Under this Section the Magistrate is not *bound* to adopt the summary procedure in the case of the offences mentioned in it. The Section only confers a *discretion* to try such offences in a summary way if the *Magistrate thinks fit* to do so. In each case he ought to consider whether the summary procedure would be appropriate to the case. As a rule, such procedure should be confined to cases of a simple nature where not much evidence is needed.[1] The pro-

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4. (1901) 14 C P L R 158 (158), *Emperor* v. *Ratan Singh Rajput*.

Note 3.

1. (1916) 1916 Mad 589 (589) : 16 Cri L Jour 773 (774), *In re, G. G. Jeramiah*. No power.

Note 4.

1. (1876) 25 Suth W R Cr 65 (66), *Issur Chunder Mundle* v. *Rahim Sheikh*.

Sec. 260 Note 4

cedure is inappropriate to cases of a complicated or serious nature.[2] Thus it would not be proper to try in a summary way cases which are hotly contested,[3] cases involving intricate questions of title and possession[4] and cases necessitating the taking of lengthy evidence[5] or requiring a local inquiry to be made.[6] Where owing to the bulk of evidence or the complication of the matters or owing to the difficult nature of the points at issue, it is not possible for the Magistrate to keep in his mind, without taking exhaustive notes, the evidence of important facts, then, even though the offence may be technical and be punishable only with a light sentence, the Magistrate will not be acting properly if he applies the summary procedure.[6a] Similarly, serious cases where a heavy sentence would be deserved in case of conviction cannot appropriately be tried summarily.[7] So also, cases where the result of the trial would have further consequences of a serious nature ought not to be tried in a summary way.[8] For instance, cases against public servants in which the whole career of the accused would depend on the result of the trial should not be tried summarily.[9]

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2. (1921) 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor* v. *Rustomji Mancherji.*
(1913) 14 Cri L Jour 105 (107) : 35 All 173, *Dinanath* v. *Emperor*. Great deal of correspondence having to be gone through.
[See (1873) 20 Suth W R Cr 55 (56), *In the matter of Mohesh Chunder*. In prosecutions for serious offences, it is necessary that the formalities should be duly observed.]

3. (1931) 1931 Mad 233 (233) : 32 Cri L Jour 689, *Subramania Maistry* v. *Nachiar Ammal.*

4. (1876) 25 Suth W R Cr 65 (66), *Issur Chunder Mundle* v. *Rahim Sheikh.*
(1899-1900) 4 Cal W N 247 (249), *Sri Ramchandra Roy* v. *Dinanath Mukhopadhaya.*
(1912) 13 Cri L Jour 771 (771) : 6 Sind L R 120, *Emperor* v. *Tirth Das Kewalram.*
(1922) 1922 Pat 265 (266) : 21 Cri L Jour 374, *Bhim Bahadur Singh* v. *Emperor.*
(1922) 1922 Pat 296 (297) : 23 Cri L Jour 440, *Parmeshwar Lal Mittar* v. *Emperor.*
(1923) 1923 Rang 157 (157) : 24 Cri L Jour 929, *Maung Shwe Ku* v. *Emperor.*
[But see (1926) 1926 Oudh 63 (63) : 26 Cri L Jour 1452, *Sukhpat* v. *Emperor*. Fact that a question of title is involved is not itself a reason for holding that the case is too complicated to be tried summarily.]
[See also (1923) 1923 Pat 157 (157) : 23 Cri L Jour 120, *Mahomed Ishaq* v. *Emperor.*]

5. (1921) 1921 Lah 236 (236) : 22 Cri L Jour 145, *Ghasita Mal* v. *Emperor*. Number of accused large and number of witnesses even greater—Case should not be tried summarily.
(1921) 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor* v. *Rustomji Mancherji.*
(1891) 1891 All W N 183 (183), *In the matter of Sheo Sahai Bhagat*. Trial taking ten hearings, summary trial not proper.
(1934) 1934 Lah 243 (245) : 15 Lah 610 : 35 Cri L Jour 1094, *M. Mohd. Abdulla* v. *Emperor.*
[Compare (1927) 1927 All 136 (137) : 28 Cri L Jour 140, *Naubhat* v. *Emperor*. Mere fact that number of accused is large is not conclusive reason against summary trial.]
(1892) 1892 All W N 30 (30), *In the matter of the petition of Mansa.*

6. (1921) 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor* v. *Rustomji Mancherji.*
(1891) 1891 All W N 183 (183), *In the matter of Sheo Sahai Bhagat.*

6a (1925) 1925 Sind 284 (284) : 19 Sind L R 136 : 26 Cri L Jour 1026, *Rahimtullah* v. *Emperor.*

7. (1916) 1916 All 53 (54) : 17 Cri L Jour 413 (414) : 38 All 506, *Aijag Hussain* v. *Emperor.*
(1893) 7 C P L R 6 (8), *Empress* v. *Gangaram Sonar.*
(1893-1900) 1893-1900 Low Bur Rul 198 (198), *Empress* v. *Nga San*. Boat thefts and cattle thefts call ordinarily for a severe sentence.
(1912) 13 Cri L Jour 780 (781) : 6 Sind L R 101, *Emperor* v. *Allahrakhio* (Do).
(1927) 1927 Sind 257 (257) : 28 Cri L Jour 959, *Amir Bux* v. *Emperor* (Do).

8. (1929) 1929 All 267 (268) : 30 Cri L Jour 505, *Emperor* v. *Bashir.*
(1921) 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor* v. *Rustomji Mancherji.*

9. (1883) 6 Mad 396 (399), *Subramanya Iyer* v. *Empress.*
(1911) 12 Cri L Jour 143 (144) : 9 Ind Cas 831 (Lah), *Sohan Singh* v. *Emperor.*
(1932) 1932 Lah 188 (189) : 33 Cri L Jour

Similarly, where the owner of a flour mill is prosecuted for public nuisance for starting the mill in a residential locality he should not be tried summarily if the result of the trial would have the effect, in case of conviction, of compelling him to permanently close down his business.[10]

But the mere fact that there are a number of accused persons is not a conclusive reason against trying a case summarily.[11]

A summary trial is undesirable when a Magistrate takes cognizance of a case upon his own knowledge as in such a case he is himself in the position of a prosecutor and it would not be proper for him to deal with the case in a summary way in such case.[12]

Where the accused is deaf and dumb, it has been held that the summary mode of trial is not suitable.[13]

5. Offences to which the Section applies.

This Section empowers the classes of Magistrates enumerated in it to try summarily the offences specified in the Section.[1] These offences are classified in Clauses (a) to (m) of sub-section 1 of the Section. Clause (m) refers to offences under the Cattle Trespass Act. All the offences mentioned in clauses (b) to (l) are offences under the Penal Code. Clause (a) is general and applies to all offences whether under the Penal Code or other Acts. Hence, the Section applies to offences under other Acts also, provided they are not offences punishable with death, transportation or imprisonment for a term exceeding six months.[2] The fact that several offences are charged against the accused does not make the Section inapplicable where all the offences are triable summarily.[3] But the summary procedure cannot be extended to offences not

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108, *Robert John Bradley* v. *Emperor.*

(1932) 1932 Mad W N 478 (480), *D'Souza* v. *Annappa Sheregara.*

(1895) Ratanlal 778 (778), *Empress* v. *Hari Gopal.*

(1895) Ratanlal 784 (785), *Empress* v. *Waman Dhonddeo.*

[But see (1926) 1926 Oudh 63 (63) : 26 Cri L Jour 1452, *Sukhpat Lal* v. *Emperor.*]

[But Compare (1929) 1929 Pat 716 (717) : 30 Cri L Jour 869, *Jagdish Prasad* v. *Emperor.* Petty theft by Railway watchman—Summary trial appropriate though accused liable to be dismissed from service on his conviction.]

10. (1921) 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor* v. *Rustomji Mancherji.*

11. (1927) 1927 All 136 (137) : 28 Cri L Jour 140, *Naubat* v. *Emperor.*

[But compare (1921) 1921 Lah 236 (236): 22 Cri L Jour 145, *Ghasita Mal* v *Emperor.* Number of accused large and number of witnesses even greater—Case should not be tried summarily.]

12. (1876) 25 Suth W R Cr 69 (71), *In re Romanath Bannerjee.*

(1898) 3 Cal W N 330*n*, *Empress* v. *Hamed Hossein.*

13. (1906) 4 Cri L Jour 444 (445) (Bom), *In re A Deaf and Dumb Man.*

Note 5.

1. (1923) 1923 All 432 (433), *Emperor* v. *Bulaki.* Theft under S. 379 in which the value of property stolen does not exceed Rs. 50.

(1919) 1919 All 64 (64) : 21 Cri L Jour 28, *Udit Narain* v. *Emperor.* In case of theft, etc., the value of the property stolen should be *found* to be less than Rs. 50.

2. (1894) 1 Weir 906 (907), *In re Naroo Rowthan.* Offence under S. 65-A, Stamp Act 1 of 1879.

(1928) 1928 All 719 (720): 50 All 718: 30 Cri L Jour 214, *Emperor* v. *Bihari Bhar.* Offence under S. 22, Cl. (2), sub-cl. (a), Criminal Tribes Act 6 of 1924.

(1902) 1902 All W N 24 (24), *Emperor* v. *Bindesari Prasad.* Offence under S. 121, Railways Act of 1890.

(1919) 1919 Bom 173 (174): 43 Bom 888 : 20 Cri L Jour 699, *Emperor* v. *Dhondya.* S. 130 read with S. 126 (a), Railways Act.

(1934) 1934 All 331 (332) : 35 Cri L Jour 677, *Jwala Prasad* v. *Emperor.* Offence under Child Marriage Restraint Act of 1929.

3. (1884) 10 Cal 408 (409), *Gamirullah Sarkar* v. *Abdul Sheikh.*

Sec. 260 Note 5

mentioned in the Section.[4] Thus, offences for which the maximum punishment awardable under the law exceeds the litmits mentioned in Clause (a) and which are not covered by any of the other clauses in sub-section 1 cannot be tried summarily.[5] Even the consent of the accused will not enable a Magistrate to try summarily an offence not covered by the Section.[6] Where there are several accused persons, the fact that the offence of which one of them is accused is not triable summarily, will make the summary procedure inapplicable to *all* the accused persons.[7] Similarly, where a number of offences are charged against the accused person he cannot be tried summarily unless *all* the offences are capable of being tried in a summary way.[8]

Where a number of offences of receiving or retaining stolen property are charged against the accused under the provisions of Section 234 *supra*, in determining whether the accused can be tried summarily, the value of the property to be taken into account under Clause (f) of sub-section 1 is the value of the property in respect of each offence separately and not the aggregate value of the property which is the subject-matter of all the offences.[8a]

Clause (a) of the Section does not control the other clauses of the sub-section. Hence, the offences mentioned in the other clauses can be tried summarily though they do not fall within the purview of Clause (a).[9]

In determining whether a case relates to an offence triable summarily, a Magistrate should have regard primarily to the allegations with which his help is sought.[10] Thus in a large measure, where there is a complaint, the al-

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(1876) 25 Suth W R Cr 5 (6), *Empress* v. *Ramaotar Paure.*

4. (1874) 21 Suth W R Cr 12 (13), *In re, Belaki Pathak.*
(1875) 24 Suth W R Cr 71 (72), *Kopil Dolai* v. *Kanhaijeuna.*
(1922) 1922 Pat 227 (228): 25 Cri L Jour 545, *Brij Nandan Panday* v. *Emperor.* Before the Magistrate can assume jurisdiction to try offence of theft in a summary way, he has to satisfy himself that the property in respect of which offence was committed is less than Rs. 50 in value.

5. (1872-92) 1872-92 Low Bur Rul 63 (63), *Sooba Reddy* v. *Crown.* Offence under S. 354, I. P. C.
(1881) 1881 Pun Re Cr No. 56, page 56. *Nawab* v. *Empress.* Offence under Ss. 304, 147 and 325, I. P. C.
(1891) Ratanlal 539 (540), *Empress* v. *Abdul.* Offence under S. 497, I. P. C.
(1894) 1894 All W N 176 (176), *Empress* v. *Hassan Ali.* Offence under S. 224, I. P. C.
(1928) 1928 Bom 142 (143): 52 Bom 254: 29 Cri L Jour 492, *Ganu Sadu* v. *Emperor.* Offence under S. 147, I. P. C.
(1874) 21 Suth W R Cr 12 (13), *Empress* v. *Bebheki Pathak.* (Do).
(1901) 28 Cal 251 (253), *Parsi* v. *Bandhi.* Offence under S. 211, I. P. C.
(1930) 1930 Cal 711 (712): 32 Cri L Jour 110, *Topzai Hossain* v. *H. C. Hunt.* (Do.)
(1932) 1932 Mad W N 478 (480), *D' Souza* v. *Annappa Sheregara.* Offence under S. 342, I. P. C.
(1916) 1916 Pat 197 (2) (198): 1 Pat L Jour 230: 17 Cri L J 473 (474), *Haboo* v. *Kariman.* Theft of property exceeding Rs. 50 in value.
(1912) 13 Cri L J 58 (58): 13 Ind Cas 394 (Rang), *Emperor* v. *Nga Sit Cho.* Offence under Sec. 9, Opium Act, 1878.
(1879) 1 Weir 654 (654). Offence under Sec. 19, Arms Act.
(1925) 1925 Oudh 627 (627): 28 Oudh Cas 123: 26 Cri L Jour 800, *Bhikha* v. *Emperor.* Offence under U. P. Excise Act 4 of 1910, S. 60.

6. (1872-92) 1 Low Bur R 63 (63), *Sooba Reddi* v. *Crown.*

7. (1925) 25 Cri L Jour 528 (528): 77 Ind Cas 992 (Cal), *Chandra Mohan Das* v. *Emperor.*

8. (1928) 1928 Bom 142 (142): 52 Bom 254: 29 Cri L Jour 492, *Ganu Sadu* v. *Emperor.*

8a. (1934) 1934 Sind 185 (186): 28 Sind L R 336: 36 Cri L Jour 608, *Chetumal Rekumal* v. *Emperor.*

9. (1892) Ratanlal 600 (600), *Empress* v. *Bhavdya.*

10. (1900-01) 5 Cal W N 252 (253), *Kailash Chunder Pal* v. *Joynuddi.*
(1906-07) 11 Cal W N 204*n* (204) *Kedarnath Chowdhury* v. *Khosal Mondal.*
(1925) 1925 All 290 (291): 47 All 64: 26 Cri

legations in the complaint and the sworn statement of the complainant will determine the question of the applicability of the summary procedure. But the Magistrate is not absolutely confined to the complaint and the complainant's allegations. If there are good reasons for holding that the allegations are exaggerated, it is open to a Magistrate to go behind them and to try the accused for the offence which he holds that the circumstances of the case indicate to have been committed.[11] But where there are no good reasons for such a view the Magistrate will not be justified in ignoring the aggravating features of a case so as to enable himself to adopt the summary procedure.[12]

Where the Magistrate takes cognizance of an offence on a Police report he may ignore the allegations in the first information given in the Police Station which point to aggravating circumstances and try the accused for the offence of which he is charged in the Police report and if such offence is triable summarily, the Magistrate can adopt the summary procedure notwithstanding the allegations in the first information.[13]

L Jour 586, *Raghunandan Prasad* v. *Emperor.*

(1926) 1926 Cal 1202 (1203): 53 Cal 738: 27 Cri L Jour 1295, *Madhab Chandra Saha* v. *Emperor.* Complaint disclosing only offence triable summarily—Magistrate not bound to assume facts which would make summary procedure inapplicable.

11. (1888) 10 All 55 (57, 58), *Empress* v. *Jagjiwan.*
(1887) 1887 All W N 103 (103), *Empress* v. *Lakshmi Narain.*
(1899) 1 Bom L R 683 (684), *Empress* v. *Vallabh Gopal.*
(1889) 16 Cal 715 (724), *Golap Pandy* v. *Boddam.*
(1933) 1933 Oudh 50 (51): 34 Cri L Jour 547, *Gudar* v. *Emperor.*
(1875) 23 Suth W R Cr 19 (19), *Empress* v. *Abdoo Sheikh.* High Court refused to interfere with discretion of trying Magistrate.
(1885) 11 Cal 236 (237), *Ramanund* v. *Koylash.*
[See also (1927) 1927 Cal 505 (509): 28 Cr L Jour 697, *Government of Assam* v. *Kantila Chutia.* Case based on Police report.]
[But see (1876) 25 Suth W R Cr 19 (20): *In re, Ramachandra Chatterjee.* (1878) 2 Cal L R 374 (375), *Bepuloolla* v. *Nazim Sheikh.*]

12. (1874) 6 N W P H C R 254 (256), *In the matter of Mewa.*
(1893) Ratanlal 670 (670), *Empress* v. *Lakshman.*
(1898) Ratanlal 988 (989), *Empress* v. *Husain Saheb.*
(1887) 1887 Pun Re Cr No. 5 page 9, *Sardar Khan* v. *Empress.*
(1897-1901) 1 Upp Bur Rul 75 (75), *Empress* v. *Bustien.*
(1877) 1 Cal L R 434 (435), *In re Chunder Sookor.*
(1879) 4 Cal 18 (20), *Empress* v. *Golam Mahomed.*
(1929) 1929 All 349 (350): 51 All 540: 30 Cri L Jour 686, *Mewalal* v. *Emperor.*
(1932) 1932 Mad W N 478 (480), *D'Souza* v. *Annappa Sheregara.*
(1874) 22 Suth W R Cr 29 (29), *Chunder Shekhur Thakoor* v. *Nitaloo.*
(1875) 23 Suth W R Cr 3 (4), *Empress* v. *Banee Madhub Das.*
(1875) 24 Suth W R Cr 21 (22), *Haran Sheikh* v. *Ramdhun Biswas.*
(1875) 24 Suth W R Cr 46 (47), *In re, Fakeer Mahomed.*
(1875) 24 Suth W R Cr 48 (48), *Emaral Sheikh* v. *Mohammadi Sheikh.*
(1875) 24 Suth W R Cr 71 (72), *Kopil Dolai* v. *Kanhai Jeuna.*
(1900) 27 Cal 983 (985), *Sheo Bhajan* v. *Masawi.*
(1897) 4 Cal 18 (19), *Empress* v. *Golam Mahommed.*
(1907) 5 Cri L Jour 21 (22) (Lah), *Barkat Khan* v. *Empreror.*
(1908) 8 Cri L Jour 227 (229): 36 Cal 67, *Phanindranath Chatterji* v. *Emperor.*
(1913) 4 Cri L Jour 462 (463): 20 Ind Cas 622 (Rang.), *R. S. Sharma Iyer* v. *Emperor.*
(1902) 29 Cal 409 (410), *Bishu Shaik* v. *Saber Mollah.*
(1874) 22 Suth W R Cr page 65 (66), *Empress* v. *Buzleh Ali.* When the accused is charged with theft of a box containing Rs. 50, the Magistrate will not be justified in striking out value of the box and trying case summarily.
[See also (1918) 1918 Nag 150 (151): 14 Nag L R 190: 19 Cri L Jour 1003, *Dipchand* v. *Emperor.* Case under S. 457, I. P. C.—First information giving list of stolen property exceeding Rs. 50 in value—Magistrate cannot try summarily.]

13. (1931) 1931 All 51 (52): 53 All 218; 32 Cr

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But where the Police report points to an offence not triable summarily, and the evidence also discloses such an offence, it is not open to the Magistrate to ignore the aggravating circumstances and proceed in regard to an offence triable summarily.[13a]

As to the procedure to be adopted in cases where in the course of a trial or inquiry commenced in the regular way it is found that the offence committed is triable as a summary case, *see* Section 251, Note 4 "Change of procedure subsequent to commencement of trial."

The trial of an accused in a summary way for an offence which is not triable summarily is void under Section 530, Clause (q). The fact that at the end of the trial the accused is *convicted* of an offence which could have been tried summarily does not validate the proceedings.[14]

The Section applies only to trials for offences. It does not apply to proceedings which are not trials for offences. Thus proceedings under Chapter 36 (Maintenance of wives and children) cannot be conducted in a summary way.[15] Similarly, the inquiry made by a Magistrate under the first part of Section 2 of the Workmen's Breach of Contract Act 13 of 1859 is not a trial for an offence and such inquiry cannot be held in a summary manner.[16] A contrary view, however, has been held by the Allahabad High Court.[17]

The Section applies only to cases where the matter charged is exclusively any of the offences mentioned in the Section. Hence where the accused, in case of conviction, would be liable to enhanced punishment under Section 75 of the Penal Code by reason of a previous conviction and such conviction is set out in the charge as provided for in Section 221, the accused cannot be tried summarily although the trial may be for an offence mentioned in the Section.[18]

The High Court as a superior Court of Record has a *special jurisdiction* to punish *summarily* contempts of its authority, and this jurisdiction is independent of, and unaffected by, the provisions of the Code.[19]

Under Section 67 of the Forest Act of 1927 it is provided that the

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L Jour 556, *Sundar Teli* v. *Emperor*. [But compare (1918) 1918 Nag 150 (151): 14 Nag L R 190: 19 Cri L Jour 1003, *Dipchand* v. *Emperor*. Case under S. 457, I P C—First information giving list of stolen property of value exceeding Rs. 50—Case cannot be tried summarily.]

13a (1934) 1934 Lah 243 (244): 15 Lah 610: 35 Cri L Jour 1094, *M. Mohd. Abdulla* v. *Emperor*.

14. (1928) 1928 Bom 142 (143): 52 Bom 254: 29 Cri L Jour 492, *Ram Sadu* v. *Emperor*.

15. (1875) 24 Suth W R Cri 61 (62), *Harkishore* v. *Bharoti*.
(1893) 20 Cal 351 (352), *Kali Dassi* v. *Durga Charan*.

16. (1882) 1 Weir 696 (696), *In re, Govinthan*.
(1903-04) 2 Low Bur Rul 163 (164), *Emperor* v. *Periaswamy Achari*.
(1882) 4 Mad 234 (234), *Pollard* v. *Mothial*.
(1899-1900) 4 Cal W N 253 (253), *In the matter of Ram Sarup Bhakat*.
(1904) 1 Cri L Jour 263 (264): 33 Bom 22, *Emperor* v. *Dhondu Krishna Kambya*.
(1908) 8 Cri L Jour 409 (410): 33 Bom 25, *Emperor* v. *Balu Salaji*.
(1912) 13 Cri L Jour 194 (195): 1912 Pun Re Cri No. 5, *Emperor* v. *Harlal*.
(1913) 14 Cri L Jour 256 (256): 6 Sind L R 165, *Emperor* v. *Sobrab*.
[But see (1879) 1 Weir 694 (694), *In re, Higgins*.]

17. (1889) 11 All 262 (265), *Empress* v. *Inderjit*.
(1921) 1921 All 285 (286): 43 All 281: 22 Cri L Jour 165, *Abdus Samat* v. *Yusuf*.

18. (1878) 2 Weir 324 (325).
(1872-92) 1 Low Bur Rul 386 (387), *Empress* v. *Kalu*.

19. (1926) 1926 Lah 1 (2): 6 Lah 528: 26 Cri L Jour 1409, *In the matter of Habib*.
(1927) 1927 Lah 610 (611). 28 Cri L Jour 727, *In re Muslim Outlook, Lahore*.
(1926) 1926 Rang 188 (189): 4 Rang 257: 27 Cri L Jour 1214, *Ibrahim Mammojee* v. *Emperor*.

Magistrates of the classes mentioned therein can try summarily forest offences of the kind specified in the Section.[20]

Sec. 260 Notes 5—6

6. Sub-Section 2.

This sub-section provides for the procedure to be followed in cases in which in the course of a summary trial the Magistrate comes to the conclusion that the case ought not to be tried in a summary way. The Code does not contain any express provision for the procedure to be followed in cases in which in the course of a regular trial the Magistrate finds that the case may be tried summarily. The question arises whether in such circumstances the Magistrate is at liberty to change his procedure to that of a summary trial. As to this, *see* Section 251, Note 4 "Change of procedure after commencement of trial."

Sec. 261

Power to invest Bench of Magistrates invested with less power.

261.* The Local Government may confer, on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class, power to try summarily all or any of the following offences :—

(*a*) offences under the Indian Penal Code, Sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 *and* 504 ;

(*b*) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month *with or without fine* ;

(*c*) abetment of any of the foregoing offences ;

(*d*) an attempt to commit any of the foregoing offences, when such attempt is an offence.

Synopsis.

	Note No.		Note No.
Legislative changes.	1	**Conservancy clauses of Police Acts.**	3
Offences triable summarily.	2		

Other Topics.

Appeal. See S. 260, Note 2.
Magistrate — Empowered. See S. 260, Note 3.
Municipal Acts—Offences under. See S. 260, Note 4, Pt. 10.

*(Code of 1882—S. 261—Same as that of 1898 Code.)

(Code of 1872—S. 225.)

Power to invest Bench of Magistrates invested with less power.

225. The Local Government may invest any Bench of Magistrates invested with the powers of a Magistrate of the second or third class with power to try summarily all or any of the following offences :—

Offences coming within Ss. 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426 and 447, I. P. C.; any offences against Municipal Acts, and the Conservancy Clauses of Police Acts, punishable with fine or with imprisonment not exceeding one month.

(Code of 1861—Nil.)

20. [See (1902) 1902 Pun L R No. 128, page 537, *Narain Singh* v. *Emperor*.]

Sec. 261 Notes 1—3

1. Legislative changes.

Differences between Codes of 1861 *and* 1872:—

There was no corresponding Section in the Code of 1861. The corresponding Section in the Code of 1872 was Section 225.

Changes made in 1882:—

The following offences were added to the list of offences triable under the Section:—

1. Offences under Sections 278 and 279 of the Penal Code.
2. Abetments and attempts to commit the offences mentioned in the Section.

Changes made in 1923:—

1. The offence under Section 504 of the Penal Code was added to the list of offences in Cl. (a).
2. The words "with or without fine" were added at the end of Cl. (b).

2. Offences triable summarily.

A Bench of Magistrates with second or third class powers cannot try *summarily* any offences except those mentioned in this Section.[1]

3. Conservancy clauses of Police Acts.

It has been held by the Madras High Court that Section 48 of the General Police Act (24 of 1859) (corresponding to Section 34 of the General Police Act 5 of 1861) which relates to obstructions and nuisances in roads within the limits of towns is a conservancy clause within the meaning of this Section.[1]

Sec. 262

262.* (1) In trials under this Chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as hereinafter mentioned.

Procedure for summons and warrant-cases applicable.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

Limit of imprisonment.

Synopsis.

* **(Code of 1872—S. 226.)**

Procedure for summons and warrant cases applicable, with certain exceptions.

226. In trials under this chapter, the provisions of this Code in regard to summons cases shall be followed in respect of summons cases, and the procedure for warrant cases in respect of warrant cases, with the exceptions hereinafter provided.

(Code of 1861—Nil).

Section 261—Note 2.

1. (1911) 12 Cri L Jour 383 (384, 385) : 1 Upp Bur R 70, *Nga San Hmi* v. *Emperor.*
(1874) 21 Suth W R Cr 12 (13), *Empress* v. *Bebheki Pathak.*

Note 3.

1. (1890) 13 Mad 142 (143, 144), *Empress* v. *Olaganandan.*

Other Topics.

Appeal. See S. 260, Note 2.
Compensation. See Note 2, F.-N. (5).
Offences requiring severe punishment. See Note 3, Pt. 2; S. 260, Note 4, Pt. 7.
Provisions applicable to summary cases. See Note 2 and Note 2, F-N. 4 to 6.
Security proceedings. See Note 3, Pt. 4.
Sentences of fines. See Note 3, Pt. 6.
Solitary confinement. See Note 3, Pt. 7.
Strict compliance with procedure. See Note 2, Pts. 6 & 7.

1. Legislative changes.

Differences between Codes of 1861 *and* 1872:—

There was no corresponding Section in the Code of 1861. The corresponding Section in the Code of 1872 was Section 226.

Changes made in 1882:—

The second paragraph was added. At the same time, the provision in Section 222 of the prior Code authorising the infliction in summary trials of any sentence that might be lawfully passed under Section 20 of the Code (corresponding to Section 32 of the present Code) was omitted.

2. Procedure to be followed in summary trials.

This Section and the following three Sections provide for the procedure to be followed in summary trials. Offences that can be tried summarily comprise both summons cases and warrant cases. This Section provides that in the summary trial of summons cases the procedure to be followed is that of summons cases and in the summary trial of warrant cases the procedure to be followed is that of warrant cases, except as otherwise provided in the Chapter. In other words, the procedure to be followed in summary trials is the same as that prescribed for ordinary trials except as otherwise provided for. Such exceptions are provided in sub-section 2 of this Section and in Sections 263 and 264.

Where there is no provision for the departure from the ordinary procedure, such procedure should be followed in summary trials as strictly as in ordinary trials. Thus, proceedings in summary trials as in ordinary trials should commence with the issue of a summons or warrant for the appearance of the accused.[1] Similarly, the following provisions apply to summary trials equally with ordinary trials: Section 191,[1a] Section 243,[2] Section 257,[3] Section 342[4] and Section 250.[5]

As to the applicability of Section 256 to warrant cases *see* Section 256, Note 2 "Scope and applicability of Section."

Even in cases where a departure from the ordinary procedure is

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Section 262—Note 2.

1. (1892) 15 Mad 83 (87), *Empress* v. *Erugadu.*
1a (1905) 2 Cri L Jour 187 (188) (Lah), *Kanhaya Lal* v. *Emperor.*
2. (1892) 15 Mad 83 (87), *Empress* v. *Erugadu.*
3. (1909) 9 Cri L Jour 583 (584) : 5 Low Bur Rul 20, *Ameer Batcha* v. *Emperor.*
(1895) Ratanlal 768 (769), *Empress* v. *Keru.*
4. (1922) 1922 Pat 5 (6) : 23 Cri L Jour 114, *Balkesar Singh* v. *Emperor.*
(1927) 1927 Cal 250 (251, 252) : 54 Cal 286 : 28 Cri L Jour 297, *Bechu Lal Kayastha* v. *Injured Lady.*
(1923) 1923 Cal 164 (164) : 49 Cal 1075 : 24 Cri L Jour 3, *Gulzari Lal* v. *Emperor.*
[But see (1924) 1924 Mad 30 (30) : 46 Mad 766 : 24 Cri L Jour 847 (F B), *Dharamsingh* v. *Emperor.* Section 342 does not apply to summons cases whether tried in the regular way or summarily.]
5. (1930) 1930 Mad 929 (929, 930) : 32 Cri L Jour 207, *Palani Goundan* v. *Krishnappa Goundan.* Reasons for ordering compensation must be recorded.
(1888) 11 Mad 142 (144), *Empress* v. *Basava.*

Sec. 262 Notes 2—3

provided for, Magistrates should be careful not to exceed the limits upto which such departure is allowed and they should follow strictly any special procedure that may be provided for summary trials in such cases. Thus Section 263 dispenses with the recording of evidence and the drawing up of a formal charge, but requires the Magistrate to draw up a statement giving the particulars mentioned in the Section. Magistrates should be careful to prepare this statement as required by the Section.[6] Similarly, in appealable cases, it is provided that a judgment containing the particulars mentioned in Section 264 should be drawn up. An omission to comply with this requirement will be an irregularity in the trial.[7]

3. Sentence that can be passed in summary trials—Sub-section 2.

This Section prohibits the infliction in summary trials of a sentence of imprisonment for any term exceeding three months.[1] The object of the Section is to restrict the passing of sentences of imprisonment of considerable length in a summary trial from a conviction in which the right of appeal is greatly restricted.[1a]

Where an accused is convicted of a number of offences in a summary trial, a separate sentence must be passed in respect of each offence,[1b] (as in any other mode of trial). But it has been held that where in such a case the accused is sentenced to imprisonment for a term of three months in respect of each offence, the sentences must be ordered to run *concurrently* and not consecutively, as otherwise, the object of the Section will be defeated.[1c]

Where a case is tried summarily and referred to a superior Magistrate under Section 349, the mere fact of such a reference being made does not make the trial other than a summary one and the Magistrate to whom the case is referred, if he does not try the case anew in any way as he is authorised to do under Section 349, cannot pass any sentence of imprisonment for a term exceeding the three months' period mentioned in this Section.[2]

But the prohibition applies only to *substantive* sentences of imprisonment. Hence, where imprisonment is ordered in default of the payment of fine the term for which such imprisonment is ordered may exceed the limits imposed by this Section.[3] Similarly, the jurisdiction of a Magistrate to order security for keeping the peace in cases coming under Section 106 is not affected by this Section[4] and where such security is ordered the power to commit to prison in

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6. (1874) 22 Suth W R Cr 28 (28), *Empress* v. *Johrie Singh.*
   (1892) 15 Mad 83 (87), *Empress* v. *Erugadu.*
   (1923) 1923 Pat 56 (56) : 23 Cri L Jour 94, *Damodar Das* v. *Empress.* Reasons for conviction must be given as required by S. 263.
7. (1894) Ratanlal 725 (725), *Empress* v. *Hussain.*

Note 3.

1. (1924) 25 Cri L Jour 240 (240) : 76 Ind Cas 704 (704) (Rang), *Nga San Ba* v. *Emperor.*
   (1909) 9 Cri L Jour 23 (23) : 4 Low Bur Rul 338, *Po Ka* v. *Emperor.*

1a (1934) 1934 Rang 116 (117) : 12 Rang 122 : 35 Cri L Jour 1413, *Emperor* v. *Nga Po Tay.*

1b (1934) 1934 Sind 185 (187) : 28 Sind L R 336 : 36 Cri L Jour 608, *Chetumal Rekumal* v. *Emperor.*

1c (1934) 1934 Rang 116 (117) : 12 Rang 122 : 35 Cri L Jour 1413, *Emperor* v. *Nga Po Tay.*

2. (1932) 1932 All 507 (507, 508) : 33 Cri L Jour 472, *Gopal* v. *Emperor.*

3. (1884) 6 All 61 (61), *Empress* v. *Asghar Ali.* [But see (1921) 1921 Lah 236 (236) : 22 Cri L Jour 145, *Ghasita Mal* v. *Emperor.*]

4. (1886) 1886 All W N 181 (181), *Empress* v. *Lachman.*
   (1904) 1 Cri L Jour 1054 (1055) : 7 Oudh Cas 338, *Meghu* v. *Emperor.*

default of furnishing the security under Section 123 is, again, unaffected by this Section.[5] Sec. 262 Note 3

The Section only restricts the term for which a sentence of *imprisonment* can be passed; it does not set any limits to the amount of *fine* that can be imposed on the convicted person.[6] Nor is the power of the Magistrate to sentence the convicted person to solitary confinement under Section 73 of the Penal Code in any way affected by the Section.[7]

Sec. 263

263.* In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter, in such form as the Local Government may direct, the following particulars:—

Record in cases where there is no appeal.

(*a*) the serial number;

(*b*) the date of the commission of the offence;

(*c*) the date of the report or complaint;

(*d*) the name of the complainant (if any);

(*e*) the name, parentage and residence of the accused;

(*f*) the offence complained of and the offence (if any) proved, and in cases coming under clause (*d*), clause (*e*), clause (*f*) or clause (*g*) of Sub-section (1) of Sec. 260, the value of the property in respect of which the offence has been committed;

(*g*) the plea of the accused and his examination (if any);

(*h*) the finding, and, in the case of a conviction, a brief statement of the reasons therefor;

(*i*) the sentence or other final order; and

(*j*) the date on which the proceedings terminated.

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* **(Code of 1882—S. 263.)**

Same as that of 1898 Code except the addition noted in Note 1.

(Code of 1872—S. 227.)

227. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses, nor the reasons for passing the judgment, nor draw up a formal charge, but he or they shall enter in a register to be kept for the purpose, the following particulars:—

Record in cases where there is no appeal.

(*a*) the serial number;

(*b*) the date of the commission of the offence;

(*c*) the date of the report or complaint;

(*d*) the name of the complainant;

(*e*) the name, parentage and residence of the accused person;

(*f*) the offence complained of or proved;

(*g*) the prisoner's plea.

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5. (1886) 1886 All W N 181 (181), *Empress* v. *Lachman*.
(1904) 1 Cri L Jour 1054 (1055) : 7 Oudh Cas 338, *Meghu* v. *Emperor*.

6. (1913) 14 Cri L Jour 105 (106) : 35 All 173, *Dinanath* v. *Emperor*.

7. (1884) 6 All 83 (83), *Empress* v. *Annu Khan*.

Sec. 263 Notes 1—2

Synopsis.

Other Topics.

Accused to know the charges against him. See Note 5, Pts. 2, 3, 5 and 7.
Appeal—Summary cases. See Sec. 260, Note 2.
Delegation to clerk of preparation of record. See Sec. 265, Note 2, Pt. 1.
Entries by whom to be made. See Note 4, Pt. 5.
Evidence. See Note 2, Pt. 2 and Note 3; Note 3 F-N. (9).
Hearing of evidence—Essential. See Note 2, Pt. 2.
Heavy and long trials—Non-summary. See Sec. 260, Note 4, Pts. 3 to 6a.
Non-compliance—Effect. See Note 2, Pt. 2; Note 7, Pts. 7 and 8.
Notes of evidence. See Note 3, Pts. 4 to 9.
Record to show the nature of offences. See Note 5, Pts. 1, 3 and 5.
Revision. See Note 7, Pts. 6, 7, and 8.
Strict compliance—Essential. See Note 4, Pt. 2; Note 2, Pt. (2).

1. Legislative Changes.

The words "nor the reasons for passing the judgment" occurring in the Code of 1872 after the words "need not record the evidence of the witnesses" have been omitted in the subsequent Codes.

The following words were for the first time introduced in the Code of 1882:—

(a) "and in cases coming under Clause (d), Clause (e) or Clause (f) of Section 260 . . . . . has been committed" in Clause (f);
(b) "and his examination if any" in Clause (g);
(c) "or other final order" in Clause (i).

1898 *Code*. The words "or Clause (g) of sub-section 1" were added.

2. Scope and applicability of the Section.

It has been seen under Section 262 that the procedure to be followed in summary trials is the same as that in ordinary trials except as may be otherwise provided. This Section provides for some of the matters in respect of which the ordinary procedure may be departed from in summary trials. It provides that in such trials the evidence of witnesses need not be recorded and that no formal charge is necessary; but that the Magistrate or Bench of Magistrates as the case may be, should enter in the prescribed form the particulars mentioned in the Section.

The Section applies only to cases in which no appeal lies.[1] The procedure applicable to cases in which an appeal lies is provided for in Section 264.

(*h*) the finding, and, in the case of a conviction, a brief statement of the reasons therefor;
(*i*) the sentence; and
(*j*) the date on which the proceedings terminated.

(Code of 1861—Nil.)

Section 263—Note 2.

1. (1878) 2 Cal L R 511 (514), *In the matter of Sher Mohomed.*

That Section provides that in appealable cases in summary trials a judgment should be prepared containing the particulars mentioned in this Section and the substance of the evidence and that such judgment shall be the only record in cases coming under the Section. The question has arisen whether the exemption from recording the evidence of witnesses for which express provision is made in this Section applies in cases coming under Section 264 also. As to this, *see* Notes under Section 264.

It has been seen in the notes under Section 262 that except in regard to matters for which a different procedure is prescribed or permitted for summary trials, it is the duty of the Magistrate in such trials to follow the rules of ordinary procedure as strictly as in ordinary trials. Thus, though this Section dispenses with the *recording* of evidence, it does not dispense with the *hearing* of evidence and a finding in a summary trial which is based on a refusal or failure to hear evidence is as much liable to be upset as a finding in an ordinary trial which is assailable on a similar ground.[2]

This Section and the other Sections in this Chapter refer only to the summary procedure in trials before Magistrates and Benches of Magistrates *other than* Presidency Magistrates. As to summary procedure in trials before Presidency Magistrates, *see* Section 362, sub-section 4, Sections 370 and 441.

There being so little to be recorded under this Section, and consequently, there being so little protection, from without, to the accused against the risk of error, haste or inaccuracy, the scanty provisions of this Section must be strictly complied with and the record must be sufficiently exact and full to enable the revisional Court to say whether the law has been complied with or not on the points to be recorded.[3]

See also Notes under Section 262.

3. "The Magistrate or Bench of Magistrates need not record the evidence of the witnesses."

This Section exempts the Magistrate or Bench of Magistrates holding a summary trial from recording the evidence of witnesses as in ordinary trials.[1] The contrary view[2] is against the express provisions of this Section and Section 354 and cannot be supported.

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2. (1912) 13 Cri L Jour 759 (760) : 39 Cal 931, *Jabbar Sheikh* v. *Tomiz Sheikh.*
(1905) 2 Cri L Jour 187 (188) (Lah), *Kanhaya Lal* v. *Emperor.*
(1913) 14 Cri L Jour 122 (123) : 35 All 136, *Rama* v. *Emperor.* Where record shows that no evidence was taken on a certain essential point, conviction must be set aside.
(1905) 9 Cal W N 237*n* (238), *Birbal Sardar* v. *Emperor.* Refusal to allow time to accused to adduce evidence in charge of theft—Summary conviction set aside.
3. (1934) 1934 Lah 596 (597) : 15 Lah 277 : 35 Cri L Jour 1464, *Abdul Rahman* v. *Emperor.*

Note 3.

1. (1906) 10 Cal W N 279*n* (279), *Mahomed Hossein* v. *Keshab Chandra.*
(1927) 1927 All 124 (125) : 49 All 261 : 28 Cri L Jour 97, *Mantoo Tewari* v *Emperor.*
(1905) 2 Cri L Jour 336 (337) (All), *Emperor* v. *Someshar Das.*
(1913) 14 Cri L Jour 122 (123) : 35 All 136, *Rama* v. *Emperor.*
(1932) 1932 Oudh 98 (98) : 7 Luck 498 : 33 Cri L Jour 342, *Ahmad Jan* v. *Emperor.*
(1900) 22 All 340 (341), *Empress* v. *Narain Singh.*
(1934) 1934 Bom 157 (158) : 58 Bom 298 : 35 Cri L Jour 841, *Tippanna Kontya Mannavaddar In re.*
(1935) 1935 Rang 106 (107) : 13 Rang 225 : 36 Cri L Jour 892, *Emperor* v. *Maung Po Saw.* Ss. 355 and 356 do not apply to summary trials.
2. (1922) 1922 Pat 5 (6, 7) : 23 Cri L Jour 114, *Balkesar Singh* v. *Emperor.*
[See (1928) 1928 Mad 928 (928) : 29

Sec. 263 Notes 3—4

Although the Magistrate or Bench of Magistrates trying a case summarily is not *bound* to record the evidence of witnesses, such recording of evidence is not prohibited and in cases of importance, it has been held that Magistrates would do well to record the evidence.[3]

Moreover, Magistrates in such cases may take *notes* of the evidence for their own information and use, and it has been laid down that where a case is likely to be adjourned to a long date the Magistrate ought to take such notes.[4] The question arises as to whether such notes of evidence, where they are taken, form part of the record or are the private property of the Magistrate which he can destroy at his option. On this question there is a conflict of decisions. On the one hand, it has been held by the Allahabad High Court[5] and the Rangoon High Court[5a] and the Oudh Chief Court[6] that such notes do not form part of the record and can be destroyed by the Magistrate at his option. But, on the other hand, it has been held by the High Court of Calcutta[7] and the Judicial Commissioner's Court of Nagpur[8] that such notes form part of the record and cannot be destroyed by the Magistrate. *See also* the undermentioned cases.[9]

This Section applies only to cases where no appeal lies. As to the question whether in cases in which an appeal lies the Magistrate is bound to record the evidence as in ordinary trials, *see* notes under Section 264.

4. "He or they shall enter . . . particulars."

This Section requires the Court in a summary trial to prepare a record in the form that may be prescribed by the Local Government containing the various particulars mentioned in Clauses (a) to (j) of the Section. By implication this dispenses with the recording of a judgment in the form laid down by Section 367.[1] But the record prescribed by this Section must be prepared scrupulously and carefully and must be complete in all the particulars specified in the Section.[2] The particulars must be recorded in separate columns; lumping

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Cri L Jour 584, *Kappal Nadar* v. *Emperor*. Court trying case summarily is not relieved of the duty of making a precise record of the evidence adduced before it.]

3. (1891) 14 Mad 223 (224), *Empress* v. *Suka Singh*.
4. (1931) 1931 Bom 142 (143) : 32 Cri L Jour 276, *Hanifbhai* v. *Mahomed Yakub*.
5. (1927) 1927 All 124 (124) : 49 All 261 : 28 Cri L Jour 97, *Mantoo Tewari* v. *Emperor*.
   (1927) 1927 All 480 (481) : 49 All 562 : 28 Cri L Jour 442, *Ismail* v. *Emperor*. [But see (1927) 1927 All 157 (157) : 49 All 131 : 28 Cri L Jour 88, *Atma Ram* v. *Emperor*. Submitted not good law in view of 1927 All 124 which was decided later and was a Bench decision.]

5a (1935) 1935 Rang 106 (107) : 13 Rang 225 : 36 Cri L Jour 892, *Emperor* v. *Maung Po Saw*.

6. (1927) 1927 Oudh 42 (43) : 28 Cri L Jour 76, *Bhawani Bhik* v. *Emperor*.
7. (1921) 1921 Cal 165 (165) : 48 Cal 280 : 22 Cri L Jour 462, *Satish Chandra Mitra* v. *Emperor*.
8. (1926) 1926 Nag 79 (79) : 26 Cri L Jour 1454, *Lal Chand* v. *Emperor*.
9. (1920) 1920 Pat 654 (654) : 21 Cri L Jour 229, *Jagdish Parsad Lal* v. *Emperor*. The Court will insist upon the production of the original record of statements made by witnesses on which the accused were convicted.
   (1920) 1920 Pat 492 (493) : 21 Cri L Jour 630, *Titlu Sahu* v. *Emperor*. *Held* that Magistrate would have exercised a better discretion if he had given accused copies of his notes of evidence.
   (1875) 24 Suth W R Cr 66 (66), *Queen* v. *Doma Ram*. A trial must be considered to be summary if the procedure is summary, notwithstanding that the record is made at great length and the decision is come to with great care.

Note 4.

1. (1920) 1920 All 79 (80) : 21 Cri L Jour 442, *Bhola Nath* v. *Emperor*.
2. (1874) 22 Suth W R Cr 28 (28), *Empress* v. *Johrie Singh*.

together in the same column all the particulars is not proper.[3] The record must be prepared at the time of the trial; its preparation after the close of the trial is not sufficient.[4] Further, the record must be prepared by the presiding officer of the Court itself. Except in cases where he is authorised to use the services of an officer appointed for the purpose under Section 265, sub-section 2, he cannot depute a clerk to prepare the record.[5]

The register prepared under this Section forms part of the record and under Section 548 the accused is entitled to copies of it if he applies for them.[6]

5. Clause (f)—Particulars of offence charged and proved.

Though this Section dispenses with the framing of a formal charge in cases coming under it, the record prepared under the Section must specify the offence complained of and proved.[1] The accused is entitled to know clearly the offence with which he is charged to the same extent as in ordinary trials.[2] The record must show that the accused was not in any way prejudiced in this respect. The specification of the offence in the record should be sufficiently full and clear to give the accused sufficient notice of what he is charged with and what he has to meet.[3] The principles in conformity with which charges must be framed in warrant cases apply to the particulars to be recorded under this Section.[4] The mere mention of the Section under which the accused is charged is not enough.[5] Similarly, the prohibition of misjoinder of charges applies to summary trials as well as ordinary trials, and the record must show that there was no misjoinder.[6] Where there are several accused the offences charged against each should be distinctly stated.[7]

Where the offence complained of is an offence of theft or other offence falling under Clauses (d) to (g) of sub-section 1 of Section 260, the value of the property in respect of which the offence was committed must also be specified in the record in order to make it clear that the offence was one which could be tried in a summary way.[8]

(1906) 4 Cri L Jour 40 (41) (Rang), *Saminathan Chetty* v. *Rangoon Municipality.*
(1899) 21 All 189 (192), *Empress* v. *Mukundi Lal.*
(1882) 1882 All W N 59 (59), *Empress* v. *Madho.*

3. (1922) 23 Cri L Jour 161 (162): 65 Ind Cas 625 (626) (Lah), *Ghulam Mahomed* v. *Emperor.*
4. (1892) 15 Mad 83 (87), *Empress* v. *Erugadu.*
5. (1883) 6 Mad 396 (399), *Subramanya Iyer* v *Queen.*
6. (1910) 11 Cri L Jour 17 (18): 1909 Pun Re Cr No. 9, *Mangi Ram* v. *Emperor.*

Note 5.

1. (1906) 4 Cri L Jour 40 (41) (Rang), *Saminathan Chetty* v. *Rangoon Municipality.*
(1882) 1882 All W N 242 (242), *Empress* v. *Chotey Lal.*
(1882) 1882 All W N 59 (59), *Empress* v. *Madho.*
2. (1882) 1882 All W N 59 (59), *Empress* v. *Madho.*
3. (1882) 1882 All W N 59 (59), *Empress* v. *Madho.*
(1912) 13 Cri L Jour 224 (224): 14 Ind Cas 320 (Cal), *Jharu Sheikh* v. *Emperor.*
4. (1912) 13 Cri L Jour 224 (224): 14 Ind Cas 320 (Cal), *Jharu Seikh* v. *Emperor.*
5. (1903-04) 2 Low Bur Rul 43 (44), *Emperor* v. *Maung Cho.*
(1906) 4 Cri L Jour 40 (41) (Rang), *Saminathan Chetty* v. *Rangoon Municipality.*
6. (1912) 13 Cri L Jour 224 (224): 14 Ind Cas 320 (Cal), *Jharu Sheikh* v. *Emperor.*
7. (1903-04) 2 Low Bur R 43 (44), *Emperor* v. *Maung Cho.*
8. (1891) 1891 All W N 183 (183), *In the matter of Sheo Sahai Bhagat.*
(1919) 1919 All 64 (64): 21 Cri L Jour 28, *Udit Narain* v. *Emperor.*
(1873) 20 Suth W R Cr 17 (17), *Empress* v. *Abheen Painda.*
(1906) 10 Cal W N 233*n* (233) *Chaitan Charan Maity* v. *Kala Chand Shamanta.*
(1922) 1922 Pat 227 (228): 25 Cri L Jour

Sec. 263 Notes 6—7

6. Clause (g)—Plea of accused and his examination (if any).

The record should contain the plea of the accused and particulars as to his examination by the Court.[1] The accused must be asked to state his plea as in ordinary trials.[2] Further the accused must be examined under Section 342 with a view to enable him to explain any circumstances appearing against him, after the case for the prosecution has been closed and before the accused is called on to enter upon his defence.[3] The use of the words "if any" in this clause does not make it optional with the Court to apply the provisions of Section 342 to summary trials.[3a] The words cover only cases where the accused pleads guilty or owing to the weakness of the prosecution evidence the accused can be acquitted without his being examined under Section 342.[4] But the examination of the accused need not be recorded in the manner laid down in Section 364.[5] (*See* Section 364, Clause 4). It has been held that even the failure to record the particulars of the examination as required by this Section is only an irregularity covered by Section 537 and does not vitiate the trial where the accused has not been prejudiced.[6]

7. Clause (h)—Finding and in case of conviction brief statement of reasons therefor.

Where the finding is one of conviction, the record must contain a brief statement of the *reasons* for conviction.[1] The statement of reasons may

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545, *Brij Nandan Panday* v. *Emperor*.

Note 6.

1. (1928) 1928 All 266 (266): 29 Cri L Jour 265, *Murat Singh* v. *Emperor*.
   (1905) 9 Cal W N 76*n* (76), *Shib Chandra Ray* v. *Nanda Rani Dasi*.
2. (1905) 9 Cal W N 76*n* (76), *Shib Chandra Ray* v. *Nanda Rani Dasi*.
3. (1922) 1922 Pat 5 (7): 3 Pat L Jour 322: 23 Cri L Jour 114, *Balkeshar Singh* v. *Emperor*.
   (1926) 1926 Nag 300 (301): 22 Nag L R 65: 27 Cri L Jour 632, *Bhagwan* v. *Emperor*.
   (1922) 1922 Pat 296 (297): 23 Cri L Jour 440, *Parmeshwar Lall Mittar* v. *Emperor*.
   (1921) 1921 Pat 11 (12): 6 Pat L Jour 174: 22 Cri L Jour 427, *Gulam Rasul* v. *Emperor*.
   (1926) 1926 Sind 1 (2): 20 Sind L R 34: 26 Cri L Jour 1554, *Emperor* v. *Nabu*.
   (1914) 1914 Cal 663 (663): 41 Cal 743: 15 Cri L Jour 190, *Mahomed Hossein* v. *Emperor*.
   [See (1922) 1922 Lah 45 (47): 23 Cri L Jour 154, *Haji Muhamad Baksh* v. *Emperor*.]

3a (1935) 1935 All 217 (219): 36 Cri L Jour 1290, *Sia Ram* v. *Emperor*.
   (1935) 1935 Sind 193 (193), *Devjimal* v. *Emperor*.

4. (1926) 1926 Sind 1 (3): 20 Sind L R 34: 26 Cri L Jour 1554 (FB), *Emperor* v. *Nabu*.
   (1926) 1926 Nag 300 (301): 22 Nag L R 65: 27 Cri L Jour 632, *Bhagwan* v. *Emperor*.

5. (1927) 1927 Pat 369 (370): 6 Pat 504: 28 Cri L Jour 1037, *Purshotam Das* v. *Emperor*.

6. (1935) 1935 All 217 (219): 36 Cri L Jour 1290, *Sia Ram* v. *Emperor*.

Note 7.

1. (1927) 1927 Nag 250 (251): 28 Cri L Jour 495, *Nisarali* v. *Secretary, Municipal Committee, Nagpur*.
   (1921) 1921 Oudh 240 (240): 24 Oudh Cas 293: 23 Cri L Jour 427, *Emperor* v. *Mian Jan*.
   (1932) 1932 Oudh 98 (98): 7 Luck 498: 33 Cri L Jour 342, *Ahmad Jan* v. *Emperor*.
   (1919) 1919 Pat 253 (253): 20 Cri L Jour 431, *Jankey Rai* v. *Emperor*.
   (1920) 1920 Pat 138 (138): 21 Cri L Jour 656, *Maqsood Alam* v. *Emperor*.
   (1923) 1923 Pat 56 (56): 23 Cri L Jour 94, *Damodar Das* v. *Emperor*.
   (1928) 1928 Mad 197 (197): 51 Mad 338: 29 Cri L Jour 207, *Lalamma* v. *Emperor*.
   (1883) 1883 All W N 114 (114), *Empress* v. *Girwar Dial*.
   (1880) 6 Cal L R 273 (275), *In the matter of Doulat Singh*.
   (1879) 1879 Pun Re Cr No. 6, page 11, *Gaggat Ram* v. *Empress*.
   (1905) 9 Cal W N 75*n*, *Emperor* v. *Haladar Maiti*.
   (1902) 6 Cal W N 40 (40), *Dinanath Talukdar* v. *Jogendra Narain*.
   (1882) 8 Cal 195 (198), *Empress* v. *Radir Nath Shaha*.
   (1933) 1933 Mad W N 736 (737), *Mabub Sahib* v. *Kesavalu Chetty*.
   (1874) 22 Suth W R Cr 28 (28), *Empress* v. *Johria Singh*.

Sec. 263 Note 7

be brief;[2] but the brevity must not tend to obscurity.[3] The statement must be sufficient to enable a Court of revision to judge whether the lower Court had sufficient material before it for convicting the accused.[4] The reasons must refer briefly to the evidence in support of the conclusions of the Court.[5] Merely saying "I believe the prosecution" is not enough as this is only a conclusion and not a reason.[5a] Where the reasons for conviction are not properly recorded, with the result that when the matter goes before a Court of revision the latter feels a doubt as to the guilt of the accused, the benefit of the doubt must go to the accused.[6] But where despite the defectiveness of the record in this particular the Court of revision is satisfied from the other material on the record that the conviction was right, it will not be upset merely because of the non-compliance with this Section, such non-compliance being merely an

(1882) 1882 All W N 242 (242), *Empress* v. *Chotey.*
(1882) 1882 All W N 59 (59), *Empress* v. *Madho.*

2. (1920) 1920 All 79 (80) : 21 Cri L Jour 442, *Bholanath* v. *Emperor.*
(1899) 21 All 189 (192), *Empress* v. *Mukundi Lal.*

3. (1899) 21 All 189 (191), *Empress* v. *Mukundi Lal.*

4. (1900-02) 1 Low Bur Rul 208 (209), *Me Da Li* v. *Crown.*
(1885) 1885 All W N 213 (213), *Empress* v. *Mohan.*
(1924) 1924 Oudh 297 (299) : 24 Cri L Jour 916, *Emperor* v. *Jagmohan Das.*
(1905) 2 Cri L Jour 375 (376) : 3 Low Bur Rul 3, *Kuchi* v. *Emperor.*
(1911) 12 Cri L Jour 280 (280) : 10 Ind Cas 921 (Rang), *Ket Foom* v. *Emperor.*
(1909) 10 Cri L Jour 216 (216) : 2 Sind L R 3, *Imperator* v. *Dino.*
(1915) 1915 Sind 53 (53) : 16 Cri L Jour 713 (714) : 9 Sind L R 89, *Ram Harakh* v. *Emperor.*
(1912) 13 Cri L Jour 708 (709) : 16 Ind Cas 516 (All), *Brij Basi Lal* v. *Emperor.*
(1906) 3 Cri L Jour 178 (180) (Cal), *Khosh Mahomed* v. *Empress.*
(1929) 1929 Lah 378 (379) : 10 Lah 231 : 29 Cri L Jour 877, *Din Muhammad* v. *Emperor.*
(1930) 1930 Lah 481 (482) : 32 Cri L Jour 50, *Atam Parkash* v. *Emperor.*
(1931) 1931 Lah 33 (38) : 32 Cri L Jour 532, *Baliram* v. *Emperor.*
(1923) 1923 Mad 185 (186) : 46 Mad 253 : 24 Cri L Jour 84, *Dervish Hussain, In re.*
(1887) 1887 Pun Re Cr No. 7, page 10, *Mehtab* v. *Empress.*
(1913) 14 Cri L Jour 594 (594) : 16 Oudh Cas 357, *Jagannath* v. *Emperor.*
(1895) Ratanlal 778 (779), *Empress* v. *Harigopal.*
(1930) 1930 Lah 481 (482) : 32 Cri L Jour 50, *Atam Parkash* v. *Emperor.*
(1918) 1918 Pat 484 (485) : 19 Cri L Jour 719, *Jankider* v. *Raghunath Lal.*
(1881) 6 Cal 579 (581), *Empress* v. *Panjab Singh.*
(1894) 18 Bom 97 (98), *Empress* v. *Shidgauda.*
(1899) 1899 All W N 81 (82), *Empress* v. *Muhammad Haniff.*
(1889) 1889 Pun Re Cr No. 5, page 40, *Sher Singh* v. *Empress.*
(1900) 27 Cal 450 (451), *Ainuddi Sheikh* v. *Empress.*
(1899) 3 Cal W N 281 (282), *Lalit Mohan* v. *Chunder Mohan.*
(1886) 1886 All W N 181 (181), *Empress* v. *Lachman.*
(1899) 13 C P L R 17 (18), *Empress* v. *Bhikia Marar.*
(1900-02) 1 Low Bur Rul 95 (96), *Vadivaloo Swamy* v. *Crown.*
(1928) 1928 All 266 (267) : 29 Cri L Jour 265, *Murat Singh* v. *Emperor.*
(1932) 1932 Oudh 98 (98) : 7 Luck 498 : 33 Cri L Jour 342, *Ahmadjan* v. *Emperor.*
(1934) 1934 Lah 596 (597) : 15 Lah 277 : 35 Cri L Jour 1464, *Abdul Rahman* v. *Emperor.* Bare reference to section of statute is not enough.

5. (1906) 10 Cal W N 279*n*, *Mahomed Hossien* v. *Keshab Chandra.*
(1899) 21 All 189 (190), *Empress* v. *Mukundi.*
(1930) 1930 Lah 481 (481) : 32 Cri L Jour 50, *Atam Parkash* v. *Emperor.*
[See (1931) 1931 Bom 142 (143) : 32 Cri L Jour 276, *Hanifabhai* v. *Mahomed Yakub.*]
(1900-02) 1 Low Bur Rul 45 (46), *Empress* v. *Bashin.*
[See also (1935) 1935 Sind 144 (144), *Dayaram Satoomal* v. *Emperor* Record should contain a clear statement of facts constituting offence and must show that each of the ingredients necessary for conviction has been considered and held proved by the Magistrate.]

5a (1934) 1934 Lah 596 (598) : 15 Lah 277 : 35 Cri L Jour 1464, *Abdul Rahman* v. *Emperor.*

6. (1931) 1931 Lah 33 (38) : 32 Cri L Jour 532-*Bali Ram* v. *Emperor.*

Sec. 263 Note 7

irregularity within Section 537.[7]

Section 441 provides that when the record of the proceeding of any Presidency Magistrate is called for by the High Court under Section 435 he may submit a written statement of the grounds of his decision and that the High Court should consider such statement before upsetting his decision. There is no such provision in the case of other Magistrates and so, when the reasons for conviction are not recorded as required by this Section and the matter goes up before a Court of revision the lower Court cannot send any written statement of its reasons for its decision for the consideration of the Court of revision.[8]

The Section requires reasons to be recorded only in case of *conviction*; no reasons need be recorded for an *acquittal*.[9]

Sec. 264

264.* (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in Section 263.

Record in appealable cases.

(2) Such judgment shall be the only record in cases coming within this Section.

Synopsis.

	Note No.		Note No.
"Judgment embodying the substance of the evidence."	**1**	**Sub-section 2—"Such judgment shall be the only record in cases coming within this Section."**	**2**

Other Topics.

Appealable summary cases. See S. 260, Note 2.
Failure to record—Effect. See Note 1, Pts. 5 to 7.
Framing of charges—Not needed. See Note 2, Pt. 2 and Note 2, F-N. (2).
Notes of evidence See Note 2, Pt. 3 and S. 263, Note 3, Pts. 4 to 9.
Records and registers. See S. 263, Note 4, Pt. 6.
Record by whom and when to be made See S. 263, Note 4, Pt. 5 and S. 265, Note 2, Pt. 1.
Substance of whole evidence and not of each witness's testimony. See Note 1, Pt. 2.
Time of record. See S. 263, Note 4, Pt. 4.

1. "Judgment embodying the substance of the evidence."

The language of the Section is imperative. In a case coming within the Section the judgment ought to embody the substance of the evidence adduced

* **(Code of 1882—S. 264**—Same as that of 1898 Code.)

(Code of 1872—S. 228.)

228. If a Magistrate or Bench of Magistrates acting under Ss. 222, 223 or 224, passes a sentence of more than three months' imprisonment, or of fine exceeding two hundred rupees;

Record in appealable cases.

or if a Bench of Magistrates acting under S. 225, convicts any person, such Magistrate or Bench of Magistrates shall, before passing sentence, record a judgment embodying the substance of the evidence on which the conviction was had, and also the particulars mentioned in S. 227. Such judgment shall be the only record in cases coming within this Section.

(Code of 1861—Nil.)

7. (1925) 1925 Bom 138 (139): 23 Cri L Jour 466, *Emperor* v. *Namdeo Lakman.*
8. (1905) 9 Cal W N 75*n* (76), *Emperor* v. *Haladar Maiti.*
9. (1906) 3 Cri L Jour 433 (436) (Rang), *Narayanaswamy* v. *A. Blake.*

on both sides.[1] The evidence of each witness need not be separately recorded and only the substance of the evidence as a whole need be given.[2] But, it is not sufficient compliance with the law to state that "the witnesses for the prosecution support the statement of the complainant" and "the statement of the witnesses examined by the accused is very conflicting."[3] Further, it must be remembered that the substance of the evidence is a matter quite distinct from the facts which may be considered as proved by the evidence. Hence, a mere statement of the facts which the evidence of certain witnesses is considered to have proved is not sufficient.[3a] The evidence must be stated plainly and must not be left to be deduced by inference.[3b] The substance of the evidence should be so recorded as to enable the appellate Court to judge if there are sufficient materials for the decision.[4]

The failure to set forth the substance of the evidence is fatal to the case[5] because it prejudices the accused in that it prevents the proper disposal of the appeal that he is enabled to make.[6]

Where the substance of evidence is not given an appellate Court need not *quash the conviction*, but may only remand the case, directing the trial Court to remedy the defect, if necessary, by re-examining the witnesses.[7]

2. Sub-section 2—"Such judgment shall be the only record in cases coming within this Section."

Section 263 expressly provides that in cases coming under that Section it is not necessary to record the evidence of witnesses or frame a formal charge. There is no such express provision in this Section. But the effect of the provision in sub-section 2 that the judgment prepared in accordance with sub-section 1 should be the only record in the case is to dispense with the recording of the

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Section 264—Note 1.

1. (1909) 9 Cri L Jour 23 (23): 4 Low Bur Rul 338, *Po Ka* v. *Emperor.*
   (1924) 1924 Oudh 167 (167): 24 Cri L Jour 484, *Salim* v. *Emperor.*
   (1874) 1874 Pun Re Cr No 2, page 4, *Bakku* v. *Emperor.*
   (1928) 1928 Bom 433 (433): 29 Cri L Jour 1005, *Nurudin Sheikh Adam* v. *Emperor.*
   (1894) Ratanlal 725 (725), *Empress* v. *Husein.*
   (1934) 1934 Oudh 177 (178): 35 Cri L Jour 677, *Emperor* v. *Akbar Ali.* Where the Magistrate merely wrote in one sentence that the accused were entitled to the benefit of the doubt and acquitted them, *held* that there was no judgment in the eye of law and that the acquittal should be set aside.
2. (1876) 25 Suth W R Cr 6 (7), *Kristodhone Dutt* v. *The Chairman of the Municipal Commissioners of the Suburbs of Calcutta.*
   (1929) 1929 Oudh 151 (152): 30 Cri L Jour 557, *Jamna Prasad* v. *Emperor.*
   [But compare (1909) 9 Cri L Jour 23 (23): 4 Low Bur Rul 338, *Po Ka* v. *Emperor.* Personality of each witness and the circumstances in which he was in a position to observe relevant facts should appear briefly but clearly on the record.]
3. (1924) 1924 Oudh 167 (167): 24 Cri L Jour 484, *Salim* v. *Emperor.*

3a. (1909) 9 Cri L Jour 23 (23): 4 Low Bur Rul 338, *Po Ka* v. *Emperor.*

3b. (1928) 1928 Bom 433 (433): 29 Cri L Jour 1005, *Nuruddin Sheikh Adam* v. *Emperor.*

4. (1909) 9 Cri L Jour 23 (23): 4 Low Bur Rul 338, *Po Ka* v. *Emperor.*
   (1929) 1929 Oudh 151 (152): 30 Cri L Jour 557, *Jamna Prasad* v. *Emperor.*
   (1878) 1 All 680 (682), *Empress* v. *Kairan Singh.*
   [See (1897) Ratanlal 934 (934), *Empress* v. *Nawajbai.*]
   [But see (1931) 1931 Mad 233 (233): 32 Cri L Jour 689, *Subramania Maistry* v. *Nachiar Ammal.*]
5. (1928) 1928 Bom 433 (433): 29 Cri L Jour 1005, *Nuruddin Sheikh* v. *Emperor.*
   (1874) 1874 Pun Re Cr No 2, page 4, *Bakku* v. *Empress.*
   (1894) Ratanlal 725 (725), *Empress* v. *Hussein.*
   (1882) 1882 All W N 178 (179), *Empress* v. *Lalji.*
6. (1928) 1928 Bom 433 (433): 29 Cri L Jour 1005, *Nuruddin Sheikh* v. *Emperor.*
7. (1878) 1 All 680 (682), *Empress* v. *Karan Singh.*

Sec. 264 Note 2

evidence of witnesses[1] and the framing of a formal charge[2] even in cases coming under this Section. Even if the evidence of witnesses is actually recorded or the Court takes rough notes of the evidence, such evidence or notes cannot form part of the record in view of the express provision of sub-section 2;[3] and the appellate Court cannot travel beyond the judgment to any other material in order to test the substance of the evidence forming part of the judgment.[4]

Sec. 265

265.* (1) Records made under Section 263 and judgments recorded under Section 264 shall be written by the presiding officer, either in English or in the language of the Court, or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother-tongue.

Language of record and judgment.

(2) The Local Government may authorize any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings.

Bench may be authorized to employ clerk.

*** (Code of 1882—S. 265)**

Same as that of 1898 Code, except the additions noted in Note 1.

(Code of 1872—Ss. 229 and 230.)

229. Records made under section two hundred and twenty-seven and judgments recorded under section two hundred and twenty-eight, shall be written by the presiding officer, either in English or in the language of the district in which the trial was held, or, by direction of the Court to which such presiding officer is immediately subordinate, in the language of the presiding officer.

Language of judgment.

Note 2.

1. (1927) 1927 All 124 (125): 49 All 261 : 28 Cri L Jour 97, *Mantoo Tewari* v. *Emperor.*
   (1927) 1927 Bom 426 (428): 28 Cri L Jour 537, *Emperor* v. *Chimanlal.*
   (1905) 2 Cri L Jour 375 (376): 3 Low Bur Rul 3, *Kuchi* v. *Emperor.*
   (1925) 1925 Sind 284 (284): 19 Sind L R 136: 26 Cri L Jour 1026, *Rahimtullah* v. *Emperor.*
   (1931) 1931 Mad 233 (233): 32 Cri L Jour 689, *Subramania Maistry* v. *Nachiar Ammal.*
   (1934) 1934 Bom 157 (158): 58 Bom 298 : 35 Cri L Jour 841, *Tippanna Koutya Mannavaddar, In re.*
   [But see (1921) 1921 Cal 165 (165): 48 Cal 280 : 32 Cri L Jour 451, *Satish Chandra Mitra* v. *Manmatha Nath Mitra.* Submitted not correct.]
2. (1926) 1926 Lah 301 (301): 7 Lah 303 : 27 Cri L Jour 639, *Emperor* v. *Salig Ram.*
   (1925) 1925 Oudh 722 (722): 26 Cri L Jour 1334, *Kallu Bari* v. *Emperor.*
   [See (1926) 1926 Cal 1202 (1203): 53 Cal 738: 27 Cri L Jour 1295, *Madab Chandra Saha* v. *Emperor.* In any case failure to frame charge is not fatal in view of Section 535 (2).]
   [But see (1924) 1924 Cal 63 (64): 25 Cri L Jour 1270, *Natabar Khan* v. *Emperor.* Submitted not correct.]
3. (1925) 1925 Sind 284 (284): 19 Sind L R 136: 26 Cri L Jour 1026, *Rahimtulla Ibrahim* v. *Emperor.* The rough notes taken by the Magistrate should not be attached to the record.
   [See also cases cited in foot-note (1) above.]
4. (1926) 1926 Mad W N 90*n* (90).
   (1927) 1927 Mad 298 (299): 28 Cri L Jour 138, *Nagoor Kanni Nadura* v. *Sithu Naick.*
   (1928) 1928 Mad 597 (598): 29 Cri L Jour 625, *Chokkalingapandaram* v. *Emperor.*

(3) If no such authorization be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record. Sec. 265 Notes 1—3

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment.

Synopsis.

Other Topics.

Delegation to clerk of preparation of record—Not warranted. See Note 2, Pt. 1.
Effect of S. 367. See Note 3, Pt. 4.
Judgment by Bench of Magistrates. See Note 2, Pt. 2.
Signature and not initials. See Note 3, Pts. 1 & 2.
Substance of whole evidence and not of each witness's evidence. See S. 264, Note 1, Pt. 2.

1. Legislative changes.

Sub-sections 3 and 4 were newly added in the Code of 1898.

2. "Shall be written by the presiding officer."

This Section provides that the record or the judgment in summary trials should be written by the presiding officer. The preparation of such record is thus the duty of the Magistrate himself and he cannot depute a clerk to do it.[1] But in cases falling under sub-section 2 the record or judgment may be prepared by the officer appointed for the purpose under it and the members of the Bench trying the case may sign the record or judgment so prepared. Where a case is tried by a Bench of Magistrates, it has been held that the record or judgment ought to be prepared in the presence of all the Magistrates forming the Bench and they must all be aware of their contents and approve of them, even though the formal pronouncement of the same may be left to be made by the Chairman of the Bench in their absence. Therefore, a record or judgment prepared by the Chairman in the absence of the other Magistrates is not valid in law, even though the others may have concurred in the *decision*.[2]

3. Signature on judgment or record.

The requirements of public policy necessitate the writing of the full name of the Magistrate who signs the judgment and the mere putting in of the initials is not a sufficient compliance with the law. Therefore, where one of the three members of a Bench trying a case summarily merely initials the judgment instead of signing his full name in it, he cannot be held to have 'signed' the judgment as required by the Section.[1] Such initialling instead of

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230. The Local Government may authorize any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer of such Court, and the record or judgment so prepared shall be signed by each member of such Bench present, conducting the proceedings.

Bench of Magistrates may be empowered to employ clerk.

(Code of 1861—Nil)

Section 265—Note 2.

1. (1883) 6 Mad 396 (399), *Subramania Iyer* v. *Empress.*
2. (1928) 1928 Mad 1172 (1172) : 52 Mad 237 : 29 Cri L Jour 973, *Ramakotiah* v. *Subba Rao.*

Note 3.

1. (1930) 1930 Mad 867 (868) : 54 Mad 252 :

Sec. 265 Note 3

signing the full name has been held to amount to an illegality and not a mere irregularity within the meaning of Section 537.[2] The signature should be made with a pen and not with a stamp.[3]

Section 367 provides that a judgment should be signed by the presiding officer of the Court. Where a case is tried summarily by a Bench of Magistrates it is provided by Clause 3 of this Section that the judgment or record prepared by a member of the Bench should be signed by every member of the Bench. Where the judgment or record is prepared by the Chairman of the Bench, will the signature of the Chairman alone be sufficient as that of the "presiding officer" under Section 367 or is it necessary that the record or judgment should be signed by each of the other members of the Bench also? On this question it has been held by the High Court of Madras that the words "the presiding officer of the Court" in Section 367 are no more than a compendious description of all classes of judicial officers, Magistrates and Judges who have to pronounce judgments; that they do not afford any assistance in the construction of this Section and that the intention of this Section is that by whomsoever the record or judgment is written, it should be signed by all the members present. Hence, the fact that the record or judgment has been written and signed by the Chairman of a Bench does not dispense with the signatures of the other members of the Bench.[4] It was, however, held in this case that the failure of the other members of the Bench to sign the record or judgment will amount only to an irregularity, if they had all, as a fact, concurred in the decision pronounced.

Where copies are furnished to the parties of the judgment or record, the copy should contain a copy of the signature of all the members of the Bench who signed the original. A copy, wherein is given the signature of only the Chairman of the Bench, is irregular.[5]

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

A.—Preliminary.

Sec. 266

266.* In this Chapter, except in Sections 276 and 307 and in Chapter XVIII, the expression "High Court" means a High Court of Judicature established under the Indian High Courts Act, 1861,

"High Court" defined.

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*(Code of 1882—S. 266.)

CHAPTER XXIII.

Of Trials before High Courts and Courts of Session.

A.—Preliminary.

266. In this Chapter, except in S. 307, the expression "High Court" means a High Court of Judicature established or to be established under the 24th and 25th of Victoria, Chap. 104, and includes the Chief Court of the Punjab, and such other Courts as the Governor-General in

"High Court" defined.

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32 Cri L Jour 430, *Brahmaiah* v. *Emperor.*

2. (1930) 1930 Mad 867 (868) : 54 Mad 252 : 32 Cri L Jour 430, *Brahmaiah* v. *Emperor.*

3. (1883) 6 Mad 396 (398), *Subramanya Iyer* v. *Empress.*

4. (1930) 1930 Mad 187 (187) : 53 Mad 165 : 31 Cri L Jour 715, *Nathan* v. *Emperor.* Dissenting from 1928 Mad 1172 (1172).

5. (1930) 1930 Mad 867 (868) : 54 Mad 252 : 32 Cri L Jour 430, *Brahmiah* v. *Emperor.*

or the Government of India Act, 1915, and includes the Chief Court of Oudh, *the Courts of the Judicial Commissioners of the Central Provinces, and Sindh* and such other Courts as the Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of this Chapter *and of Chapter XVIII.*

Synopsis.

Other Topics.

Applicability to trials under Indian Criminal Law Amendment Act (14 of 1908). See Note 2.
Burma. See Note 1, F-N. (1).
Compared with Sec. 4 Cl. (*j*). See Note 3.
Oudh. See Note 2 and Note 1, F-N. (1).
Sindh. See Note 2 ; Note 4 ; Note 1, F-N. (1).

1. Legislative changes.

Consequent on the changes in the status and constitution of the highest courts in the several provinces since the enactment of the Code of 1898, appropriate amendments and deletions have been made in the wording of this Section.[1]

The words "or the Government of India Act, 1915" were inserted by the Amending Act 13 of 1916 and the words "and Chapter XVIII" at the end of the Section were added by the Criminal Procedure Code (Amendment) Act 18 of 1923.

2. Scope and applicability.

This chapter deals with the procedure to be adopted by a Court of Session or a High Court in the trial of cases committed to it under Chapter XVIII of the Code. The language of Sections 193 and 287 implies that this Chapter has reference only to cases committed to a Court of Session. It would appear, therefore, that the procedure laid down in this chapter was not intended to be applicable to the trial of such exceptional cases as a Court of Session or a High Court may take cognizance of otherwise than on commitment as provided for in Section 193.

The material distinction between a trial held by a Magistrate and a trial under this Chapter is that while in the former the right and duty to decide

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Council may, by notification in the *Gazette of India*, declare to be High Courts for the purposes of this Chapter.

(Codes of 1872 and 1861—Nil).

Section 266—Note 1.

1. The words "The Chief Court of the Punjab" were repealed by the Repealing and Amending Act 1919 (XVIII of 1919).

The words 'The Chief Court of Lower Burma" were repealed by S. 3 and Sch. II, Repealing and Amending Act, 1923 (XI of 1923.)

The words "The Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind and" were inserted by S. 12 of Act XII of 1923.

The words "or to be established" were omitted by S. 2 and Schedule of Amending Act, 1916 (XIII of 1916.)

The words "The Chief Court of Oudh" were inserted by Act (32 of 1925.)

Sec. 266 Notes 2—4

a case rests solely in the Magistrate, in trials under this Chapter, the judge is bound by the verdict of a jury or to consider the opinion of assessors, as the case may be.

Section 14 of the Indian Criminal Law Amendment Act 14 of 1908 makes the provisions of this Chapter applicable, subject to certain prescribed conditions, to trials before the special tribunals constituted under the said Act.

This Section is merely an interpretation clause. It does not purport to confer on the Chief Courts of Central Provinces, Oudh and Sindh, the status of a Chartered High Court with original criminal jurisdiction. The Section only provides that the expression "High Court" occurring in Chapters 18 and 23 (except Sections 297 and 307) means not only a Chartered High Court, but includes within its ambit certain other specified Courts for the limited purpose of indicating the procedure to be followed by such other Courts in original criminal trials.[1]

See also Notes 3 and 4 below.

3. "High Court."

The expression "High Court" is defined in Section 4 (*j*) of the Code. But that definition is subject to the provision in Section 266 giving the expression a different meaning for certain purposes.

A High Court exercising original criminal jurisdiction is not a Sessions Court within the meaning of the Code.[1]

4. Judicial Commissioner.

It has been seen in Note 2 above that the effect of the definition of "High Court" in this Section is not to confer the status of a High Court on Courts which are not statutory High Courts, but is only to extend to such Courts the procedure applicable to statutory High Courts, in the trial of sessions cases. The Judicial Commissioner's Court of Sindh, for example, is in its constitution a Sessions Court under Section 1-A of the Sindh Courts Act 12 of 1866. But in the trial of sessions cases it is deemed to be a High Court to the extent prescribed in Section 266. As such when a Judicial Commissioner of that Court in a sessions trial disagrees with the verdict of the jury, the procedure to be adopted is that of a High Court as provided in Section 305 of this Chapter and the judge has no power of reference under Section 307.[1] The Court of a Judicial Commissioner, as for example of Sindh is a High Court only for the purposes of Chapter 23 (and of Chapter 18) and remains a Sessions Court for other purposes notwithstanding Section 266 and an appeal lies under Section 418 of the Code from the decision of a judge of that Court in a sessions trial.[2]

Note 2.

1. (1925) 1925 Sind 249 (251, 252): 19 Sind L R 309: 26 Cri L Jour 562 (F B), *Haji Khudabux* v. *Emperor*.
   (1928) 1928 Sind 149 (157, 159): 2 Sind L R 349: 29 Cri L Jour 945, *Emperor* v. *Jiand*.

Note 3.

1. (1932) 1932 Cal 867 (868): 59 Cal 1248: 34 Cri L Jour 107, *Sukumar Majumdar* v. *Emperor*.

Note 4.

1. (1925) 1925 Sind 249 (250 to 252): 19 Sind L R 309: 26 Cri L Jour 562 (F B), *Haji Khudabux* v. *Emperor*.
   (1925) 1925 Sind 34 (35): 25 Cri L Jour 428, *Emperor* v. *Mithoo*.
2. (1928) 1928 Sind 149 (152, 157, 161): 22 Sind L R 349: 29 Cri L Jour 945 (F B), *Emperor* v. *Jiand*.

Trials before High Court to be by jury.

267.* All trials under this Chapter before a High Court shall be by jury ;

and, notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent[3] of any High Court established under the Indian High Courts Act, 1861, [or the Government of India Act, 1915,] the trial may, if the High Court so directs, be by jury.

Synopsis.

Other Topics.

Jury in England and in India—Difference. See Note 1, Pts. 2 to 5.
Offences triable by jury. See S. 269, Note 2.
Offences triable with assessors. See S. 269, Note 3, Pt. 3.
Requisite number of competent assessors. See S. 268, Note 2.

1. Trial by jury.

The word "jury" means a company of men sworn to deliver a verdict upon evidence delivered to them touching the issue.[1] The system of trial by jury in England is based on the common law and on the constitutional principle that every person is entitled to demand that he be not restrained of his liberty except *per legale judicium parium suorum vel per legem terrae* so that trial by jury is the rule except in particular cases. In this country there is no such inalienable right to be tried by jury.[2] It is only a creation of statute[3] and is simply a mode of trial prescribed by the legislature in certain cases.[4] The verdict of the jury in India has therefore not got the same *sacrosanct* character as it has in England, and repugnancy in the verdict is not in itself sufficient to justify the quashing of a conviction based on such verdict.[5]

2. Criminal cases transferred to the High Court under this Code.

See Sections 449 and 526.

Where a Criminal case is transferred to the High Court, and there is no order under the Section, that it should be tried by jury, the trial will be by assessors if that is the mode of trial prescribed in the Code from which the case is transferred.

*** (Code of 1882—S. 267.)**

267. All trials under this chapter before a High Court shall be by jury ; and notwithstanding anything herein contained, in all Criminal Cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the twenty-fourth and twenty-fifth of Victoria, Chapter 104, the trial may, if the High Court so directs, be by jury.

Trials before High Court to be by jury.

(Codes of 1872 and 1861—Nil).

Section 267—Note 1.

1. *Whartons Law Lexicon.*
2. (1869) 11 Suth W R Cr 29 (30), *In re Gorachand Ghose.*
3. (1895) 19 Bom 749 (762), *Empress* v. *Ramachandra Govind Harshe.*
4. (1869) 11 Suth W R Cr 29 (30), *In re Gorachand Ghose.*
5. (1914) 1914 Cal 886 (887) : 41 Cal 754 : 15 Cri L Jour 402, *Manindra Chandra* v. *Emperor.*

Sec. 267 Note 3

3. Transfer under Letters Patent.

See Section 29 of the Letters Patent (Madras, Bombay and Calcutta) and the corresponding clause of the Letters Patent for the other High Courts.

Sec. 268

Trials before Court of Session to be by jury or with assessors.

268.* All trials before a Court of Session shall be either by jury, or with the aid of assessors.

Synopsis.

Other Topics.

Effect of trial of jury case with assessors and *vice versa*. See Note 1 and S. 269, Note 3.

Sessions Court—Trial when by jury and when with aid of assessors. See Note 1, Pt. 1.

1. Scope of the Section.

The ordinary rule is that a trial before a Court of Session is to be with the aid of assessors. A trial by jury is an exception and is provided for by Section 269 *infra*. In the absence of a notification under Section 269 trials before Sessions Courts *must* be with the aid of assessors.[1]

As to the effect of a jury trying a case triable with the aid of assessors and *vice versa*, *see* Section 536 and Note 3 to Section 269.

2. "With the aid of assessors."

In cases triable with the aid of assessors it is mandatory that the trial should commence with the requisite number of competent assessors under Section 284, but where in the course of the trial some of them are unable to attend, the trial may proceed with the aid of the other assessors (*see* Section 285).

The jurisdiction of the Sessions Judge to commence his trial and his jurisdiction to continue the trial are dependent upon his choosing the requisite number of competent assessors to aid him and on the continuation of at least one of them throughout the trial. Any finding or sentence passed by a Sessions Judge in contravention of these requisites will not be one passed by a Court of

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* **(Code of 1882—S. 268.)**

Same as that of 1898 Code.

(Code of 1872—S. 232.)

Trials to be by jury or with assessors.

232. All trials before the Court of Session shall be either by jury, or conducted with the aid of two or more assessors.

(Code of 1861—S. 324.)

Trials before the Sessions Court with assessors.

324. In a trial before the Court of Session not by jury, the trial shall be conducted with the aid of two or more assessors as members of the Court.

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Section 268—Note 1.

1. (1888) 1888 Pun Re Cr No. 18, page 32, *J. Skilling* v. *Empress.*
(1896) 1896 Pun Re Cr No. 11, page 29, *Mullineaux* v. *Empress.*

competent jurisdiction.[1] The defect is not one which can be cured by Section 537 *infra*.[2]

The scheme of the Code shows that in the view of the legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury.[3]

3. Position of the jury and of the assessors.

The jury form a tribunal or body with a foreman and their verdict is the verdict of the body or where there is no unanimity, of the majority (Section 301). In cases tried by jury, the jury is the real tribunal but is aided by the judge and in certain matters directed by the judge.[1]

The assessors, on the other hand, do not form a body, but each acts and expresses his opinion *individually*. They are only to assist the judge and take no part in the judgment. The Judge is the sole judge of law and fact and the responsibility for the decision rests only with him.[2]

In trials by jury the judge is bound to sum up the whole case to the jury and record their verdict (Section 297), while in trials with the aid of assessors, the judge *may* sum up the case and should record their opinion (Section 309).[3]

An appeal in a case tried by jury will lie on a matter of *law* only while, an appeal in a case tried with the aid of assessors will lie on a matter of fact as well as on a matter of law (Section 418).

4. Recording evidence in the absence of Jurors or Assessors.

In only one instance is a Court of Session authorised to record evidence in the absence of the jury or assessors and that is when *additional evidence* is called for by the appellate Court. *See* Section 428, sub-section 3, *infra*. Where a material evidence was recorded after the assessors were discharged the evidence so taken is recorded *coram non judice*— in the presence of a person not a pro-

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Note 2.

1. (1901) 24 Mad 523 (535), *Emperor* v. *Tirumal Reddi.*
   (1899) 21 All 106 (107), *Empress* v. *Balu Lal.*
   (1894) 1894 All W N 207 (207), *Empress* v. *Badri.* Trial begun with only one competent assessor.
   (1869) Weir 3rd Edn. 927. (Do.)
   (1891) 15 Bom 514 (515), *Empress* v. *Bastiano.* (Do.)
   (1901) 25 Bom 694 (696), *Emperor* v. *Jayaram.* (Do.)
   (1912) 13 Cri L Jour 473 (473, 474) (Mad), *Sessions Judge of Tanjore* v. *Thiyazaraja Thevan.* (Do.)
   (1902) 6 Cal W N 715 (716), *Emperor* v. *Messeruddin Shikdar.*
   (1891) 13 All 337 (338, 339), *Empress* v. *Muhammad Mahmud Khan.* Continuous attendance of at least one assessor essential
   (1910) 11 Cri L Jour 724 (725) : 13 Oudh Cas 337, *Khub Singh* v. *Emperor.* Only one competent assessor.
   (1924) 1924 Nag 287 (287) : 20 Nag L R 129 : 25 Cri L Jour 459, *Jairam Kunbi* v. *Emperor.* Trial begun with less than the number of assessors required by law.
2. (1901) 25 Bom 694 (696), *Emperor* v. *Jayram* 15 Bom 514 and 21 All 106, followed.
   (1924) 1924 Nag 287 (287) : 20 Nag L R 129 : 25 Cri L Jour 459, *Jairam Kunbi* v. *Emperor.*
   (1901) 24 Mad 523 (535), *Emperor* v. *Tirumal Reddi.*
   (1910) 11 Cri L Jour 724 (725) : 13 Oudh Cas 337, *Khub Singh* v *Emperor.*
3. (1931) 1931 Bom 313 (318) : 55 Bom 576 : 32 Cri L Jour 1147, *Lakshman Chavji Naranjikar* v. *Emperor.*

Note 3.

1. (1901) 24 Mad 523 (536, 538), *Emperor* v. *Tirumal Reddi.*
2. (1912) 13 Cri L Jour 677 (678), : 16 Ind Cas 325, (Bom), *Emperor* v. *Shankar Balwant Kulkarni.*
   (1901) 24 Mad 523 (537, 538), *Emperor* v. *Tirumal Reddi.*
   (1871) 15 Suth W R Cr 25 (25), *Empress* v. *Ameeroddeen.*
3. (1871) 15 Suth W R Cr 25 (26), *Empress* v. *Ameeroddeen.*

Sec. 268 Note 4

per judge—i. e., before a tribunal which had no authority to do it, inasmuch as the assessors and the judge *together* constitute the Court.[1] This is a material irregularity which vitiates the trial and the provisions of Section 537 *infra* do not apply to such a case.[2]

Sec. 269

269.* (1) The Local Government may, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

Local Government may order trials before Court of Session to be by jury.

(2) The Local Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

Synopsis.

*** (Code of 1882—S. 269.)**

269. The Local Government may, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any District, and may revoke or alter such order.

Local Government may order trials before Court of Session to be by jury.

When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for all such offences.

Note 4.

1. (1893) 15 All 136 (136, 137), *Empress* v. *Ram Lal.*
   (1921) 1921 All 284 (285) : 43 All 125 : 22 Cri L Jour 127, *Jaisukh* v. *Emperor.*
   (1893) 21 Cal 642 (653, 664), *Empress* v. *Sagal Sambo Sago.*
   (1906) 3 Cri L Jour 42 (43) (Bom), *Emperor* v. *Ningappa Sayadappa.* Jury case.
   (1873) 5 N W P H C R 110 (111, 112), *Empress* v. *Cheit Ram.*
   [See however (1901) 24 Mad 523 (538), *Emperor* v. *Tirumal Reddi.* Assessors do not form members of the Sessions Court.]
2. (1893) 15 All 136 (136, 137), *Empress* v. *Ram Lal.*

Other Topics.

Appeal. See Note 8, Pt. 1.
Code interfering with right of trial by jury *intra vires*. See Note 2, Pt. 1.
Conviction for minor offence not charged. See Note 3, Pt. 4.
Failure of objection at proper stage. See Note 3.
Independant and not joint opinion of assessors. See Note 7, Pt. 5a. See also S. 268, Note 3, Pt. 2.
Notification as to certain persons in respect of offences triable by jury valid. See Note 5, Pt. 1.
Offences triable by jury. See Note 2.
Offences triable with assessors. See Note 3, Pt. 3.
Opinion of all jurors as assessors not taken—Effect. See Note 10, Pt. 1, F-N. (1).
Trial of jury case with assessors and *vice versa*. See Note 3 ; See also S. 536.

1. Legislative changes.

There is no material difference between Section 322 of the Code of 1861 and Section 233 of the Code of 1872.

Difference between the Codes of 1872 *and* 1882:—

A new paragraph was added in Section 269 of the Code of 1882 to the effect that where the accused was charged with several offences some of which were and some were not triable by jury, he should be tried by jury for *all such offences*.[1]

Difference between the Codes of 1882 *and* 1898:—

1. Sub-section 2 of the present Section is new.
2. The words "he shall be tried ... ... jury" in sub-section 3 have been substituted for the words "he shall be tried by jury for all such offences" which occurred in the old Code.

2. Scope of the Section.

This Section empowers the Local Government to direct by order in the Official Gazette that the trial of all offences or of any particular class of offences before any Court of Session shall be by jury. As has been seen in the Notes to Section 267 *ante* there is no inalienable right to be tried by jury as exists under the Common Law in England. This Section, therefore, limiting the right of trial by jury to the cases notified by the Local Government under this Section and impliedly negativing such a right in other criminal

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(Code of 1872—S. 233, paras. 1 and 2.)

Local Government may order trials before Court of Session to be by jury.

233. The Local Government may order that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury, in any district ; and such Local Government may from time to time revoke or alter such order.

Orders passed under this Section shall be published in the Official Gazette, and in such other manner as the Local Government from time to time directs.

(Code of 1861—S. 322.)

CHAPTER XXIII

Of Juries and Assessors.

Local Government by order to specify in what places trials to be by Jury.

322. The Local Government may order that the trial of all offences or of any particular class of offences by any Court of Session shall be by Jury in any District, and such Local Government may from time to time revoke or alter such order. Orders passed under this Section shall be published in the Government Gazette, and in such other manner as the Local Government shall direct.

Section 269—Note 1.

1. [See (1886) 9 Mad 42 (43), *Queen* v. *Lakshmana*.]

Sec. 269 Notes 2—3

cases is *intra vires* of the Indian Legislature and does not offend Section 22 of the Indian Council's Act 1861.[1]

3. "Trial of .... shall be by jury in any District."

Where any District in a Division in which the Local Government has directed that the trial of certain offences shall be by jury, ceases to belong to such Division the right of trial by jury for such offences also ceases in that District.[1]

The words "trial of ... ... in any District" mean that the trial shall be by jury in any District *when so ordered by a notification* and not that the trial shall be by jury of offences *committed* in any District. There is not only no prohibition against the trial being otherwise than by jury in a District not affected by a notification under this Section;[2] but in view of Section 268, a trial in a Court of Session *must*, in the absence of a notification under this Section, be with the aid of assessors.[3] But a trial by jury in a case which is triable by the judge with the aid of assessors is not invalid merely on that ground. Nor is a trial with assessors in a case triable by jury invalid unless objection is taken for such trial before the Court records its finding. *See* Section 536 *infra*.

When a person is charged with an offence triable by the Judge with the aid of assessors and is tried accordingly but the assessors express the opinion that he is not guilty of the offence charged but guilty in respect of a minor offence with which he was not charged, a conviction on the opinion of the assessors for such minor offence is not invalid, even though such minor offence is triable by jury.[4]

Conversely, where an accused is charged with an offence triable by a jury and is accordingly tried by a jury, the latter has power under Section 238 *supra* to find the accused guilty of a minor offence not included in the charge though such offence is not triable by a jury but is triable with the aid of assessors.[5]

Where an offence which is not triable by a jury is tried by a jury as a matter of fact, the trial does not become other than one by a jury for purposes of appeal and an appeal is competent under Section 418, *infra* only on a matter of law.[6] In such a case also, it is not open to the Judge to treat the verdict of the jury as the opinion of the assessors.[6a]

Note 2.

1. (1910) 11 Cri L Jour 453 (456) : 37 Cal 467, *Barindra Kumar* v. *Emperor*.

Note 3.

1. (1867) 8 Suth W R Cr 39 (39), *Queen* v. *Khoodeeram*.
   [See also (1867) 8 Suth W R Cr 53 (53), *Queen* v. *Bhagidhone Katchari*.]
2. (1917) 1917 Sind 42 (2) (43) : 18 Cri L Jour 51 (51) : 10 Sind L R 154, *Emperor* v. *Jumo*.
3. (1919) 1919 Oudh 193 (194) : 22 Oudh Cas 130 : 20 Cri L Jour 691, *Sripal Singh* v. *Emperor*. Offence under S. 395, I. P. C., notified as triable by jury. Offence under S. 396 cannot be tried by Jury though it includes offence under S. 395.
   [See also S. 268, Note 1.]
4. (1921) 1921 Bom 59 (59) : 45 Bom 619 : 22 Cri L Jour 51, *Emperor* v. *Changouda*.
5. (1926) 1926 Bom 134 (135) : 27 Cri L Jour 650, *Emperor* v. *Gulab Chand*.
6. (1931) 1931 Mad W N 129 (130), *Manika Ramanna* v. *Emperor*.
   (1903) 26 Mad 243 (247, 248), *Muthusami Pillai* v. *Queen Empress*, (Per Bhashyam Iyengar, J.—Per Benson, J., *contra*). In such a case decision must be deemed to be by Judge with the aid of assessors and appeal lies on facts also.

6a (1879) 4 Cal L R 405 (409), *Bhootnath Dey, In re*.
   (1898) 25 Cal 555 (557), *Surja Kurmi* v. *Queen-Empress*.

The powers of transfer conferred on the High Court under Section 526 *infra* are not in any way limited or controlled by this Section. Hence, the trial of an offence which would in the ordinary course be by jury in a particular district, may be transferred to another district where it would be held with the aid of assessors only.[7]

4. Trial for substantive offence read with Section 149 of the Penal Code.

Where the offence under Section 325 of the Penal Code was triable by jury but all offences of rioting were excluded from jury trial and a person was charged under Sections 325 and 149 by reason of his being a member of an unlawful assembly, it was held by the High Court of Allahabad that the essential part of the offence was rioting and not the offence under Section 325 and that therefore the offence charged should be tried by the Judge with the aid of assessors.[1] On the other hand, the High Court of Patna has held that, in all cases in which an accused is charged with an offence triable by jury read with Section 149 of the Penal Code, the Court must always *first* determine whether the particular offence has been committed by an individual and *next* whether Section 149 makes the accused responsible as a participator and that therefore if the particular offence is triable by jury, such offence read with Section 149 must also be triable by jury.[2] It is submitted that the latter view is correct.

5. "Or of any particular class of offences."

The words "class of offences" is not restricted to some classification recognised by the Legislature such as is found in the Penal Code (e. g., offences against the state or against the person), or in the Criminal Procedure Code (e. g., bailable offences, cognisable offences). It may include a classification according to the *persons* who commit the offences, or in regard to the *particular occasion* in connection with which they were committed. Therefore a notification withdrawing an order for trial by jury previously notified, in respect of certain offenders whose case is pending before a Court, is not incompetent.[1]

6. Special jury list—Sub-section 2.—*See* Section 325, *infra*.

7. Charge for offences triable some by jury and others with assessors—Sub-section 3.

There was no provision corresponding to this sub-section in the Codes of 1861 and 1872, but as a matter of practice, a procedure similar to that contemplated by this sub-section was followed where, at the same trial an accused was charged with offences some of which were triable by jury and others by the Judge with the aid of assessors.[1] In the Code of 1882 it was however, enacted that, in such cases the accused should be tried for *all* the offences only by *jury*. The present sub-section 3 directs that the jury should themselves act as assessors in respect of the offences triable with the aid of

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7. (1935) 1935 Sind 145 (180) : 28 Sind L R 397 : 36 Cri L Jour 1161, *Emperor* v. *Hari*.

Note 4.

1. (1933) 1933 All 128 (129) : 34 Cri L Jour 441 : 55 All 68, *Dakhani* v. *Emperor*.

2. (1926) 1926 Pat 253 (254) : 5 Pat 238 : 27 Cri L Jour 512, *Ramsundar Isser* v. *Emperor*.

Note 5.

1. (1900) 23 Mad 632 (635), *Queen* v. *Ganapatty Vannianar*.

Note 7.

1. (1865) 5 Suth W R Cri Letters 7 (7), *Re Smith*.

Sec. 269 Note 7

assessors[2] and has thus given effect to the view that had been held before the Code of 1882.

A joint trial for different offences some of which are, and others are not triable by jury, is not illegal.[3] In fact the procedure, at the trial, for both classes of offences (i. e., those triable by jury and those with assessors) is the same, up to the point of summing up.[4] The charge to the jury is combined with the summing up to the jurors as assessors, and the Judge should clearly explain to the jurors the double capacity of jurors and assessors in which they are acting.[5] The Judge should then take the verdict of the jury in respect of the offences triable by jury and the opinion of the jurors as *assessors* in respect of the other offences charged. He should not take the verdict of the jury as juror in respect of the latter offences.[5a] In *Mavsing Bechar* v. *Emperor*[6] Chandavarkar, J., observed as follows:—

> "The law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain."

Where a verdict is given by the jury in respect of the offences triable by jury and an opinion is given by them as assessors in respect of the other offences, the judge should in respect of the verdict follow the procedure laid down in Sections 306 and 307, and in respect of the opinion, the procedure laid down in Section 309.[6a] Where the jury gave a verdict of not guilty in respect of the offences triable by jury and expressed a similar opinion as assessors in respect of the other offences charged and the judge, disagreeing with the opinion of the assessors convicted the accused in respect of the latter charges, and in the interests of justice made also a reference under Section 307 in respect of the verdict it was held that the procedure followed by the Judge was correct and that he was not bound to wait before convicting on the latter charges, till the reference to the High Court was answered.[7]

Where an accused is charged with a number of offences some of which are triable by a jury and some by the Judge with the aid of assessors

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2. (1928) 1928 Mad 275 (276) : 29 Cri L Jour 351, *Arumuga Kone, In re.*
3. (1915) 1915 Mad 1036 (1037) : 16 Cri L Jour 717 (718), *In re Sennimalai Goundan.*
4. (1909) 10 Cri L Jour 30 (31) : 33 Bom 423, *Mav Singh Bechar* v. *Emperor.*
5. (1902) 2 Weir 334 (334), *Sivaga.*
5a (1908) 7 Cri L Jour 236 (238) (Bom), *Emperor* v. *Vyankat Singh Sambhu Singh.*
6. (1909) 10 Cri L Jour 30 (31) : 33 Bom 423, *Mav Singh Bechar* v. *Emperor.*
[See also (1926) 1926 Bom 134 (135) : 27 Cri L Jour 650, *Emperor* v. *Gulabchand Dosji.*]
6a (1935) 1935 Bom 165 (166), *Emperor* v. *Mhaskukalu.* Judge may accept verdict of Jury and at the same time disregard their opinion as assessors.
(1934) 1934 All 61 (67) : 35 Cri L Jour 1349, *Ram Das* v. *Emperor.* So far as the case relating to the charge triable by Judge with the aid of assessors is concerned he is the sole Judge of facts and the opinion of the jury does not count.
(1898) 8 Bom L R 599 (600), *Emperor* v. *Kalidas Bhudar.* Reference to High Court with regard to offence not triable by Jury is illegal.
[See also (1890) 13 Mad 426 (428), *Queen-Empress* v. *Sami.* In an appeal against the decision of the Judge with regard to the offence tried with the aid of assessors, the High Court dismissed from their minds the verdict of the Jury with reference to the offence tried by the Jury.]
7. (1932) 1932 Bom 61 (62) : 33 Cri L Jour 172, *Emperor* v. *Chanbasappa Baslingappa.*

but the Judge fails to follow the procedure laid down in sub-section 3 and all the offences are tried by the jury, the irregularity in the procedure does not make the trial illegal or other than a trial by jury.[8]

The Sub-section only applies to cases where a person is charged with offences triable by a jury as well as those triable with the aid of assessors. It does not apply to a case where the accused is only charged with an offence triable by a jury but subsequently it is found on the evidence that he has committed a different offence which is triable with the aid of assessors.[9]

The provisions of this sub-section may be followed where the accused is charged with an offence triable by a jury and in the alternative with an offence triable with the aid of assessors.[10]

But the sub-section does not apply merely because an offence triable by a jury is *included* in an offence triable with the aid of assessors or *vice versa*, where only one of the offences is actually charged.[11]

8. "Same trial."

Where in the same trial a person is tried by a jury and there is also another charge tried by the Judge with the jurors as assessors, there is a right of appeal from the conviction on the latter charge under Section 410 of the Code. The words "same trial" in Sub-Section 3 must be read in a distributive sense and cannot be read as taking away the right of appeal.[1]

9. Judgment in cases tried under sub-section 3.

Where the procedure laid down in sub-section 3 of the Section was followed and the Judge stated both cases for the benefit of the jury and his summing up covered both the charges, it was held that the failure to write a separate judgment in respect of the charges triable with the aid of assessors did not vitiate the trial.[1]

10. "With the aid of jurors as assessors."

A person charged with distinct offences some of which are triable by jury and others by the Judge with assessors, is entitled under sub-section 3, to be tried for the latter offences, by the Judge with *all* the jurors as assessors. A trial with *some* of the jurors alone as assessors would be illegal.[1]

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8. (1899) 23 Bom 696 (697), *Queen Empress* v. *Jayram Haribhai*. Case can be submitted to High Court under S. 307 *infra*.
[See also (1901) 25 Bom 680 (689) (F B), *King-Emperor* v. *Parbhushankar*. In such a case the trial must be deemed to have been by a Jury within the meaning of S. 418 *infra*.]

9. (1926) 1926 Bom 134 (135) : 27 Cri L Jour 650, *Emperor* v. *Gulab Chand Dosoji*.

10. [See (1898) 22 Mad 15 (18), *Queen-Empress* v. *Anga Valayan*.]

11. (1919) 1919 Oudh 193 (194) : 22 Oudh Cas 130 : 20 Cri L Jour 691, *Sripal Singh* v. *Emperor*.

Note 8.

1. (1918) 1918 Mad 821 (823) : 18 Cri L Jour 346, *Karuppa Goundan* v. *Emperor*.

Note 9.

1. (1930) 1930 Oudh 57 (57, 58) : 1930 Cri Cas 153 : 4 Luck 721 : 31 Cri L Jour 599, *Bisheshwar* v. *Emperor*.
(1928) 1928 Mad 275 (275) : 29 Cri L Jour 351, *Arumuga Kone* v. *Emperor*.

Note 10.

1. (1903) 26 Mad 598 (599), *Ramakrishna Reddi* v. *Emperor*. Failure to take the opinion of all is not an "omission" or irregularity within the meaning of S. 537 which can be cured.
(1900) 2 Weir 332 (332), *In Re Veerabadra*. (Do.)
(1911) 12 Cri L Jour 239 (240) : 9 Ind Cas 281 (Mad), *Panjari Pakeerappa* v. *Emperor*.
(1927) 1927 Pat 13 (16) : 6 Pat 208 : 27 Cri L Jour 1100, *Abdul Hamid* v. *Emperor*.

Sec. 270

Trial before Court of Session to be conducted by Public Prosecutor.

270.* In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

Synopsis.

Note No.		Note No.
1	"Shall be conducted."	3
2		

Legislative changes.
Scope of the Section.

Other Topics.

Police Prosecutors. See S. 495.
Private Counsel—Rights of. See Note 2, Pts. 2 and 3, also S. 493.
Public Prosecutor—Definition. See S. 4, sub-S. (1), Cl. (f), also Ss. 492 and 493.
Section only directory. See Note 3, Pt. 1.

1. Legislative changes.

1. The Code of 1861 provided in Section 360 thereof that prosecution should be conducted by "The Government pleader or by some other officer specially empowered in that behalf." Under Section 235 of the Code of 1872, the prosecution was to be conducted by the "Public Prosecutor, *Government pleader or by some other officer specially empowered by the Magistrate of the District in that behalf*" and the word "Public Prosecutor" was defined as person appointed by the Local Government as such.

2. *Difference between the Codes of* 1872 *and* 1882:—

The words "Government pleader or ... ... behalf" which occurred in Section 235 of the Code of 1872 were omitted in view of Section 492 of the Code which enlarged the definition of "Public Prosecutor."

3. There is no difference between the Code of 1882 and this Code in this respect.

2. Scope of the Section.

The Public Prosecutor appointed under Section 492 *infra* represents the Crown in all trials before the Court of Session[1] and it is only such Public Prosecutor that is entitled to conduct prosecutions in a Court of Session. A counsel instructed by a *private* person cannot do so without being specially empowered by the Magistrate of the District.[2] In fact a private prosecutor has no position at all in litigation.[3] But a private complainant may under the provi-

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* **(Code of 1882—S. 270.)**
Same as that of 1898 Code.

(Code of 1872—S. 235.)

Trial before Court of Session to be conducted by Public Prosecutor, Government Pleader.

235. In every trial before a Court of Session, the prosecution shall be conducted by the Public Prosecutor, (Government Pleader, or by some other officer specially empowered by the Magistrate of the District in that behalf.)

(Code of 1861—S. 360.)

Every trial before Court of Session to be conducted by Government Pleader, &c.

360. In every trial before a Court of Session, the prosecution shall be conducted by the Government pleader or by some other officer specially empowered in that behalf, and the complainant, if there be a complainant, shall be examined as a witness in the case.

Section 270—Note 2.

1. (1893) 16 All 84 (86), *Empress* v. *Durga.*
2. Sel Cas Oudh 31.
3. (1924) 1924 Pat 283 (284) : 2 Pat 708 : 25 Cri L Jour 446, *Gulli Bhagat* v. *Narain Singh.*

sions of Section 493 *infra* instruct a counsel to appear in the case who can watch the case and act under the directions of the Public Prosecutor.

3. "Shall be conducted."

Notwithstanding the use of the word "shall" in the Section it has been held that the Section is only directory and not mandatory, and the absence of a Public Prosecutor at the beginning of the trial by reason of the omission of the Government or of the District Magistrate to appoint a public prosecutor, is only an irregularity curable by Section 537 of the Code.[1]

B.—Commencement of Proceedings.

271.* (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

Commencement of trial.

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

Plea of guilty.

Synopsis.

Other Topics.

Conviction—Discretionary. See Note 12, Pts. 1a to 4.
Conviction on the plea. See Note 13, Pts. 2 to 5.
Effect of not reading the charge. See Note 4, Pts. 4 and 5.
Plea by the pleader. See Note 10, Pts. 2 and 3.
Plea of "not guilty." See Note 9, Pt 1.
Plea of not guilty—Conviction on a confession before Magistrate. See Note 13, Pt. 1.
Plea to be considered as a whole. See Note 7, Pt. 1.
Pleas—Held to be sufficient or otherwise. See Note 7, Pts. 2 to 13.
Postponement of convictions. See Note 15, Pt 4.
Record should show the explaining of the charge. See Note 4, Pt. 3.

1. Scope of the Section.

This Section and the next contain all that is necessary as to pleading and there is no need to supplement their contents by a reference to any other

*(Code of 1882—S. 271, Code of 1872—S. 237 and Code of 1861—S. 362—Same as above.)

Note 3.

1. (1887) 1887 Pun Re Cr No. 35, page 77 (78), *Ismail* v. *Empress.*

Sec. 271 Notes 1—4

system of jurisprudence. Under this Section the accused can plead guilty or claim to be tried or he can refuse to plead which is taken to be the same as claiming to be tried.[1]

2. "Commencement of proceedings."

The preliminary proceedings referred to as "Commencement of proceedings" in the heading above this Section are not any part of the actual *trial* of the case.[1] It is only where, under the next Section, the accused refuses to plead or does not plead or claims to be tried and the Court chooses the jurors or assessors that the *trial* begins.[2] (*See* Section 286 *infra*). It follows therefore that the trial does not begin with the reading of the charge under this Section.[3]

3. "The accused shall appear or be brought."

As a general rule a convict should be relieved of his chains when brought before a Court for trial or as a witness. There can be no question that the display of fetters must have a prejudicial effect against him in the eyes of jurors or assessors. The exception to this rule should be when the superintendent or the keeper of the jail certifies that the use of the chain is necessary to guard against violence or an attempt to escape. But the judge cannot refuse to try an accused brought in fetters though he can direct the removal of the same.[1]

4. "And the charge shall be read out in Court and explained to him."

The actual charge sheet is an important document, and should be drawn up with care and caution so that the accused may have no doubt whatever as to the offences which he is called upon to answer. When a record is prepared for an appeal it should be seen whether there is on the record a charge which has been read and explained to the accused and if it is absent the reason therefor should be ascertained.[1] A mere reading out of the charge is not enough; it should be *explained* to the accused[2] and the record should

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Section 271—Note 1.

1. (1914) 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cri L Jour 460, *Emperor* v. *Nirmal Kanta Roy.*

Note 2.

1. (1927) 1927 Bom 161 (162) : 28 Cri L Jour 402, *Emperor* v. *Dorabji Pestonji Gora.*
2. (1931) 1931 Cal 341 (343): 1931 Cri Cas 405 : 58 Cal 1214 : 32 Cri L Jour 667, *Mahammad Yusuf* v. *Emperor.*
   (1925) 1925 Lah 446 (447) : 6 Lah 262 : 27 Cri L Jour 421, *Emperor* v. *Fitz-Maurice.*
   [See however (1933) 1933 Cal 354 (355) : 60 Cal 643 : 34 Cri L Jour 611, *Sudhindra Kumar Roy* v. *Emperor.* Assumed that trial may begin though jury not chosen—It is submitted that this view is incorrect]
3. (1890) 15 Bom 514 (515), *Queen* v. *Bastiano.*

Note 3.

1. (1869) 4 Mad H C Rul App 69 (69).

Note 4.

1. (1920) 1920 All 72 (73) : 21 Cri L Jour 410, *Jagdeo Prasad* v. *Emperor.*
   (1888) Ratanlal 386 (386), *Empress* v. *Sarwel.*
   [See also (1935) 1935 Oudb 241 (243): 36 Cri L Jour 477, *Munnoo Lal* v. *Emperor.*]
2. (1901) 3 Bom L R 489 (496), *Emperor* v. *Trimbaka Bewaji.*
   (1886) 9 Mad 61 (63), *Aiyavu* v. *Empress.*
   (1880) 5 Cal 826 (827), *Empress* v. *Vaimbilee.*
   (1886) Ratanlal 229 (236), *Empress* v. *Nepal.*
   (1906) 4 Cri L Jour 346 (352) : 30 Bom 611, *Empress* v. *Kothia Navalya Bhil.*
   (1917) 1917 Oudh 362 (366, 367) : 18 Cri L Jour 742 : 20 Oudh Cas 136, *Kesho Singh* v. *Emperor.*
   (1923) 1923 All 285 (286) : 25 Cri L Jour 592, *Jodha Singh* v *Emperor.*
   (1904) 1 Cri L Jour 746 (748) (Bom), *In re, Sitaram Shivambat.*
   (1919) 1919 Upp Bur Rul 23 (23) : 3 Upp Bur Rul 137 : 20 Cri L Jour 540, *Nga Han* v. *Emperor.*
   (1884) 2 Weir 336 (336), *Garrapu Margadu, In re.*

show that the charge has been read out and explained to the accused.[3] Where a deaf and dumb person was convicted of an offence upon a trial without an attempt to communicate with him respecting the charge against him, the conviction was set aside.[4] But where the accused is defended by a counsel and the charge is read out and the counsel does not object, the omission to explain is only an irregularity if it has not caused any prejudice to the accused and is cured by Section 537 *infra*.[5]

Before reading out the charge, the judge should scrutinise the charge as to whether it requires any amendment before the accused is called on to plead thereto.[6]

5. "He should be asked whether he is guilty."

The Court is bound to ask the accused whether he is guilty of the offence charged or claims to be tried. If he is charged with any previous conviction, he should be asked about it also, and his plea taken.[1] A conviction cannot be supported where the accused has not been asked whether he is guilty or claims to be tried.[2]

An accused person should not, however, be encouraged to plead guilty in the hope of receiving a lenient punishment.[3]

If, *before* the commencement of the proceedings, the judge considers that there is no evidence to warrant a commitment he should refer the case to the High Court for getting the commitment quashed under Section 215 *ante*.[4]

An objection as to jurisdiction of the Court to try the case should be taken before the plea is taken and the jury sworn.[5]

6. Alternative charges.

An accused should never be called on to plead in the alternative but only separately as to each of the heads of a charge.[1]

7. "If he pleads guilty."

In order to see whether the accused has pleaded guilty or not, the *whole* and not merely a part of his statement should be considered.[1] There is

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(1885) 2 Weir 337 (338) : 9 Mad 61 (63), *Aiyavu Nadan* v. *Empress*.

2. (1881) 7 Cal 96 (97), *Empress* v. *Gopal Dhanuk*.
(1893-1909) 1893-1909 Low Bur Rul 328 (328), *Nga Nye* v. *Queen*.

4. (1870-71) 6 Mad H C R App 7 (7) : 2 Weir 11, *Thomas Nash Turnbull, In re*.

5. (1884) 8 Bom 200 (212), *Queen* v. *Appa*.
(1886) Ratanlal 229 (236), *Queen* v *Nepal*.
(1886) 2 Weir 339 (339), *In re Singa*.

6. (1918) 1918 Mad 821 (822) : 18 Cri L Jour 346, *Karuppa Goundan* v. *Emperor*.

Note 5.

1. (1902) 4 Bom L R 177 (177), *Emperor* v. *Govind Sakharam*.

2. (1905) 9 Cal W N 76*n* (76*n*), *Shib Chunder* v. *Nanda*.

3. (1916) 1916 Upp Bur 1 (1) : 17 Cri L Jour 402 . 2 Upp Bur Rul 113, *Nga Kyaw Zan Hla* v. *Emperor*.

4. (1901) 5 Cal W N 411 (412), *Emperor* v. *Jogeshwar*.

5. (1871) 15 Suth W R Cr 71*n* (74*n*), *Queen* v. *Nabadwip*.
(1868) 1 Beng L R O Cr 1 (7), *Queen* v. *Thompson*.
(1862-63) 1 Mad H C R App 31 (36), *In re Willians*.

Note 6.

1. (1887) Ratanlal 327 (327), *Empress* v. *Lakshman*.

Note 7.

1. (1918) 1918 All 353 (354) : 40 All 119 : 19 Cri L Jour 174, *Ashbey Clarke Harris* v. *Emperor*.
(1866) 5 Suth W R Cr 70 (70), *Queen* v. *Chokoo*.
(1867) 7 Suth W R Cr 39 (39), *Queen* v. *Greedhary Manjee*.
(1914) 1914 All 558 (558) : 16 Cri L Jour 103, *Surjan Singh* v. *Emperor*.
(1894) 21 Cal 955 (976), *Wafadar Khan* v. *Empress*
(1885) 11 Cal 410 (412), *Netai Laskar* v. *Empress*.

Sec. 271 Note 7

no such language as pleadings in a Criminal Court and an accused person cannot be judged in a criminal case, by *how* he pleads or fails to plead in the proceeding.[1a]

A plea of guilty on which the Court can act must be a plea of guilty of the offence charged *without any qualification*. The judge should see whether or not the man understood what the charge was in order to ascertain what he meant by his plea of guilty.[2] Thus where the accused instead of pleading guilty in the words of the Section makes a rambling statement more or less admitting guilt, it would be much safer if the judge records a plea of not guilty and proceeds to try the case in the ordinary way.[3] The plea of guilty must distinctly admit each and every fact necessary to constitute the offence. Thus where the accused merely admits that he beat his wife and that she died but does not admit that he had any intention of causing such bodily injury as was likely to cause death, it is not a sufficient plea of guilty to the charge of murder.[4] Similarly where an accused, while admitting that he killed the deceased, states that he was not in his right mind at the time[5] or that he did it under grave and sudden provocation[6] or that he was put to instant fear of death by the co-accused[7] or that he did it while under epileptic fits[8] or in a struggle arising from the fact of the deceased having first attacked him,[9] he cannot be said to have pleaded guilty to the charge of murder. Likewise where an accused, while admitting having presented a false petition, states that he did so under the influence of certain persons mentioned[10] or unthinkingly without the intention to injure[11] he cannot be said to have pleaded guilty to the charge of intentionally giving a false complaint.

Where the prisoner states that he is guilty but adds that he did not commit the offence with which he is charged, it does not amount to a plea of guilty.[12] Where a prisoner accused of dacoity admitted having accompanied

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(1876) 25 Suth W R Cr 23 (24), *Queen* v. *Sonoollah.*
(1867) 8 Suth W R Cr 38 (38), *Queen* v. *Sheikh Boodhoo.*
(1885) 9 Mad 61 (63), *Aiyavu* v. *Empress.*
(1911) 12 Cri L Jour 142 (142) : 9 Ind Cas 790 (Mad), *Kamakka* v. *Emperor.*
(1932) 33 Cri L Jour 570 (571) : 138 Ind Cas 217 (218) (Lah), *Faqir Mohammad* v. *Emperor.*

1a (1924) 1924 All 299 (300) : 46 All 64 : 25 Cri L Jour 327, *Umed Singh* v. *Emperor.*
(1911) 12 Cri L Jour 585 (587) : 36 Mad 457, *G. G. Jeremiah* v. *F. S. Vas.*

2. (1898) 1898 All W N 16 (16), *Queen* v. *Dhiyan Singh.*
3. (1908) 7 Cri L Jour 295 (296) (All), *Emperor* v. *Deoki.*
4. (1884) 2 Weir 336 (337), *Gurapu Marigadu, In re.*
(1906) 8 Cri L Jour 337 (338) (Bom), *Emperor* v. *Chinia Bhika Koli.*
(1876) 25 Suth W R Cr 23 (24), *Queen* v. *Sonoollah.*
(1870) 2 N W P H C R 479 (480), *Queen* v. *Hursookh.*
(1890) 14 Bom 564 (566), *Queen* v. *Sakharam.*
(1888) 1 C P L R 25 (26), *Queen* v. *Adhika.*
5. (1873) 5 N W P H C R 110 (111), *Queen* v. *Chit Ram.*
6. (1885) 11 Cal 410 (412), *Netai Laskar* v. *Queen.* Provocation pleaded.
(1891) Ratanlal 532 (532, 533), *Queen* v. *Lakshman.*
(1914) 1914 All 558 (558) : 16 Cri L Jour 103, *Surjan Singh* v. *Emperor.*
(1920) 1920 Cal 522 (523) : 21 Cri L Jour 547, *Emperor* v. *Akub Ali.*
(1864) 1 Suth W R Cr 17 (18), *Queen* v. *Gour Chandra.*
(1867) 8 Suth W R Cr 38 (38), *Queen* v. *Sheikh Boodhoo.*
(1899-1901) 1 Upp Bur Rul 76 (76), *Nga Shwe Kye* v. *Empress.*
7. (1886) 9 Mad 61 (63), *Aiyavu* v. *Empress.*
8. (1894) Ratanlal 698 (698), *Queen* v. *Mhatarya.*
9. (1880) 5 Cal 826 (828), *Empress* v. *Vaimbilee.* [See (1869) 11 Suth W R Cr 6 (6). *Queen* v. *Jaipal Koiree.* Charge of grievous hurt.]
10. (1886) 1886 All W N 66 (66), *Queen* v. *Sundar.*
11. (1881) 7 Cal 96 (97), *Queen* v. *Gopal Dhanuk.*
12. (1869) 11 Suth W R Cr 53 (53), *Queen* v. *Mittun Chowdhry.*

the dacoits for a short distance but stated that he turned back immediately and had nothing to do with the dacoity, it was held that it did not amount to a plea of guilty to the charge of dacoity.[13]

Where a native Indian subject charged with the murder of another native Indian subject in a foreign territory admitted the causing of death but stated that he was not punishable for the act as the act was committed outside British India, the plea is really one of not guilty.[14]

After the accused has claimed to be tried, any confessional statement made by him at the end of trial is not a plea of guilty on which the Judge can convict him without taking the verdict of the jury.[15]

The use of expressions like "Your honour will please pardon the fault; in future, no such thing will happen" is not itself an incriminating statement.[16]

A plea of guilty is not a *confession* such as is dealt with in the Evidence Act. The plea is a statement which if accepted by the Court, amounts to a waiver on the part of the accused, of trial, in which alone a confession might be utilised in evidence.[17]

8. Partial plea of guilty.

Where in a charge of intentionally giving false evidence in two alternate statements, the accused pleads guilty, as to one, it does not by any means follow that a verdict of not guilty is to be recorded in the alternative matter of the charge. That ought to be tried in the ordinary way.[1] Where the prisoner pleads not guilty to the graver offence charged but guilty to the minor offence charged the Court should proceed to try him for the graver offence. It is not competent to the Public Prosecutor to withdraw the charge after the accused had been arraigned and pleaded not guilty. The prisoner is entitled to a trial and a clear verdict of the jury.[2]

9. "Claims to be tried."

A plea of "*not guilty*" is not recognised by the Code. The accused can plead *guilty* under this Section; he can *claim to be tried* or he can refuse to plead which amounts to the same thing as claiming to be tried. A plea of *not guilty* amounts to a claim to be tried.[1] Where an accused claims to be tried or makes a plea which amounts to such a plea the Court should regularly try the accused and cannot convict him on a confession before the committing Magistrate.[2] In such cases there should be a formal trial by the jury or with the aid

13. (1867) 7 Suth W R Cr 39 (39), *Queen* v. *Greedhary Manjee.*

14. (1883) 1883 Pun Re Cr No. 22 page (50), *Fakir* v. *Empress.*

15. (1866) 2 Weir 334 (335), *Anonymous.*
(1905) 2 Cri L Jour 609 (610) (Bom), *Emperor* v. *Bai Nani.*

16. (1912) 13 Cri L Jour 62 (63) : 13 Ind Cas 398 (Cal), *Jang Bahadur Lal* v. *Emperor.*

17. (1934) 1934 Pat 330 (334) : 1934 Cri Cas 722: 35 Cri L Jour 1322, *Shyama Charan* v. *Emperor.*

Note 8.

1. (1866) 8 Suth W R Cr Letters 6 (6), *Thako Chokree, In re.*
(1872) 8 Beng L R App 25 (26), *Queen* v. *Hossain Ali.*

2. (1866) 5 Suth W R Cr 4 Letters (4), *Bissonath In re.*

Note 9.

1. (1914) 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cri L Jour 460, *Emperor* v. *Nirmal Kanta.*
(1931) 1931 Cal 341 (343): 1931 Cri Cas 405: 58 Cal 1214 : 32 Cri L Jour 667, *Mahammad Yusuf* v. *Emperor.*

2. (1870) 2 N W P H C R 479 (480), *Queen* v. *Harsookh.*
(1886) 1886 All W N 22 (23), *Queen* v. *Tika Ram.*

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of assessors.[3] If the accused, claiming to be tried, pleads that his act comes under any general exceptions of the Indian Penal Code he must plead them specifically. In the absence of such a plea, the absence of such circumstances will be presumed under Section 105 of the Indian Evidence Act.[4] But this does not mean that the accused must lead the evidence. If it is apparent from the evidence on the record, whether produced by prosecution or by the defence that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception.[5] Thus where a right of private defence is not pleaded, the Court on finding on the evidence before it that the accused acted in his right of private defence, is bound to take cognisance of the same.[6]

10. Plea must be by the accused himself.

The accused should plead by his *own mouth*[1] and not by his pleader[2] unless such pleader has been permitted by the Court to appear in the place of the accused.[3]

As to admissions by pleader, *see* the undermentioned cases.[4]

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3. (1873) 5 N W P H C R 110 (112), *Queen* v.
(1890) 14 Bom 564 (566), *Queen* v. *Sakharam valad Ramji.*
(1888) Ratanlal 410 (410, 411), *Queen* v. *Malhari.*
(1904) 1 Cri L Jour 772 (773) (Bom), *Emperor* v. *Mahmad Ismail.*
(1905) 2 Cri L Jour 609 (610) (Bom), *Emperor* v. *Bai Nani.*
(1907) 6 Cri L Jour 424 (425) (Bom), *Emperor* v. *Somabhai Nathabhai.*

4. (1915) 1915 Cal 773 (778) : 30 Ind Cas 113 (117): 16 Cri L Jour 561, *Emperor* v. *Upendranath Das.*
(1916) 1916 Cal 633 (636) : 16 Cri L Jour 724, *Emperor* v. *Dwijendra Chandra Mukerji.*
(1922) 1922 Lah 1 (20) : 3 Lah 144 : 23 Cri L Jour 513, *Mahant Narain Das* v. *Emperor.*
(1904) 1 Cri L Jour 427 (427) (All), *Emperor* v. *Gullu.*
(1910) 11 Cri L Jour 374 (375) : 32 All 451, *Emperor* v. *Wajid Hussain.*
(1912) 13 Cri L Jour 905 (911): 17 Ind Cas 1001 (1007) (Cal), *Jhakri Chamar* v. *Emperor.*
(1920) 1920 Cal 39 (40) : 21 Cri L Jour 317, *Mantajali* v. *Emperor.*
(1925) 1925 Cal 1214 (1214), *Kali Das Raha* v. *Deodhari Mistri.*
(1927) 1927 Cal 324 (326) : 28 Cri L Jour 384, *Adam Ali Taluqdar* v. *Emperor.*
(1898) 1898 All W N 210 (210), *Queen-Empress* v. *Sukhai.*
(1898) 1898 All W N 209 (210), *Queen* v. *Chakuri.*
(1898) 21 All 122 (124), *Queen* v. *Tirumal.*
(1880) Ratanlal 229 (230, 238), *Queen* v. *Nepal.*
(1878) 1 Cal L R 62 (65), *Jamsheer Sirdar In re.*

5. (1923) 1923 All 327 (328) : 45 All 329 : 24 Cri L Jour 225, *Mt. Anandi* v. *Emperor.*
(1911) 12 Cri L Jour 18 (18) : 8 Ind Cas 1088 (Mad), *In re Garugu Ramayya.*
(1912) 13 Cri L Jour 905 (911) : 17 Ind Cas 1001 (Cal), *Jhakri Chamar* v. *Emperor.*

6. (1924) 1924 All 645 (651) : 26 Cri L Jour 501, *Emperor* v. *Kishen Lal.*
(1924) 1924 All 694 (694) : 25 Cri L Jour 472, *Umed Singh* v. *Emperor.* Plea of justification should be considered in a defamation case even though not raised.
(1882) 11 Cal L R 232 (233), *In the matter of Kali Churn Mookerjee.*
(1897) 1 Cal W N 545 (547), *Pasput Gope* v. *Ram Bhajan Ojha.*

Note 10.

1. (1904) 1 Cri L Jour 939 (939) (Bom), *Emperor* v. *Sursing Mathuradas.*
(1871) 15 Suth W R Cr 42 (42), *Queen* v. *Roopa Gowalla.*

2. (1904) 1 Cri L Jour 939 (939) (Bom), *Emperor* v. *Sursing Mathuradas.*
(1900) 2 Bom L R 751 (752), *Queen* v. *Sangaya.* Plea of guilty by a pleader appointed by the Court to defend the accused on a charge of murder is not binding on the accused.

3. (1926) 1926 Bom 218 (222) : 50 Bom 250 : 27 Cri L Jour 440, *Dorabshah Bomanji Dubash* v. *Emperor.*

4. (1920) 1920 All 99 (101) : 21 Cri L Jour 777, *Sheo Narain Singh* v. *Emperor.*
(1872) 17 Suth W R Cr 49 (49), *Queen* v. *Kazim Mundle.*
(1890) 1890 Pun Re Cr No. 2, page 5, *Shib Ram* v. *Simla Municipal Committee.*

11. Record of the plea.

If the accused pleads guilty, the Court should make a record of such plea.[1] It is not the duty of the Court, at the time of recording such plea, to decide whether any statement accompanying it is true or false. Any such statement must be regarded only as explanatory of the plea.[2] The whole of the statement made by a prisoner should be recorded as nearly as possible in the very words used by him, though it need not be recorded in a foreign language unknown to the Court or Magistrate, the use of which makes it necessary to have recourse to an interpreter. The language in which the statement is conveyed to the Court by the interpreter is the language in which it should be recorded.[3] The plea of guilty should be taken down in the form of question and answer and in the exact words used by the accused.[4]

It is also desirable that shorthand notes of proceedings of Sessions Courts should be maintained so as to ensure a full and accurate record of what happens in Court.[5]

12. Plea of guilty—When may be accepted.

A plea of guilty may be accepted by the Court and he may be convicted thereon without the matter going before the assessors or the jury.[1a] But the Court is not *bound* to accept a plea of guilty in all cases. On the other hand, the Court must carefully consider whether the accused has fully understood the nature of the charge to which he pleads guilty.[1b] In cases where, the natural sequence of accepting the plea of guilty would be a sentence of death it is not in accordance with the usual practice to accept a plea of guilty.[1] Murder is a mixed question of law and fact and unless the Court is satisfied that the accused knew exactly what was implied by his plea of guilty, the plea should not be accepted but the case should be tried, specially where the accused

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Note 11.

1. (1907) 6 Cri L Jour 434 (436) (Cal), *The Deputy Legal Remembrancer* v. *Upendra Kumar Ghose.*
   (1908) 7 Cri L Jour 295 (296) (All), *Emperor* v. *Deoki.*
   (1908) 8 Cri L Jour 380 (381): 30 All 540, *Emperor* v. *Kheoraj.*
   (1888) 1 C P L R 25 (26), *Queen* v. *Mussammat Adhika.*
   (1910) 11 Cri L Jour 193 (193): 4 Ind Cas 1126 (Mad), *In re Sadayan.*
   (1900) 23 Mad 151 (154), *Queen* v. *Chinna Povuchi.*
   (1931) 1931 Cal 341 (343): 1931 Cri Cas 405: 58 Cal 1214: 32 Cri L Jour 667, *Mahomed Yusuf* v. *Emperor.*
   (1881) 7 Cal 96 (97), *Queen* v. *Gopal Dhanuk.*
   (1926) 1926 All 318 (320): 27 Cri L Jour 449, *Shanker* v. *Emperor.*
   (1888) Ratanlal 386 (386), *Queen* v. *Sarwel.*
   (1917) 1917 Bom 220 (221): 18 Cri L Jour 699, *Laxmaya Shiddappa* v. *Emperor.*
2. (1891) Ratanlal 532 (532), *Queen* v. *Lakshman.*
3. (1880) 5 Cal 826 (830), *Queen* v. *Vaimbilee.*
4. (1903) 5 Bom L R 999 (1000), *Emperor* v. *Abdul Hoosain Shamsuddin.*
5. (1924) 1924 Cal 257 (288): 25 Cri L Jour 817, *Emperor* v. *Barendra Kumar Ghose.*

Note 12.

1a (1867) 8 Suth W R Cr 21 (21), *Nobid Mali, In re.*
   (1867) 8 Suth W R Cr L 6 (6), *In re Thakochokree.*
   (1866) 6 Suth W R Cr L 4 (4), *In re Neamut.*
   (1866) 5 Suth W R Cr L 2 (2), *In re Kellii.*
   (1866) 6 Suth W R Cr L 3 (3), *In re Aljoo.*
   (1866) 2 Weir 335 (335).
   (1868) 10 Suth W R Cr 43 (43) (F B), *Queen* v *Sree Kant Charal.*
   (1905) 2 Cal L Jour 18*n* (18*n*), *Magha Sheik* v. *Emperor.*
   (1934) 1934 Pat 330 (334): 1934 Cri Cas 722: 35 Cri L Jour 1322, *Shyama Charan* v. *Emperor.*

1b (1935) 1935 Rang 49 (51): 1935 Cri Cas 176: 12 Rang 616: 36 Cri L Jour 336, *Nga Ywa* v. *Emperor.*

1. (1900) 23 Mad 151 (154), *Queen* v. *Chinna Poruchi.*
   (1928) 1928 Cal 775 (776): 30 Cri L Jour 508, *Hasaruddin Mohommad* v. *Emperor.*
   (1917) 1917 Bom 220 (221): 18 Cri L Jour 699, *Laxmaya Shiddappa* v. *Emperor.*
   (1906) 3 Cri L Jour 337 (338) (Bom), *Emperor* v. *Chinia Bhika Koli.*

Sec. 271 Notes 12—13

is an ignorant person.[2] An accused person does not plead to a Section of a criminal statute. He pleads guilty or not guilty to the facts alleged that disclose an offence under that Section. Sometimes a "plea of guilty" is an admission only of the facts alleged and not the offence as when such facts do not in law constitute the offence.[3] So a plea of guilty cannot be accepted when the offence in question has not been committed in the eye of law.[4] A plea of guilty cannot be accepted when it is clear that the offence was not correctly stated to him.[5] Each case depends, however, upon its own circumstances which should be examined to see whether the plea of guilty is one which should be acted upon;[6] where the prisoner has the services of a pleader and a plea of guilty is made advisedly, the Court can certainly convict him on his plea.[6a] But where an accused, who is charged for an offence under Section 302 Penal Code (for which there is a clear *prima facie* evidence) pleads guilty to an offence under Section 304 Penal Code, the Court cannot accept the plea of guilty but should proceed to try him for the offence charged.[7] There is no provision for an inquiry for the purpose of seeing if it is right and proper to convict the accused on his plea; if any such enquiry is necessary it should take the form of a trial and be conducted as such.[8]

Though the Section provides for a conviction being based on the accused's plea of guilty entered at the *commencement* of the proceedings, this does not mean that if at any later stage the accused pleads guilty the Court is not entitled to record the plea and convict the accused on such plea.[9]

13. "Thereon" in sub-section 2.

The word 'thereon' shows that the conviction is on the plea recorded before the Sessions Judge and has no reference to what has passed before the Magistrate in the preliminary enquiry. So if the accused makes a plea which amounts to a claim to be tried before the Sessions Judge he cannot be

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(1906) 3 Cri L Jour 80 (81): 1905 Pun Re Cr No. 54, *Pala Singh* v. *Emperor.*
(1934) 1934 Sind 204 (205): 1934 Cri Cas 1410: 28 Sind L R 327: 36 Cri L Jour 324, *Achar Sanghar* v. *Emperor.*

2. (1922) 1922 All 233 (233): 23 Cri L Jour 283, *Dalli* v. *Emperor.*
(1922) 1922 All 266 (267): 24 Cri L Jour 609, *Mt. Sukhia* v. *Emperor.*
(1897-1901) 1 Upp Bur Rul 78 (79), *Nga San Daik* v. *Queen.*
(1905) 2 Cal L Jour 18*n* (18*n*), *Magha Sheikh* v. *Emperor.*
(1897-1901) 1 Upp Bur Rul 72 (72), *Mi Nyein* v. *Queen*
(1897) 19 All 119 (120), *Queen* v. *Bhadu.*
(1925) 1925 All 647 (647, 648): 26 Cri L Jour 1316, *Lahori* v. *Emperor.*
(1925) 1925 Sind 188 (189): 17 Sind L R 268: 26 Cri L Jour 177, *Emperor* v. *Kasim Walad Mohammed Saffer.*
(1906) 3 Cri L Jour 317 (318) (Kathiawar), *Emperor* v. *Woman Behni Bechar.*
(1866) 1866 Pun Re Cr No. 47, page 56, *Queen* v. *Zoolfoo.*
(1868) 1868 Pun Re Cr No. 3, page 6, *Queen* v. *Chongutta.*
(1906) 3 Cri L Jour 337 (338) (Bom), *Emperor* v. *Chinia Bhika Koli.*

3. (1915) 1915 Cal 153 (153): 15 Cri L Jour 703, *Gaya Roy* v. *Emperor.*
(1926) 1926 Lah 406 (406): 7 Lah 359: 27 Cri L Jour 907, *Basant Singh* v. *Emperor.*
(1932) 1932 Lah 363 (364): 1932 Cri Cas 492: 33 Cri L Jour 646, *Bahadur Singh* v. *Emperor.*
(1919) 1919 Bom 160 (160): 43 Bom 842: 20 Cri L Jour 681, *Murarji Raghunath Gujarati* v. *Emperor.*
(1930) 1930 Bom 176 (176): 1930 Cri Cas 484: 31 Cri L Jour 926, *Emperor* v. *Mahadeo Govind*

4. (1928) 1928 Lah 827 (828): 29 Cri L Jour 645, *Mt. Darkan* v. *Emperor.*
(1908) 8 Cri L Jour 421 (421) (Mad), *In re Manikam Pillai.*

5. (1893-1900) 1893-1900 Low Bur Rul 328 (328), *Nga Nge* v. *Empress.*

6. (1923) 1923 Nag 251 (253, 254): 24 Cri L Jour 570, *Manjoo* v. *Emperor.*

6a (1886) Ratanlal 229 (236), *Queen* v. *Nepal.*

7. (1888) Ratanlal 410 (410, 411), *Queen* v. *Malhari.*

8. (1891) Ratanlal 532 (533), *Queen* v. *Lakshman.*

9. (1934) 1934 Pat 330 (334): 1934 Cri Cas 722: 35 Cri L Jour 1322, *Shyama Charan* v. *Emperor.*

convicted on a confession made before the committing Magistrate.[1]

Where an accused pleads guilty to the offence charged he may either be convicted for the offence or as has been seen in Note 12 *supra* the regular trial may be proceeded with. He must not be convicted of a different offence of which he did not plead guilty and for which he was not tried.[2] Thus a person pleading guilty to a charge of murder cannot be convicted of culpable homicide not amounting to murder.[3] Similarly, a person pleading guilty to a charge of culpable homicide not amounting to murder cannot be convicted of causing grievous hurt.[4] In order that there may be a conviction on a plea of guilty, the plea must be in respect of the *offence charged*. Thus where an accused was charged of murder but the Court finding that there was no evidence under that charge convicted her of an offence under Section 318 of the Penal Code considered to have been admitted by the accused, the conviction is illegal.[5]

The fact that the accused, tired of a lengthy trial or impressed by the weight of the evidence against him or partly the one and partly the other, decides to cut short proceedings in the hope that a lenient sentence would be passed on him is not in itself a ground for departing from the ordinary tariff of punishment for the offence.[6]

14. Procedure where plea of guilty is not accepted.

Section 272 provides that where an accused person *refuses to* or *does not* plead or *claims to be tried* the Court shall proceed to try the case. There is no specific provision enabling the Court to try the case where the accused *pleads guilty* and the Court does not accept the same, though sub-section 2 of this Section provides that he *may* be convicted on such plea. In England where the Court does not think it expedient to act upon the accused's plea of guilty, the usual procedure is to advise him to withdraw his plea of guilty and to plead not guilty.[1] In this country, the general trend of opinion is that the accused may be treated in such cases as if he had pleaded not guilty, and that the trial may be proceeded with in the ordinary way.[2] The High Court of Calcutta, has, however, in the undermentioned case[3] held that the discretion denoted by the word "may" is either to convict the accused, or in a suitable case, to leave the matter there and *discharge* him, but does not include the power to proceed with the trial against him. In this view it has further held therein that where a person has pleaded guilty he ceases *ipso facto* to be an

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Note 13.

1. (1870) 2 N W P H C R 479 (480), *Queen* v. *Harsookh.*
   (1872-1892) 1872-1892 Low Bur Rul 497 (497), *Nga Tha Maung* v. *Queen.* Confession before a Myook.
2. (1899) 2 Weir 335 (335).
3. (1909) 10 Cri L Jour 5 (6) : 3 Sind L R 58, *Emperor* v. *Watu walad Lal Bux.*
   (1893) 2 Weir 335 (336).
4. (1888) Ratanlal 413 (413), *Queen* v. *Raghu.*
5. (1888) Ratanlal 386 (386), *Queen* v. *Sarwel.*
6. (1934) 1934 Pat 330 (335) : 1934 Cri Cas 722 : 35 Cri L Jour 1322, *Shyama Charan* v. *Emperor.*

Note 14.

1. (1931) 1931 Cal 341 (343) : 58 Cal 1214 : 32 Cri L Jour 667 : 1931 Cri Cas 405, *Mahommad Yusuf* v. *Emperor.*
   [See also (1909) 10 Cri L Jour 325 (340) : 3 Ind Cas 625 (Cal), *Khudiram Bose* v. *Emperor.*]
2. (1909) 10 Cri L Jour 484 (486) : 4 Ind Cas 57 (Cal), *Sukdev Tewari* v. *Emperor.*
   (1914) 1914 All 558 (558) : 16 Cri L Jour 103, *Surjan Singh* v. *Emperor.*
   (1900) 23 Mad 151 (153), *Queen* v. *Chinia Povuchi.* (22 Mad 491 distinguished.)
   (1926) 1926 All 318 (320) : 27 Cri L Jour 449, *Shankar* v *Emperor.*
   (1928) 1928 Cal 775 (776) : 30 Cri L Jour 508, *Hasaruddin Mahommad* v. *Emperor.*
   (1870) 13 Suth W R Cr 55 (56), *Queen* v. *Gobadur Bhooyan.*
3. (1931) 1931 Cal 341 (343) : 1931 Cri Cas 405 : 58 Cal 1214 : 32 Cri L Jour 667, *Mahommad Yusuf* v. *Emperor.*

Sec. 271 Notes 14—15

accused person. According to the Chief Court of Oudh the *only course* open to the Court where a plea of guilty is not accepted by it is to proceed to trial.[4]

As to the meaning of "Conviction" in this sub-section *see* the undermentioned case.[5]

15. Plea of guilty by a co-accused.

Under Section 30 of the Indian Evidence Act, when more persons than one are *being tried jointly* for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. So the question arises whether in cases where one of several accused jointly tried pleads guilty to the charge, he can be said to be jointly tried within the meaning of Section 30 of the Evidence Act, so as to render his admissions receivable in evidence against the other accused. In the undermentioned case,[1] the High Court of Calcutta has held, that where a person pleads guilty, the only course open to the Court (*whether it accepts such plea or not*) is either to convict him or to discharge him and that he can no longer be said to be an accused person jointly tried with others. This view, as has been seen in Note 14 *ante*, in so far as it relates to cases where the plea is not accepted by the Court, is against the general trend of opinion. In cases where the plea of guilty is *accepted* by the Court, a conviction should follow and the accused will, of course cease to be an accused person from that moment. Section 30 of the Evidence Act, will not therefore apply.[2] In cases where the plea of guilty is *not accepted* by the Court and the Court proceeds to trial against him, the accused does not cease to be so until the end of the trial and Section 30 will apply.[3]

Where one of the accused pleads guilty and the Court accepts it, it should not defer his conviction in order that his confession may be considered against his co-accused. Such a procedure is clearly against the spirit of the law.[4] The

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4. (1917) 1917 Oudh 362 (366) : 18 Cri L Jour 742 : 20 Oudh Cas 136, *Kesho Singh* v. *Emperor*.
5. (1900) 10 Mad L Jour 147 (158), *N. A. Subramania Aiyar* v. *Empress*.

Note 15.

1. (1931) 1931 Cal 341 (342, 344) : 1931 Cri Cas 405 : 58 Cal 1214 : 32 Cri L Jour 667, *Mahommad Yusuf* v. *Emperor*.
2. (1889) 22 Mad 491 (493), *Queen* v. *Lakshmayya Pandaram*.
(1895) 19 Bom 195 (197, 198), *Queen* v. *Pahuji*.
(1895) 17 All 524 (526), *Queen* v. *Pirbhu*.
(1914) 1914 Mad 45 (46) : 38 Mad 302 : 15 Cri L Jour 13, *In re Vempalli Bali Reddy*.
(1902) 25 Mad 61 (68), *Subramaniya Iyer* v. *Emperor*.
(1881) 1881 All W N 99 (100), *Queen* v. *Baiju*.
(1874) 11 Bom H C R 146 (148), *Reg* v. *Kalu Patil*.
(1926) 1926 All 318 (320) : 27 Cri L Jour 449, *Shankar* v. *Emperor*.
(1888) Ratanlal 400 (400), *Queen* v. *Chand*.
(1900) 1900 Pun Re Cr No. 11 page 27, *Piara Singh* v. *Queen*.
(1884) 7 Mad 102 (103, 104), *Venkatasamy* v. *Queen*.
(1901) 23 All 53 (54), *Queen* v. *Paltna*.
(1895) 2 Weir 493 (493), *Re Muppidi*.
(1911) 12 Cri L Jour 479 (479) : 38 Cal 446, *Emperor* v. *Keramet Sirdar*.
(1911) 12 Cri L Jour 605 (606) : 1911 Pun Re Cr No. 15, *Kanhaya* v. *Emperor*.
(1901) 3 Bom L R 437 (438), *Emperor* v. *Annya*,
3. (1901) 3 Bom L R 437 (438), *Emperor* v. *Annya*.
(1909) 10 Cri L Jour 484 (486) : 4 Ind Cas 57 (Cal), *Sukdev Tewari* v. *Emperor*.
(1915) 1915 All 221 (224) : 57 All 247 : 16 Cri L Jour 327, *Emperor* v. *Dip Narain*.
(1913) 14 Cri L Jour 566 (567) : 1 Upp Bur Rul 170, *Emperor* v. *Nga Po Tha*.
(1900) 23 Mad 151 (154), *Queen* v. *Chinia Povuchi*.
4. (1901) 23 All 53 (54, 55), *Queen* v. *Paltna*.
(1908) 8 Cri L Jour 380 (381) : 30 All 540, *Emperor* v. *Kheoraj*.

accused should be convicted at once[5] and should be removed from the dock in which case he can give evidence against his co-accused.[6] It is always desirable to pass a sentence completely before calling one accused who pleads guilty in a joint trial to give evidence against a co-accused,[7] so that the witness may give his evidence free of all corrupt influence which the fear of impending punishment and the desire to obtain immunity to himself at the expense of other prisoner might otherwise produce.[8] But the admissibility of the evidence of such accused pleading guilty ought not to be decided on the narrow technical ground that he had not been convicted but on the broad ground that when he gave his evidence he was not in charge of jury and no issue remained to be tried between him and the crown.[9]

16. Appeal.

Where an accused pleads guilty and he is convicted thereon he has no right of appeal except as to the extent or legality of sentence. *See* Section 412 *infra*.

Where the Court has recorded that the accused pleaded guilty the High Court cannot in a case in which the accused appeared by a pleader admit the affidavit of the accused for the purpose of showing that he did not plead guilty. If there has been any mistake in the matter it is the vakil and not the client, who ought to make an affidavit.[1]

Where an accused person has been convicted on his own plea of guilty he is not entitled on notice being issued to him under Section 439 sub-section 2 of the Code for showing cause against enhancement of sentence to go behind the plea of guilty as a confession of the facts alleged or to withdraw the plea.[2]

272.* If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case :

Refusal to plead or claim to be tried.

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* **(Code of 1882—S. 272—*Same.*)**

(Code of 1872—Ss. 238 and 265.)

Refusal to plead or claim to be tried.

238. If the accused person refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed, and to try the case.

The same jury or assessors may try in succession several offenders.

265. The same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as to the Court seems fit.

(1900) 23 Mad 151 (154), *Queen* v. *Chinia Poruchi.*

(1931) 1931 Cal 341 (343) : 1931 Cri Cas 405: 58 Cal 1214 : 32 Cri L Jour 667, *Mahommed Yusuf* v. *Emperor.*

(1900) 1900 Pun Re Cr No. 11, page 27, *Pirra Singh* v. *Queen.*

5. (1914) 1914 All 558 (558) : 16 Cri L Jour 103, *Surjan Singh* v. *Emperor.*

6. (1917) 1917 Oudh 362 (36?) : 18 Cri L Jour 742 (746) : 20 Oudh Cas 136, *Kesho Singh* v. *Emperor.*

7. (1892) 2 Weir 520 (520), *In re Marudaimuthu.*

8. (1931) 1931 Cal 341 (344) : 1931 Cri Cas 405: 58 Cal 1214 32: Cri L Jour 667, *Mahomed Yusuf* v. *Emperor.*

9. (1902) 25 Mad 61 (68) (P C), *Subramaniya Aiyar* v. *Emperor.*

Note 16.

1. (1896) 19 Mad 209 (210), *Queen* v. *Bhashyam Chetty.*

2. (1929) 1929 Cal 747 (749, 750): 1929 Cri Cas 395 : 56 Cal 1145 :30 Cri LJour 1038, *Remembrancerof Legal Affairs Bengal* v. *Jnanendra Nath Ghose.*

Sec. 272 Notes 1—2

Trial by same jury or assessors of several offenders in succession.

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as Court thinks fit.

Synopsis.

Other Topics.

Effect of the proviso. See Note 3, Pts. 2 to 4.

No Case against accused—Procedure. See Note 2, Pt. 6.

Plea of "not guilty." See Note 2, Pts. 1 and 3.

Section inapplicable to cases and counter-cases. See Note 3, Pt. 5.

Simultaneous trial of several persons illegal. See Note 3, Pt. 4.

1. Legislative changes.

The first paragraph of this Section corresponds to Section 363 of the Code of 1861 and Section 238 of the Code of 1872. The proviso corresponds to Section 347 of the Code of 1861 and Section 265 of the Code of 1872.

2. "Refuses to, or does not, plead, or if he claims to be tried."

An accused person charged with an offence can either plead "guilty" or may "claim to be tried." A plea of "not guilty" is not recognised by the Code,[1] though such a plea, if made, will be considered as amounting to a "claim to be tried." As a matter of practice however, the expression "not guilty" is generally used and is taken as amounting to a "claim to be tried."

Where an accused makes no answer to the question whether he is guilty, an enquiry should be made whether he is obstinately mute or is dumb *ex visitatione dei*. In either case a plea of claiming to be tried should be recorded and the trial proceeded with.[2] Where, in answer to a charge of murder, the accused stated: "I did not mean to kill him; why should I kill my brother? Nor did I strike him so much that he should die," it was held that the statement amounted to a plea of "not guilty."[3] *See also* the under-mentioned case.[3a]

Where an accused is put upon his trial and has pleaded "not guilty" to the charge or has claimed to be tried he is entitled to have the trial

(Code of 1861—Ss. 363 and 347.)

Refusal to plead or plea of claim.

363. If the accused person shall refuse to plead, or shall claim to to be tried, the Court shall proceed to try the case, taking all the evidence that is forthcoming.

The same jury or assessors may try in succession several offenders.

347. The same jury, if not objected to, may try, or the same assessors may aid in the trial of, as many accused persons successively as to the Court shall seem expedient.

Section 272—Note 2

1. (1914) 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cri L Jour 460, *Emperor* v. *Nirmal Kanta Roy*.
2. (1869) Ratanlal 19 (19), *Reg* v. *Sattya*.
3. (1870) 2 N W P H C R 479 (480), *Queen* v. *Hursookh*.

3a (1883) 1883 Pun Re Cr No. 22 page 50, *Fakir* v. *Empress*. Accused saying that he killed *A* but claiming that he was not liable to punishment as the Court had no jurisdiction over him—Plea is one of claiming to be tried.

proceeded with[4] as a protection against a future proceeding against him in respect of the same charge.[5] He cannot be released without trial on the ground that there is no case against him.[6] Nor can he be convicted without trial solely upon a confession before the committing Magistrate.[7]

3. Trial by same jury or assessors of several offenders—Proviso.

It has been seen in Section 233 *ante* that where several *charges* are made against an accused person, the general rule is that each charge should be tried separately. The same principle will also apply where several *persons* are accused of offences in a case. The general rule is that they should be tried separately except in cases falling within Section 239.[1] This proviso enacts that in those cases in which several accused persons in a Sessions case are to be tried separately, it is not necessary to choose a fresh jury or a fresh set of assessors for each such separate trial and that the same jury or assessors may act in all the trials, subject, of course, to the right of the accused, provided in the Code to object to the jury or any one or more members of the jury.[2]

But the same jury may try or the same assessors may aid in the trial of any number of accused persons in a case only one *after* the other and not *simultaneously*.[3] A simultaneous trial in such cases is an illegality which is not curable by Section 537 of the Code.[4]

In the undermentioned case[5] certain members of two opposing parties in a riot were sent up for trial under two distinct committals. After the close of the case for the prosecution in one of the cases the Sessions Judge postponed the taking of the evidence for the defence and proceeded to examine the witnesses for the prosecution in the other case before the same jury. He then took the evidence of the witnesses for the defence in the first case and in the counter-case in the order named and then summed up the facts in both the cases to the jury who returned a verdict in respect of all the accused. Princep, J., observed as follows:—

"The law declares that the, 'same jury may try as many accused persons successively as to the Court seems fit.' By this we understand that one trial is to follow the other, that is, that, on the conclusion of one trial, the same jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piecemeal in such a manner that, at their conclusion, the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence, which, though they have points in common, require

4. (1883) 12 Cal L R 120 (121), *Empress* v. *Sagambur.*
(1868) 10 Suth W R Cr 43 (43), *Queen* v. *Srikant Charal.*
(1904) 1 Cri L Jour 772 (773) (Bom), *Emperor* v. *Mohamad Ismail.* Judge considering that the plea of the accused did not amount to a plea of guilty.
5. (1881) 1881 All W N 60 (60), *Empress* v. *Sunder.*
6. (1881) 1881 All W N 60 (60), *Empress* v. *Sunder.*
[See also (1874) 1874 Pun Re Cr No. 3 page 5, *Crown* v. *Jamal Khan.* A Sessions Court has no authority to discharge an accused person duly committed without trial.]
7. (1870) 2 N W P H C R 479 (480), *Queen* v. *Hursookh.*

Note 3.

1. (1887) 9 All 452 (457), *Queen* v. *Abdul Kadir*
2. (1926) 1926 All 334 (336) : 48 All 325 : 27 Cri L Jour 445, *Rajiuzzaman Khan* v. *Chhotey.*
(1931) 1931 Cal 709 (709, 710) : 1931 Cri Cas 989 : 32 Cri L Jour 1233, *Rajatulya Paikar* v. *Khundia Karigar.*
3. (1931) 1931 Cal 709 (709, 710) : 1931 Cri Cas 989: 32 Cri L Jour 1233, *Rajatulya Paikar* v. *Khudha Karigar.*
4. (1921) 1921 L B 51 (55) : 11 Low Bur Rul 73 : 23 Cri L Jour 49, *H. M. Eusoof* v. *Emperor.*
5. (1881) 6 Cal 96 (99), *Hossein Buksh* v. *Empress.*

Sec. 272 Note 3

careful discrimination as bearing upon the guilt or innocence of two sets of accused. Independently of the irregularity of the proceeding no jury ought, we think, to be placed in such an embarrassing position."

Sec. 273

273.* (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect.

Entry on unsustainable charges.

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

Effect of entry.

Synopsis.

Other Topics.

Charge clearly unsustainable—Else section inapplicable. See Note 2, Pt. 2.

1. Object and applicability of the Section.

The Section is intended to provide a short and effective way by which charges which have no merits may be disposed of.[1] This special power is, however, only conferred on the High Courts[2] and cannot be exercised by Sessions Judges.[3]

Applications under this Section should be disposed of by the High Court in the exercise of its ordinary original criminal jurisdiction.[4]

2. "The Judge may make an entry to that effect"—Sub-section (1).

Where the Court is of opinion that no offence is made out, it is its duty to make an order under this Section and stay proceedings.[1] But the charge must be *clearly* unsustainable; otherwise the judge should not take into his own hands the functions of the jury.[2] Where in a trial before the High Court it appeared that the mode of taking evidence in the preliminary investigation was entirely erroneous, it was held that an entry under this Section should be made and the prisoner sent back before the Magistrate for the depositions to be taken afresh.[3]

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* (Code of 1882—S. 273—Same.)

(Codes of 1872 and 1861—Nil.)

Section 273—Note 1.

1. (1929) 1929 Cal 756 (760): 57 Cal 1042 : 31 Cri L Jour 506: 1929 Cri Cas 468 (F B), *Girish Chandra* v. *Emperor*.
2. (1929) 1929 Cal 756 (760): 1929 Cri Cas 468 : 57 Cal 1042: 31 Cri L Jour 506 (F B), *Girish Chandra* v. *Emperor*.
3. (1935) 1935 Nag 202(204): 1935 Cri Cas 1099: 36 Cri L Jour 1389, *Maroti Jairam* v. *Emperor*.
   [See (1880) 7 Cal L R 143 (143), *Empress* v. *Poreshollah Sheikh*.]
4. (1883) 9 Cal 397 (404), *In re Churoo Chunder Mullick*.

Note 2.

1. (1894) 21 Cal 97 (99), *Queen* v. *Sukee Kuar*.
2. (1929) 1929 Cal 756 (761): 1929 Cri Cas 468: 57 Cal 1042: 31 Cri L Jour 506 (F B), *Girish Chandra* v. *Emperor*.
3. (1868) 1 Beng L R O Cr 37 (38, 39), *Queen* v. *Rajkrishna Mitter*. Mode of taking the evidence in the preliminary investigation erroneous—Note must be made.

3. Effect of the entry—Sub-section (2). **Sec. 273 Note 3**

An entry made under this Section has not the effect of an acquittal. The accused may again be tried for the same offence.[1] Section 439 *infra* has no application to an entry made under this Section. *See* sub-section 4 of that Section. For stay of proceedings under other Sections, *see* Sec. 145 sub-section 5; Sec. 240; Sec. 464 sub-section 2; and Sec. 465 sub-section 1.

C.—Choosing a jury.

274. (1) In trials before the High Court the jury shall consist of nine persons. **Number of jury.**

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than three or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct.

Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons.

274.* (1) In trials before the High Court the jury shall consist of nine persons. **Number of jury.** **Sec. 274**

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than *five* or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct:

Synopsis.

	Note No.		Note No.
Legislative changes.	1	"Jury," meaning of.	3
Non-compliance with the Section — Effect of.	2	Jury in cases of offences punishable with death—Proviso.	4

Other Topics.

Effect of S. 326. See Note 4, Pts. 1 and 2.

* **(Code of 1882—S. 274—*Same.*)**

(Code of 1872—S. 236.)

Number of jury. **236.** In trials by jury before the Court of Session, the jury shall consist of such uneven number, not being less than three nor more than nine, as the Local Government, by any general order applicable to any particular district or to any particular classes of offences in that district, directs.

Note 3.

1. (1932) 1932 Sind 157 (159): 1932 Cri Cas 693: 26 Sind L R 407: 34 Cri L Jour 14, *Maniram* v. *Emperor*.
[See also S. 403, Explanation.]

Sec. 274 Notes 1—4

1. Legislative changes.

Difference between the Code of 1861 *and the Code of* 1872:—

The number of which a jury was to consist, under the Code of 1861, was *five* or an uneven number not less than five and not more than nine. This number was reduced to *three* in the Code of 1872. Both Section 327 of the Code of 1861 and Section 236 of the Code of 1872, however dealt with the number of jury in *Sessions Courts* only.

Difference between the Codes of 1872 and 1882:—

The provision as to the number of jury in the High Courts was newly added to the Section.

Difference between the Codes of 1882 *and* 1898:—

There was no change effected in the Code of 1898, but by the Amending Act of 1923, the word "five" was substituted in sub-section 2 of the Section for the word "three" which occurred in the second paragraph of the old Section. The proviso to the Section was also newly added by the Amending Act.

2. Non-compliance with the Section—Effect of.

A trial by a jury consisting of a larger number of men than is authorised by the Section is a nullity.[1]

3. "Jury," meaning of—*See* Section 267, *ante*.

4. Jury in cases of offences punishable with death—Proviso.

As has been seen in Section 269 *ante* the Local Government may direct that the trial of certain offences shall be by jury in any District. Where an offence punishable with death is so declared to be triable by jury, this proviso will apply, and the jury should consist of *nine* persons unless it is impracticable to get that number, in which case the number should be at least seven. Under Section 326 *infra* the number of jurors to be summoned is to be double the number required for the trial. Where a lesser number of persons is summoned, and some of them do not attend with the result that seven persons are empanelled it cannot be said that it is *impracticable* to get a jury of nine, and consequently, the tribunal is not one legally constituted.[1] Where only 14 persons were summoned but eleven of them were present out of whom, however, only seven were empanelled and it was not shown that it was not practicable to get nine persons, it was held that the jury was illegally constituted and the trial bad.[2]

(Code of 1861—S. 327.)

Number, of which the Jury is to consist

327. In trials by Jury before the Court of Session the Jury shall consist of *five* persons, or of such number being an uneven number, and not being less than five or more than nine as the Local Government by any general order applicable to any particular District or to any particular classes of offences in that District, shall direct.

Section 274—Note 2.

1. [See (1904) 1 Cri L Jour 43 (44): 26 All 211, *Emperor* v. *George Booth*.]

Note 4.

1. (1928) 1928 Cal 645 (645, 646): 55 Cal 794: 29 Cri L Jour 927, *Serajul Islam* v. *Emperor* 12 persons only summoned.
   (1930) 1930 Cal 716 (717): 1930 Cri Cas 1116, *Remembrancer of Legal Affairs, Benjal* v. *Benazir Ahmad*. Only 14 persons summoned.
   [See also (1930) 31 Cri L Jour 425 (426): 122 Ind Cas 557 (Cal), *Amir Khan* v. *Emperor*.]
2. (1930) 1930 Cal 60 (61): 56 Cal 1154: 31 Cri L Jour 377, 1930 Cri Cas 612, *Dwarika* v. *Emperor*.

Sec. 274 Note 4

But where eighteen persons were summoned out of whom only eight attended and consequently only a jury of seven was empanelled, it was held that the proceedings were not vitiated.[2a]

An objection as to the proper constitution of the jury touches the very *constitution of the Court* and there is no *onus* upon the accused to show that the conditions necessary to empanel a lesser number than nine, did not exist. It is the duty of the Judge to consider whether it is not practicable to have a jury of nine.[3]

It has, however, been held in the undermentioned cases[4] that an objection by the crown as to the constitution of the jury cannot be taken for the first time in appeal against an acquittal or even at the end of the trial when the accused themselves have no complaint in respect thereof. It is submitted that this view is open to criticism. If the objection is one which affects the very *constitution of the Court*[5] it must be one affecting the *jurisdiction* of the Court itself and, under general principles of law, can be raised at any time.

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275. In a trial by jury before the Court of Session of a person not being an European or an American, a majority of the jury shall, if he so desires, consist of persons who are neither Europeans nor Americans.

Jury for trial of persons not Europeans or Americans before Court of Session.

275. * (1) *In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case*

Jury for trial of European and Indian British subjects and others.

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* **(Code of 1882—S. 275**—Same as that of 1898 Code.)

(Code of 1872—S. 241.)

Jury for trial of persons not Europeans or Americans

241. In a trial by jury, before the Court of Session, of a person not being a European or an American, at least one-half of the jury shall, if the accused person desire it, consist of persons who are neither Europeans nor Americans.

(Code of 1861—S. 325.)

How the Jury is to be constituted for the trial of other persons.

325. In a trial by Jury before the Court of Session in which a person not belonging to the races specified in S. 323, shall be tried, at least one-half of the Jury if the accused person desire it shall consist of persons not belonging to either of such races.

2a (1935) 1935 Cal 407 (411): 62 Cal 900 : 36 Cri L Jour 944 : 1935 Cri Cas 630, *Emperor* v. *Bent Permanick*

(1934) 1934 Cal 10 (13) : 61 Cal 190 : 36 Cri L Jour 803 : 1934 Cri Cas 26, *Mukunda Murari Pal* v. *Emperor.*

3. (1931) 1931 Cal 793 (795): 58 Cal 1272 : 33 Cri L Jour 129 : 1931 Cri Cas 1057, *Shahebali Sheikh* v. *Emperor.*

4. (1930) 1930 Cal 291 (291): 57 Cal 1930 Cri Cas 379, *Remembrancer of Legal Affairs, Benjal* v. *Bhajoo Majhi.* Objection in appeal.

(1932) 1932 Cal 750 (751): 33 Cri L Jour 869 : 1932 Cri Cas 744, *Remembrancer of Legal Affairs, Benjal* v. *Ajit Munchi.* Objection at the end of trial.

5. [See cases cited in foot-notes (1), (2), and (3) above.]

Sec. 275
Note 1

of an European British subject, of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians.

(2) *In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable and if such European or American, before the first juror is called and accepted, so requires, consist of persons who are Europeans or Americans.*

Synopsis.

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1. Scope of the Section.

Section 275, as it stood before 1923 provided that, in a trial by jury of a person not an European or American, a majority of the jury should consist of persons who were neither Europeans nor Americans. Section 450, now repealed, provided that in all trials, of European *British subjects* before the High Court or the Court of Session the accused may claim to be tried by jury, *half* the number of which should be Europeans or Americans, provided, in cases triable with the aid of assessors, he may, instead of claiming to be tried by jury, claim that *half* the number of assessors, should be Europeans or Americans. Section 460, also now repealed, provided that in the case of an European *not being a British subject*, or an American, *half* the number of the jury or assessors, as the case may be, should, if practicable, consist of Europeans or Americans.[1] This Section and Section 284-A together deal with the matter dealt with by the said Sections 275, 450 and 460, but with the following important changes:—

1. *In trials by jury*:—

If the accused is an European *British Subject* he may claim that the *majority* of the jury shall be Europeans or Americans. If the accused is an Indian British Subject he may claim that the *majority* of the jury shall consist of Indians. If he is an European *not being a British Subject*, or an American he may claim that a majority of the jury shall consist of Europeans or Americans and this will be allowed only where it is *practicable*.

Section 275—Note 1.

1. [See also (1865) 3 Suth W R Cr 14 (14), *Empress* v. *John Loudley*. Case under Sec. 323 of the Code of 1861.]

2. *In trials with the aid of assessors*:—

If the accused is an European *British Subject* he may claim that *all* the assessors should be Europeans or Americans. If he is an Indian British Subject he may claim that *all* the assessors should be Indians. If he is an European not being a British Subject or an American he may claim that all the assessors shall be Europeans or Americans and this will be allowed where it is *practicable* to do so.

The claim to be tried as an European or Indian British Subject mentioned in Sections 528-A and 528-B *infra* is a different and distinct one from the claim to be tried by a majority of European or Indian Jury as mentioned in this Section, though it can only be put forward by a person who has, in the language of the Section, been found under the provisions of the Code to be an European or an Indian British Subject.[2]

A claim to be tried under this Section can validly be made whether the complainant and the accused are both European or Indian British Subjects, or one is an European and the other an Indian British Subject.[3]

2. Right to be tried by majority of jurors of the nationality of the accused.

Under the High Court Criminal Procedure Act, 1875 a person who was not an European British Subject was not entitled to be tried by a jury consisting of a majority of persons who were neither Europeans nor Americans.[1] Such a right was first recognised by the Code of 1882. There is, however, no provision that the jurors should be *co-religionists* with the accused.[2]

3. Privileges of Europeans other than British Subjects.

Europeans other than European British Subjects or Americans have, under sub-section 2 of this Section, a right that a majority of the jury shall, if practicable consist of persons who are Europeans or Americans; and, under Section 285-A, in the case of trials with the aid of assessors, all the assessors shall, if practicable, be persons who are Europeans or Americans. They have no other special privileges.[1]

4. "Who has been found . . . . . Indian British Subject."

It is not sufficient for the accused to merely *assert* that he is an European or Indian British Subject. He should have been *found under the provisions of this Code* to belong to the particular nationality.[1] As to such provisions, *see* Sections 443, 528-A and 528-B, *infra*.

5. "European."

An "Anglo-Indian" is not an European within the meaning of this Section.[1]

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2. (1925) 1925 Cal 384 (387): 51 Cal 980: 26 Cri L Jour 385, *Emperor* v. *Harendra Chandra*.
3. (1935) 1935 Rang 67 (68): 13 Rang 104: 36 Cri L Jour 595: 1935 Cri Cas 167 (F B), *H. W. Scott* v. *Emperor*.

Note 2.

1. (1875) 1 Bom 232 (236): *Reg* v. *Lalu Bhai Gopaldas*.
2. (1865) 1 Suth W R Cr 2 (2), *In re Bharat Chandra Christian*.

Note 3.

1. (1933) 1933 Nag 136 (147): 34 Cri L Jour 505: 1933 Cri Cas 610, *Rego* v. *Emperor*.

Note 4.

1. (1925) 1925 Oudh 469 (470): 28 Oudh Cas 230: 26 Cri L Jour 1217, *F. S. Hay* v. *Emperor*.
   (1929) 1929 Sind 23 (23): 22 Sind L R 472: 29 Cri L Jour 721, *Emperor* v. *Soomar Abdulla*.

Note 5.

1. (1934) 1934 Pat 200 (201): 13 Pat 177: 35 Cri L Jour 827: 1934 Cri Cas 384, *Guthrie* v. *Emperor*.

Sec. 276

276.* The jurors shall be chosen by lot from the persons summoned to act as such in such manner as the High Court may from time to time by rule direct :

Jurors to be chosen by lot.

Provided that—

first, pending the issue under this Section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed ;

Existing practice maintained.

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present ;

Persons not summoned when eligible.

thirdly, in a trial before any High Court in the town which is the usual place of sitting of such High Court—

Trials before special jurors.

(*a*) if the accused person is charged with having committed an offence punishable with death, or

(*b*) if in any other case a Judge of the High Court so directs, the jurors shall be chosen from the special jury list hereinafter prescribed ; and

fourthly, in any district for which the Local Government has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in S. 325.

*** (Code of 1882—S. 276.)**

276. The jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from time to time by rule direct :

Jurors to be chosen by lot.

Proviso.

Provided that—

first, pending the issue under this Section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed ;

Existing practice maintained.

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present ; and

Persons not summoned when eligible.

thirdly, in the Presidency towns—

Trials before special jurors.

(*a*) if the accused person is charged with having committed an offence punishable with death, or

(*b*) if in any other case a Judge of the High Court so directs,

the jurors shall be chosen from the special jury list hereinafter prescribed.

(Code of 1872—S. 240.)

Jurors to be chosen by lot.

240. When the trial is to be by jury, the jury shall be chosen by lot from the persons summoned to act as jurors.

Synopsis.

Other Topics.

"Jurors"—Both special and common. See Note 4, Pt. 1.

Lots from particular class. See Note 3, Pt. 4.

"Persons present." See Note 4, Pts. 5 & 6.

1. Legislative changes.

1. There was no material difference between Section 342 of the Code of 1861 and Section 240 of the Code of 1872 corresponding to this Section.

2. *Difference between the Codes of* 1872 *and* 1882:—

A proviso corresponding to the proviso *first*, *second* and *third* of this Section was added in Section 276 of the Code of 1882.

The words "in such manner as the High Court may from time to time by rule direct" were newly added.

3. *Difference between the Codes of* 1882 *and* 1898:—

The last paragraph of the proviso was newly added in 1898.

4. *Amendment in* 1923:—

The words "in the Presidency Towns" were substituted by the words "in a trial before any High Court in the town which is the usual place of sitting of such High Court."

2. Scope of the Section.

Section 326 *infra* provides that the names of those who are to be summoned to act as jurors should be drawn by lot from among the whole body of persons who are in the list of jurors. This Section provides that those again who are to try a particular case are to be similarly chosen by lot from among the persons so summoned, or, where there is a deficiency, from amongst such other persons as might be present in Court. Where a judge fails to obtain a panel in this manner it is his duty to postpone the trial until the requisite number of jurors has been obtained in the manner provided by law.[1a] The object of these provisions is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case and an accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided therein to secure perfect impartiality.[1]

(Code of 1861—S. 342.)

Jurors to be chosen by lot.

342. Whenever a trial by jury is to be held, the persons who are to constitute the jury shall be chosen by lot immediately before the commencement of the trial from the jurors who attend in obedience to the summons.

* * * * * * *

Section 276—Note 2.

1a (1903) 7 Cal W N 188 (191, 192), *Brojendra Lal Sarkar* v. *Emperor.*

1. (1927) 1927 Cal 787 (790) : 28 Cri L Jour 889, *Rosonali* v. *Emperor.* Overruled on another point by 1928 Cal. 83 (F B).

(1911) 12 Cri L Jour 537 (539) : 12 Ind Cas 513 (Oudh), *Ahmad* v. *Emperor.* Procedure prescribed by S. 276 is imperative and it must be followed.

Sec. 276 Notes 2—3

This Section and the following Sections 277, 278 and 279 must be read together as prescribing the procedure for empanelling jurors,[2] the former, with all its provisos, being a general Section dealing with the general nature of the procedure, the details of that procedure being given in the latter.[3] The procedure to be adopted is as follows:—In the first instance a ballot should be taken from among the persons summoned under Section 326,[4] without any preliminary enquiry as to how many of them are present i. e., the names of the persons summoned should be drawn from the box, one by one, each after another, and called aloud as each is drawn and the accused asked whether he has any objection to such juror. If he objects, the objection should be decided and the juror either retained or rejected as the case may be. When all the names have been so drawn and a number of persons have answered to their names and accepted without objection, a deficiency in the number of persons required, if any, will become manifest. The deficiency will be the number by which the number of persons answering their names and empanelled falls short of the number of persons of which the jury should consist. At this stage the second proviso to the Section begins to operate and the Court has to exercise a discretion whether to allow persons to be chosen from among those present in Court in sufficient number to supply the deficiency, or whether to adjourn the case for a fresh jury to be summoned. If the Court decides to choose from among the persons present, the accused should be asked as each such person is chosen whether he objects to him and after deciding the objection should proceed to choose other persons present in the same manner until the deficiency is made up.[5]

A jury not empanelled in accordance with these principles is not one constituted in accordance with the law.[6]

3. "Shall be chosen by lot from the persons summoned to act."

Sub-section 2 of Section 279, *infra* indicates that the manner of choosing *by lot* provided by this Section applies only to jurors *attending in obedience to summons* and not to persons selected from those present in Court.[1]

It is desirable, if not necessary, that the judge should, where all the jurors have been chosen by lot, specifically state that they have been so chosen by lot.[2] Where one of the jurors was a person who was not entitled to sit on the jury, having not been summoned, it was held that the Court was

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2. (1931) 1931 Cal 793 (794) : 58 Cal 1272 : 33 Cri L Jour 129 : 1931 Cri Cas 1057, *Shahebali Sheikh* v. *Emperor*.
   (1933) 1933 All 941 (946) : 56 All 210 : 35 Cri L Jour 668 : 1933 Cri Cas 1561, *Lala* v. *Emperor*.
3. (1928) 1928 Cal 83 (87) : 55 Cal 371 : 29 Cri L Jour 437 (F B), *Kedarnath Mahto* v. *Emperor*. Per Mukerji, J.
4. (1929) 1929 Oudh 154 (155) : 30 Cri L Jour 384, *Ram Adhin* v. *Emperor*.
5. (1928) 1928 Cal 83 (86) : 55 Cal 371 : 29 Cri L Jour 437 (F B), *Kedarnath Mahto* v. *Emperor*. 1927 Cal 242 and 1927 Cal 787, overruled.
6. (1928) 1928 Pat 1 (3) : 7 Pat 61 : 28 Cri L J 881 (F B), *Akbar Ali* v. *Emperor*.
   (1927) 1927 Cal 593 (595) : 54 Cal 1026 : 28 Cri L Jour 615, *Rahamat Sheikh* v. *Emperor*. But so far as the decision says that the choosing by lot applies *only where* more than the required number are present, it must be deemed to be overruled by 1928 Cal 83, (F B).
   (1929) 1929 Cal 92 (93) : 30 Cri L Jour 484, *Intez Mandal* v. *Emperor*.

Note 3.

1. (1917) 1917 Mad 770 (771) : 18 Cri L Jour 15 (16), *In re Anipe Pelladu*. Dissenting from 33 All 385.
   (1925) 1925 Cal 798 (799) : 26 Cri L Jour 819, *Government of Bengal* v. *Muchu Khan*.
   [See also (1928) 1928 Cal 83 (86) : 55 Cal 371 : 29 Cri L Jour 437 (F B), *Kedarnath Mahto* v. *Emperor*.]
2. (1927) 1927 Nag 117 (117) : 28 Cri L Jour

not properly constituted.[3]

Where out of the persons summoned, the Court asked those who knew English to sit apart and from out of such persons chose the number required *by lot*, and this procedure was consented to by the Public Prosecutor and the counsel for the accused, in view of the fact that there were, in the case certain documents in English and identity of hand-writing was a fact in issue, it was held, that the choosing having been done by lot the action of the Court in making the choice from amongst those who knew English was well within its inherent powers of ensuring a fair trial.[4]

4. Deficiency of persons—2nd proviso.

The word "juror" in the 2nd proviso to the Section is a general term meaning both *special* and *common* jurors and therefore the procedure provided therein for making up any deficiency in the number of persons summoned applies both to common as well as to special jurors called under the 3rd and 4th provisos to the Section.[1] Thus where eighteen special jurors were summoned but only five were present, it was held that it was open to the judge to supplement the five special jurors with persons who happen to be present though they were not in the special jury list.[2]

Where the jury, at the end of the ballot, were found to be four short and four gentlemen fit to be jurors were chosen from among the by-standers it was held that the procedure adopted was correct.[3]

As has been seen in Note 2 above, the Court has a *discretion* in case of a deficiency in the number of persons summoned, either to choose the number of jurors required from among those present and proceed with the trial, or to adjourn the trial.[4] But the persons from amongst whom the deficiency is made up must be *present in Court*. Persons who are not present in Court cannot be *sent for*, for the purpose of being called as jurors and then chosen. A trial with a jury consisting of persons so chosen is not a trial by a jury empanelled according to law.[5]

A person is "present" within the meaning of the Section if he is in the precincts of the Court building either because he has been summoned for other cases or by mere chance. It is not necessary that he should be present within the four walls of the actual Court room in which the proceedings are being conducted. The intention of the Legislature is only to prevent the summoning of the individuals from the *locality* where a deficiency occurs in the number of persons summoned.[6]

177, *Sonia Koshti* v. *Emperor*.

3. (1927) 1927 Cal 820 (820) : 28 Cri L Jour 874, *Emperor* v. *Ijan*. The High Court, did not however order a retrial as the verdict was in accordance with the facts of the case.

4. (1930) 1930 Cal 437 (440) : 32 Cri L Jour 455 : 1930 Cri Cas 745, *Mohiuddin* v. *Emperor*.

Note 4.

1. (1931) 1931 Cal 793 (794, 795) : 58 Cal 1272 : 33 Cri L J 129 : 1931 Cri Cas 1057, *Shaheb Ali Sheikh* v. *Emperor*.
(1933) 1933 Cal 638 (639) : 60 Cal 725 : 34 Cri L Jour 1098 : 1933 Cri Cas 1037, *Manir Sheikh* v. *Emperor*.

2. (1933) 1933 Cal 638 (639) : 60 Cal 725 : 34 Cri L Jour 1098 : 1933 Cri Cas 1037, *Manir Sheikh* v. *Emperor*.

3. (1931) 1931 Cal 178 (179) : 32 Cri L Jour 190 : 1931 Cri Cas 242 (F B), *Emperor* v. *Panchu Sheikh*.

4. (1928) 1928 Cal 83 (86) : 55 Cal 371 : 29 Cri L J 437 (F B), *Kedarnath* v. *Emperor*.
(1931) 1931 Cal 178 (179) : 32 Cri L Jour 190 : 1931 Cri Cas 242 (F B), *Emperor* v. *Panchu Sheikh*.

5. (1929) 1929 Cal 728 (729) : 56 Cal 835 : 31 Cri L Jour 281 : 1929 Cri Cas 364, *Ahedali Fakir* v. *Emperor*.
(1928) 1928 Cal 551 (552) : 30 Cri L Jour 120, *Md. Sagirruddin* v. *Emperor*.
(1929) 30 Cri L Jour 136 (137) : 113 Ind Cas 328 (Cal), *Sadarat* v. *Emperor*.

6. [See (1932) 1932 Cal 536 (537) : 59 Cal 1123 : 33 Cri L Jour 694 : 1932 Cri Cas 564,

Sec. 276 Notes 4—7

There is no provision in the Code by which the Court is to ascertain before-hand how many of the persons summoned to serve as jurors have attended and thus to determine the deficiency which has to be supplied. The stage at which it should be ascertained whether the persons summoned have attended or not is not reached until their names are called out for the purpose of empanelling a jury.[7]

The deficiency mentioned in the proviso refers to the deficiency in the number required to make up the quorum under Section 274 *ante* and not to the deficiency in the minimum number required for drawing lots.[8]

The word "chosen" in the proviso simply means "selected" and not "chosen by lot."[9]

5. Special Jury.

Provisos 3 and 4 deal with cases in which a special jury may be summoned.[1] A special juror is a person whose name has been entered in a special list of persons prepared under Sections 313 and 325 *infra*, such persons having been selected by reason of their possessing superior qualifications in respect of property, character or education which make them fit to serve as special jurors. Where the accused is charged with an offence punishable with death a trial before the High Court should *invariably* be by a special jury. In other trials before the High Court *if the judge so directs* the jurors may be chosen from the special jury list. In the undermentioned case[2] in which the accused was charged with an offence under Section 124-A of the Penal Code, the High Court allowed a special jury.

6. Defect in selecting jurors by lot.

A defect or irregularity in the constitution of the jury, as for example, in not selecting jurymen by lot, is one curable by the application of Section 537 *infra* and, in any event, the failure to take the objection in time is a bar to raising it in the stage of appeal.[1] Thus where the Court simply selected five jurors out of the persons summoned to act as such without choosing them by lot, it was held that the irregularity was one curable under Section 537.[2]

7. High Court rules as to balloting.

See the undermentioned case.[1]

Israil v. *Emperor*.]

7. (1933) 1933 All 941 (946) : 56 All 210 : 35 Cri L Jour 668 : 1933 Cri Cas 1561, *Lala* v. *Emperor*.
8. (1933) 1933 All 941 (946, 947) : 56 All 210 : 35 Cri L Jour 668 : 1933 Cri Cas 1561, *Lala* v. *Emperor*.
9. (1933) 1933 All 941 (947) : 56 All 210 : 35 Cri L Jour 668 : 1933 Cri Cas 1561, *Lala* v. *Emperor*.
   [See also (1917) 1917 Mad 770 (771) : 18 Cri L Jour 15, *In re Anipe Palladu*.]

Note 5.

1. [See (1908) 8 Cri L Jour 281 (297) (Bom), *Emperor* v. *Balgangadhar Tilak*.]
2. (1928) 1928 Bom 74 (74) : 29 Cri L Jour 411, *Emperor* v. *Phillip Spratt*.

Note 6.

1. (1917) 1917 Mad 770 (771) : 18 Cri L Jour 15 (16), *In re Anipe Palladu*. Dissenting from 33 All 385.
   (1882) 8 Cal 739 (742), *Empress* v. *Jhulboo*.
   (1928) 1928 Pat 1 (5) : 7 Pat 61 : 28 Cri L Jour 881, *Akbar Ali* v. *Emperor*. The decision in 1928 Pat. 31 to the contrary is no longer good law in view of this decision.
2. (1927) 1927 Nag 117 (117) : 28 Cri L Jour 177, *Sonia Koshti* v. *Emperor*. Distinguishing 33 All 385 and 7 Cal W N 18[illegible]; approving 8 Cal 739.
   (1929) 1929 Oudh 154 (155) : 30 Cri L Jour 384, *Ram Adhin* v. *Emperor*.

Note 7.

1. (1876) 1 Bom 462 (465), *Reg* v. *Vithal Das*. Case under S. 33 of Act 10 of 1875.

277.* (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

Names of jurors to be called.

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated:

Objection to jurors.

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

Objection without grounds stated.

Synopsis.

Other Topics.

Representation by jurors—Not objection. See Note 2, Pt. 1.

1. Legislative changes.

1. There is no material difference between the Codes of 1861 and 1872 in this respect.

2. *Difference between the Codes of* 1872 *and* 1882:—

(a) The words "the Public Prosecutor, Government Pleader or other person appointed to conduct the prosecution" were substituted by the words "the prosecutor."

(b) A proviso corresponding to the proviso was newly added.

3. The present Section is the same as the Section 277 of the Code of 1882.

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* **(Code of 1882—S. 277—Same.)**

(Code of 1872—S. 243, Paras. 1 and 2.)

243. As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused person shall be asked if he objects to be tried by such juror.

Names of jurors to be called.

Objection may then be made to such juror by the accused person, or by the Public Prosecutor, Government Pleader, or other person appointed to conduct the prosecution, and the grounds of objection shall be stated.

Objections to jurors.

(Code of 1861—S. 343).

343. Before the commencement of a trial by jury the names of the jurors shall be called aloud, and upon the appearance of each juror, the accused person shall be asked if he objects to be tried by such juror. Any objection may then be made to such juror by the accused person or by the Government Pleader or other person appointed to conduct the prosecution, and the grounds of objection shall be stated.

Names of jurors to be called.

Objections.

Sec. 277 Notes 2—4

2. Scope of the Section.

The names of the jurors summoned should be called out and the objection of the accused to such persons taken. The Court cannot, before the names are so called, send them away merely on their own representation that they were relations of the accused.[1]

3. Failure to object—Effect of.

The objection to each juror must be raised upon his appearance in obedience to the call made under this Section. A failure to object to a juror at that time would amount to a waiver[1] on his part and if the trial proceeds the constitution of the jury cannot be assailed later on.[2]

4. Defect in choosing jury.

See Note 6 to Section 276.

Sec. 278

278.* Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed :—

Grounds of objection.

(*a*) some presumed or actual partiality in the juror ;

(*b*) some personal grounds, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years ;

(*c*) his having by habit or religious vows relinquished all care of wordly affairs ;

(*d*) his holding any office in or under the Court ;

(*e*) his executing any duties of police or being entrusted with police-duties ;

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* **(Code of 1882—S. 278**—Same as that of 1898 Code.)

(Code of 1872—Ss. 244, 245 and 405.)

244. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed :—

Grounds of objection.

(1) any ground of disqualification within S. 405 ;

(2) standing in the relation of husband, master or servant, landlord or tenant, to the person alleged to be injured or attempted to be injured by the offence charged, or to the person on whose complaint the prosecution was instituted or to the person accused ;

(3) being in the employment of any of such persons ;

(4) being plaintiff or defendant against any of such persons in any civil suit ;

(5) having complained against, or having been accused by, any of such persons in any criminal prosecution ;

(6) any circumstance which, in the judgment of the Court, is likely to cause prejudice against or favour to, any of such persons, or which renders such person improper as a juror.

Section 277—Note 2.

1. (1902-03) 7 Cal W N 188 (192), *Brojendra Lal Sarkar* v. *Emperor.*

Note 3.

1. (1917) 1917 Mad 770 (770, 771): 18 Cri L Jour 15 (15, 16), *In re Anipe Palladu.*

2. (1929) 1929 Cal 1 (6): 30 Cri L Jour 494, *Beozlur Rahman* v. *Emperor.*
(1900) 2 Weir 515 (516), *Re Mammade.*
(1932) 1932 Oudh 31 (32): 33 Cri L Jour 280: 1932 Cri Cas 63, *Girdhariji Singh* v. *Jitendra Mohan Singh.*

(*f*) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury;

(*g*) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted;

(*h*) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

Synopsis.

Other Topics.

Decision—Discretion of Court. See S. 279, Note 3.

Inability to understand language—Alleged in appeal. Note 4, Pt. 2.

1. Legislative changes.

1. The ground corresponding to Clause (h) of this Section was not found in the Code of 1861, but was introduced in Clause 6 of Section 244 of the Code of 1872.

2. The subject-matter of this Section was found distributed in Sections 244, 245 and 405 of the Code of 1872. Section 278 of the Code of 1882 consolidated the matter in all the three Sections.

3. There is no difference between the Code of 1882 and the Code of 1898 in this respect.

2. Objection as to partiality—Clause (a).

Where a juror who was the master of a school of one *X* was alleged to be an acquaintance of the Public Prosecutor who was alleged to be the retained pleader of the estate of the said *X*, the accused himself having nothing to do with *X*, it was held that that fact was not a valid ground of objection within

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Juror to understand the language in which evidence is given or interpreted.

245. The Judge shall not allow any person to serve on the jury, unless such person understands the language in which the evidence is given or interpreted.

Disqualifications.

405. The following persons are incapable of serving as jurors or as assessors, namely:—

Persons who hold any office in or under the said Court.

Persons executing any duties of Police or entrusted with any Police functions.

Persons who have been convicted of any offence against the State, or of any fraudulent or other offence which, in the judgment of the Sessions Judge and Collector, renders them unfit to serve on the jury.

Persons afflicted with any infirmity of body or mind, sufficient to incapacitate them from serving.

Persons who, by habit or religious vows, have relinquished all care of worldly affairs.

(Code of 1861—Ss. 334, 344 and 345.)

Disqualifications.

334. The following persons are incapable of serving as jurors or as assessors in trials before the Court of Session, namely:—

Persons who hold any Office in or under the said Court.

Persons executing any duties of Police or entrusted with any Police functions.

Sec. 278 Notes 2—4

the meaning of this Section.[1] But where it appeared that there was litigation pending between the accused's master and another person whose agent the juror was, it was held that the facts gave a ground for presumed partiality in the juror.[2]

3. Inability to understand language—Clause (g).

Inability to understand the language in which the evidence is given or when such evidence is interpreted, the language in which it is interpreted, is a valid ground of objection. The effect of the incompetence of the juror on this ground is to deny to the accused an essential part of the protection accorded to him by law.[1] But the mere fact that the juror does not know *English* is not a valid ground of objection.[2]

4. Failure to object - Effect of.

It is only where a cause of objection is *known* to the accused that his failure to object will preclude him from thereafter taking the objections. But if it is not known to him, there is no reason why the Court, in a proper case should not give effect to it. The view that no evidence is admissible after verdict to establish the inability of a juror to understand the proceedings is erroneous. The duty of the judge to prevent scandal and perversion of justice which would arise from compelling or permitting an incompetent juror to be sworn is a continuous duty throughout the trial.[1] Where, in appeal, it was alleged that some of the jurors did not understand the English language in which the proceedings took place, and it was stated that the appellants were

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Persons who have been convicted of any offence against the State, or of any fraudulent or other offence which, in the judgment of the Collector, renders them unfit to serve on the jury.

Persons who are afflicted with any infirmity of body or mind, sufficient to incapacitate them from serving.

Persons who, by habit or religious vows, have relinquishsd all care of worldly affairs.

Grounds of objection.

344. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed:—

(1) Any ground of disqualification within S. 334.

(2) Standing in the relation of the husband, master or servant. landlord or tenant, to the person alleged to be injured or attempted to be injured by the offence charged, or to the person on whose complaint the prosecution was instituted, or to the person accused; being in the employment on wages of either of such persons; being plaintiff or defendant against either of such persons in any civil suit, or having complained against or having been accused by either of such persons in any criminal prosecution.

(3) Any circumstance which, in the judgment of the Court, is likely to cause prejudice against, or favour to, either of such persons.

Juror to understand the language in which evidence is given or interpreted.

345. The Judge shall not allow any person to serve on the jury, unless such person understands the language in which the evidence is given or interpreted.

Section 278—Note 2.

1. (1925) 1925 Cal 729 (730): 26 Cri L Jour 1009, *Jessarat* v. *Emperor.*
2. (1928) 1928 Pat 31 (32): 7 Pat 50: 28 Cri L Jour 843, *Tajali Mian* v. *Emperor.*

Note 3.

1. (1933) 1933 P C 208 (209): 34 Cri L Jour 843 (844): 12 Pat 811: 60 Ind App 354: 1933 Cri Cas 1306 (P C), *Ras Behari Lal* v. *Emperor.*
2. (1900) 2 Weir 515 (516), *Re Mammadi.*

Note 4.

1. (1933) 1933 P C 208 (210, 211): 34 Cri L Jour 843 (846): 12 Pat 811: 60 Ind App 354: 1933 Cri Cas 1306 (P C), *Ras Behari Lal* v. *Emperor.*

not aware of that fact at the time of empanelling the jury, it was held that the allegations in such cases should be supported by an affidavit filed in time so that the Crown could make the necessary inquiries and file counter-affidavits if necessary before the appeal came on for hearing.[2] Sec. 278 Note 4

Sec. 279

Decision of objection.

279.* (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

Supply of place of juror against whom objection allowed.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by Section 276, or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury:

Provided that no objection to such juror or other person is taken under Section 278 and allowed.

Synopsis.

Other Topics.

Decision on objection—Discretion. See Note 3, Pts. 2 and 3.

1. Legislative changes.

The word "recorded" in Sub-Section 1 of the Section was not present in the Code of 1861 or of 1872. It was introduced in Section 279 of the Code of 1882.

*** (Code of 1882—S. 279.)**

Same as that of 1898 Code.

(Code of 1872—S. 243, Paras. 3 and 4.)

243. * * * * * *	
Names of jurors to be called.	Any objection made to a juror shall be decided by the Court, and the decision of the Court shall be final.

If an objection be allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons; or, if there be no such juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury, provided no objection to such juror or other person be made and allowed.

(Code of 1861—S. 342, last sentence.)

Same as that of 1872 Code.

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2. (1932) 1932 Pat 302 (304): 34 Cri L Jour 83: 1932 Cri Cas 774, *Emperor* v. *Rash Behari Lal.*

Sec. 279 Notes 2—4

2. Scope and object of the Section.

As has been seen in the Notes to Section 276, *ante*, the object of Sections 276 to 279 is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case.[1]

Section 276 is a general Section dealing with the general nature of the procedure. The details of that procedure are given in Sections 277. to 279.[2] Sub-Section 2 of this Section deals with a case where there is no effective lot owing to absence or objection or both and it provides how the number is to be completed.[3] It contemplates the possibility of a person not in the jury list being chosen to serve on the jury in case of emergency.[4]

3. Objection to a juror—Decision on.

Every objection taken to a juror must be *decided* by the Court and it should make a *record* of such decision.[1] Where an objection, on any of the grounds (a) to (g) of Section 278 *ante* is made out to the satisfaction of the Court, it "shall" be allowed. An objection on the ground of *any other circumstance* will be allowed only when, *in the opinion of the Court* such circumstance renders the juror improper to act as such.[2] In this respect the Court has a wide discretion and its decision is final.[3]

4. Procedure on allowing objection to juror—Sub-section 2.

Where an objection to a juror is allowed, his place should be supplied by any other juror attending in obedience to a summons and chosen in the manner provided by Section 276, *i. e., by lot.* If no such juror is present his place should be supplied by any other person present in Court whose name is on the jury list, or whom the Court considers a proper person to serve on the jury subject to a successful objection as stated in the proviso.[1] This latter selection need not, as has been seen in the Notes to Section 276, *ante*, be *by lot*,[2] though it must only be from among the persons *present*. A requisition of persons from outside for the purpose of choosing jurors is not legal.[3] *See also* Notes to Section 276.

Section 279—Note 2.

1. (1903) 7 Cal W N 188 (192), *Brojendra Lal Sarkar* v. *Emperor.*
   (1927) 1927 Cal 787 (790) : 28 Cri L Jour 889, *Rosonali* v. *Emperor.*
2. (1928) 1928 Cal 83 (87) : 55 Cal 371 : 29 Cri L Jour 437, *Kedarnath Mahto* v. *Emperor.*
3. (1928) 1928 Pat 1 (2, 6) : 7 Pat 61 : 28 Cri L Jour 881, *Akbar Ali* v. *Emperor.*
4. (1925) 1925 Cal 798 (799) : 26 Cri L Jour 819, *Govt. of Bengal* v. *Muchu Khan.*
   (1912) 13 Cri L Jour 33 (34) : 5 Sind L R 174, *Empress* v. *Andal.*

Note 3.

1. (1865) 3 Suth W R Cr Cir 1 (1).
2. (1871) 16 Suth W R Cr 56 (56), *Empress* v. *Krishnochuran.*
   (1881) 7 Cal 42 (46), *In the matter of Rochia Mohato.*
3. (1925) 1925 Cal 798 (799) : 26 Cri L Jour 819, *Govt. of Bengal* v. *Muchu Khan.*
   (1902) 7 Cal W N 188 (190), *Brojendra Lal Sarkar* v. *Emperor.*

Note 4.

1. (1929) 1929 Cal 728 (729) : 56 Cal 835 : 31 Cri L Jour 281 : 1929 Cri Cas 364, *Abedali Fakir* v. *Emperor.*
   (1928) 1928 Cal 83 (85) : 55 Cal 371 : 29 Cri L Jour 437, *Kedarnath Mahto* v. *Emperor.*
   (1927) 1927 Cal 787 (791) : 28 Cri L Jour 886, *Rosonali* v. *Emperor.*
2. (1927) 1927 Cal 593 (596) : 54 Cal 1026 : 28 Cri L Jour 615, *Rahamat Sheikh* v. *Emperor.* 1925 Cal 798, relied on.
   (1927) 1927 Cal 787 (791) : 28 Cri L Jour 886, *Rosonali* v. *Emperor.* Overruled on another point by 1928 Cal 83 (F B).
   (1928) 1928 Cal 83 (85, 87) : 55 Cal 371 : 29 Cri Jour 437, *Kedarnath Mahto* v. *Emperor.*
   (1917) 1917 Mad 770 (771) : 18 Cri L Jour 15 (16), *In re Ani Palladu.*
3. (1929) 1929 Cal 728 (729) : 56 Cal 835 : 31 Cri L Jour 281 : 1929 Cri Cas 364, *Abed Ali Fakir* v. *Emperor.*

Foreman of jury.

280.* (1) When the jurors have been chosen, they shall appoint one of their number to be foreman. Sec. 280

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury. and ask any information from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

Synopsis.

	Note No.		Note No.
Legislative changes.	1	**Foreman—To deliver the verdict of the Jury.**	2

Other Topics.

Bribery of Foreman—Verdict bad. See Note 2, Pt. 1.

1. Legislative changes.

Difference between the Code of 1861 *and that of* 1872:—

Section 346 of the Code of 1861 is the same as Section 246 of the Code of 1872 except that in paragraph 1 of the latter, the words "when the jury has been completed" were prefixed.

Difference between the Code of 1872 *and that of* 1882:—

(a) The words "when the jurors have been chosen" were substituted for the words "when the jury has been completed."

(b) The words "within such time as the judge thinks reasonable" were newly introduced.

There is no difference between the present Code and that of 1882 in this respect.

2. Foreman—To deliver the verdict of the jury.

Where, in a trial by jury, some of the accused were acquitted and some convicted and it was found that the foreman of the jury had taken a bribe in connexion with the same trial, it was held that the verdict of the jury could not be sustained and that the conviction should be set aside.[1]

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* **(Code of 1882—S. 280—Same.)**

(Code of 1872—S. 246.)

Foreman of jury.

246. When the jury has been completed, they shall appoint one of their number to be foreman.

It shall be the duty of the foreman to preside in the debates of the jury, to deliver the verdict of the jury, and to ask any information from the Court that may be required by the jury.

If a majority of the jury do not agree in the appointment of a foreman, he shall be named by the Court.

(Code of 1861—S. 346.)

Same as that of 1872 Code, except the addition noted in Note 1.

Section 280—Note 2.

1. (1933) 1933 Cal 639 (640): 1933 Cri Cas 1038 : 60 Cal 751 : 34 Cri L Jour 1072, *Hafez Molla* v. *Emperor*.

Cr. P. C. 194 & 195

Sec. 281

Swearing of jurors.

281.* When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873.

Synopsis.

Other Topics.

No objections to jurors after swearing. See Sec. 277, Notes.

1. Legislative changes.

There was no provision for swearing the Jury in the Code of 1861 or of 1872.[1] It was first introduced in the Code of 1882.

2. Indian Oaths Act, 1873—Omission of jury to be sworn.

Section 5, Clause (c) of the Oaths Act, 1873 enacts that oaths and affirmations shall be made by jurors. But an omission on the part of a juror to do so would not invalidate the proceedings.[1] *See* Section 13 of that Act.

3. Form of oath.

The form of oath is prescribed by the several High Courts under Section 7 of the Oaths Act, 1873.

Sec. 282

Procedure when juror ceases to attend, etc.

282.† (1) If, in the course of a trial by jury at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a

*(Code of 1882—S. 281—Same.)

(Codes of 1872 and 1861—Nil.)

†(Code of 1882—S. 282—Same.)

(Code of 1872—S. 254.)

Procedure when juror becomes unable to attend.

254. If, in the course of a trial by jury, at any time prior to the finding, any juror, from any sufficient cause, is prevented from attending through the trial, or if any juror absents himself, and it is not possible to enforce his attendance, a new juror shall be added, or the jury shall be discharged and a new jury empanelled, and in either case the trial shall commence anew.

(Code of 1861—S. 350.)

Materially the same as that of 1872 Code.

Section 281—Note 1.

1. (1864-66) 3 Bom H C R 56 (57), *Reg* v. *Lakshuman Ramachandra.*

Note 2.

1. (1873) 20 Suth W R Cr 19 (20), *Empress* v. *Ramsodoy Chuckerbutty.*

new juror shall be added, or the jury shall be discharged and a new jury chosen. Sec. 282 Notes 1—2

(2) In each of such cases the trial shall commence anew.

Synopsis.

Other Topics.

Postponement or discharge of jury—Discretion. See Note 3.
"Sufficient cause."
(a) Misconduct of jury. See Note 2, Pts. 2, 5, 6 and 11 and F-N (3) and (6).
(b) Non-appearance of witness. See Note 2, Pt. 8.
(c) Subsequent discovery of deafness or dumbness of juror. See Note 4, Pt. 1.
(d) Expression of views beforehand. See Note 2, Pts. 7, 9 and 10.

1. Legislative changes.

The provision as to the adding of a new juror when "any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted" was not found in the corresponding Sections of the Codes of 1861 and 1872 but was newly added in 1882.

2. Inherent power of Court to discharge jury.

The Code provides for the discharge of the jury only in the following cases:—

1. Under this Section when, in the course of the trial a juror is absent, or is unable to attend, or does not understand the language of the proceedings.
2. Under Section 283 when the prisoner becomes incapable of remaining at the bar.
3. Under Section 305 where, in trials before the High Court the Judge disagrees with the opinion of the majority of the jury.

But the said Sections are not exhaustive of all the circumstances under which a jury may be discharged. In a case which obviously demands interference but which is not within those for which the Code specifically provides, the Court has an *inherent power* to make such order as the ends of justice require.[1] Thus a judge may discharge a jury on the ground that a juror has *misconducted* himself during the trial.[2] The power should not however be exercised lightly nor until the judge has satisfied himself by judicial *enquiry* that reasonable grounds exist for exercising such a right.[3] The judge has un-

Section 282—Note 2.

1. (1925) 1925 Cal 729 (731) : 26 Cri L Jour 1009, *Jessarat* v. *Emperor.*
   (1923) 1923 Cal 724 (724, 725) : 50 Cal 872 : 24 Cri L Jour 677, *Rahim Sheikh* v. *Emperor.*
   (1929) 1929 Cal 343 (345) : 56 Cal 1032 : 31 Cri L Jour 366, *Abdul Rashid* v. *Emperor.*
2. (1924) 1924 Cal 323 (326) : 51 Cal 418 : 25 Cri L Jour 776, *Mamfru* v. *Emperor.*
   (1923) 1923 Cal 724 (725) : 50 Cal 872 : 24 Cri L Jour 677, *Rahim Sheikh* v. *Emperor.*
   (1934) 1934 Cal 428 (429) : 61 Cal 498 : 35 Cri L Jour 941 : 1934 Cri Cas 538, *Nagan Kundu* v. *Emperor.*
3. (1924) 1924 Cal 323 (327) : 51 Cal 418 : 25 Cri L Jour 776, *Mamfru* v. *Emperor.* Misconduct must be established by what is regarded as evidence in the eye of the law.

Sec. 282 Notes 2—3

doubted jurisdiction for the purposes of such enquiry to call upon persons to appear before him, to administer oath to them and to require them to give evidence.[4] A juror may be guilty of misconduct where he is found talking to the Court inspector when the case is called on for hearing,[5] or where during the progress of the trial he talks to persons connected with the accused or discusses the case which is being tried before him.[6] A mere expression of opinion, at the end of the trial, to a friend in a private conversation, will not however, be a ground for discharging the jury.[7] Nor can the jury be discharged merely because a witness for the defence does not attend and a postponement of the case is asked for.[8]

Where the foreman of the jury gave out the verdict in Court after the prosecution evidence was over and before the defence evidence was let in, it was held in the undermentioned case[9] that the judge had no power to discharge the jury and that he should have proceeded with the trial after explaining to the jury their error in not waiting until all the evidence was over. In a somewhat similar case in the Calcutta High Court, the Advocate-General was allowed to enter a *nolle prosequi* under Section 333 *infra* and the difficulty was thus got over.[10]

Where a juror is found guilty of misconduct during trial, the judge is, however, not bound to discharge the *whole* jury. He may deal with the matter on the analogy of this Section and add a new juror in place of the juror removed by choosing him from among the persons present in Court.[11]

A jury can be discharged by the Judge in the exercise of his inherent power even after the verdict has been recorded.[12]

3. "Is prevented from attending throughout the trial."

Whether a juror is prevented from attending *throughout the trial* depends among other things, on the days during which the trial is going to take place, and whether an adjournment is given for any length of time. There is a discretion in the judge whether to postpone the trial to a date on which the juror should be able to attend or to discharge the jury. If the juror is able to attend in a very short time it is a wrong exercise of discretion to discharge the jury.[1]

(1929) 1929 Cal 343 (345) : 56 Cal 1032 : 31 Cri L Jour 366, *Abdul Rashid* v. *Emperor.*
[See also (1925) 1925 Cal 729 (731) : 26 Cri L Jour 1009, *Jessarat* v. *Emperor.* No reasonable grounds proved —Court refused to discharge jury.]

4. (1927) 1927 Cal 628 (629) : 55 Cal 279 : 28 Cri L Jour 783, *Bhuban Chandra Prodhan* v. *Emperor.*

5. (1929) 1929 Cal 57 (58) : 56 Cal 150 : 30 Cri L Jour 435, *Rebati Mohan Chakrabutti* v. *Emperor.*

6. (1927) 1927 Cal 628 (629) : 55 Cal 279 : 28 Cri L Jour 783, *Bhuban Chandra Prodhan* v. *Emperor.*

(1921) 1921 Cal 631 (631) : 22 Cri L Jour 510, *Emperor* v. *Nazar Ali Beg.* Juror expressing outside the Court his opinion as to the guilt of the accused.

7. (1932) 1932 Cal 750 (751) : 33 Cri L Jour 869 : 1932 Cri Cas 744, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Ajit Munshi.*

8. (1902) 4 Bom L R 939 (940), *In re, Putaswami.*

9. (1886) 2 Weir 497 (498), *In re, Doraiswamy Aiya.*

10. (1902-03) 7 Cal W N 31*n* (31*n*), *Emperor* v. *Olu Muhammad.*

11. (1929) 1929 Cal 57 (58) : 56 Cal 150 : 30 Cri L Jour 435, *Rebati Mohan Chakrabutty* v. *Emperor.*

12. (1934) 1934 Cal 428 (429) : 61 Cal 498 : 35 Cri L Jour 941 : 1934 Cri Cas 538, *Nagen Kundu* v. *Emperor.*

Note 3.

1. (1927) 1927 Cal 199 (199, 200) : 28 Cri L Jour 141, *Emperor* v. *Manmothanath Mitter.*

4. "The trial shall commence anew." Sec. 282 Note 4

Where a new juror is added or the jury is discharged under this Section the trial must commence anew and cannot be continued from the stage at which the juror or the jury was discharged. Thus where after the examination of some witnesses in the case a juror was found to be deaf and was consequently discharged, and a new juror added, it was held that the trial should have commenced anew.[1]

Discharge of jury in case of sickness of prisoner.

283.* The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar. Sec. 283

Synopsis.

Other Topics.

Misconduct of jury—Discharge. See Sec. 282, Note 2.

Non-appearance of witness—Jury not to be discharged. See Sec. 282, Note 2, Pt. 8.

1. Legislative changes.

This provision of law was first incorporated in the Code of 1872.

2. Scope of the Section.

See Note 2 to Section 282.

D.—Choosing Assessors.

Assessors how chosen.

284. When the trial is to be held with the aid of assessors, two or more shall be chosen, as the judge thinks fit, from the persons summoned to act as such.

Assessors how chosen.

284.† When the trial is to be held with the aid of assessors, *not less than three and, if practicable, four shall be chosen* from the persons summoned to act as such. Sec. 284

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* **(Code of 1882—S. 283—Same.)**

(Codes of 1872 and 1861—Nil.)

† **(Code of 1882—S. 284—Same.)**

(Code of 1872—S. 239.)

Assessors how chosen.

239. When the trial is to be with assessors, the assessors shall be chosen, as the Judge thinks fit, from the persons summoned to act as assessors.

(Code of 1861—S. 342.)

342. * * * * * *

Assessors to be selected by Judge.

If the trial is to be held with the aid of assessors, the Judge shall select from the persons summoned to act as assessors, two or more persons to assist him in such trial.

Note 4.

1. (1914) 1914 All 91 (92) : 36 All 481 : 15 Cri L Jour 538, *Emperor* v. *Narain.*

Sec. 284 Notes 1—4

Synopsis.

Other Topics.

Commencement of trial with assessors. See Note 4.
Qualifications of assessors. See Note 4, Pt. 2.
Record of reasons for not having four assessors. See Note 3, Pt. 1.
Trial by jury and with assessors—Difference. See S. 274 Notes.

1. Legislative changes.

1. The words "two or more persons" which occurred in Section 342 of the Code of 1861 were omitted in Section 239 of the Code of 1872 but were reintroduced in the Section 284 of the Code of 1882.

2. *Amendment in* 1923:—

(a) The words "*Not less than three and if practicable four*" have been substituted for the words "two or more."

(b) The words "as the Judge thinks fit" have been omitted.

2. "Not less than three . . . . ."

Under the present Section as amended in 1923, there should at least be *three* assessors. Prior to this amendment, the minimum number required was *two*. The Section is imperative, and where, at least the minimum number of assessors do not attend, the Court is not properly constituted and has no jurisdiction to try the case.[1]

3. "And if practicable four."

Where a lesser number of assessors than four is chosen the Court should give reasons to explain the impracticability of having four. But a trial with three assessors without a record of these reasons is not irregular and does not offend against the provisions of this Section.[1]

4. "Shall be chosen"—Meaning of.

A mere *choosing* of assessors is not enough. They must *function* as assessors at the trial. It is only when proceedings are commenced at which assessors can give their aid, that the trial with their aid as contemplated under Section 268 and this Section can be said to have commenced. So where, though the required number of assessors are chosen as required by this Section, some of them are discharged on some ground or other *before the trial actually starts*, and the same goes on with less than the required number of assessors, the requirements of this Section are not satisfied.[1]

Section 284—Note 2.

1. (1924) 1924 Oudh 417 (417), *Pragi* v. *Emperor*. Trial with two assessors after 1923.
(1924) 1924 Nag 287 (287) : 20 Nag L R 129 : 25 Cri L Jour 459, *Jairam Kunbi* v. *Emperor*. (Do.)
(1901) 25 Bom 694 (695), *Emperor* v. *Jayaram*. Trial with one assessor when the minimum number required was two.

Note 3.

1. (1925) 1925 Pat 381 (382) : 26 Cri L Jour 713, *Jamal Momim* v. *Emperor*.

Note 4.

1. (1891) 15 Bom 514 (515), *Empress* v. *Bastiano bin Alexander*.

The selection of the assessors is entirely with the judge. In selecting them regard must be had to the nature of the case, to the person who is tried, to the nature of the evidence that is brought against him, and to the public feeling. The assessors ought not to be pleaders, nor young men fresh from college devoid of experience. They must be persons of independent condition in life, men of judgment and experience.[2]

5. "From the persons summoned to act as such."

As to the summoning of assessors, *see* Sections 326 and 327, *infra*.

Section 279 *supra* empowers the judge, under special circumstances, to choose a person present in Court to act as a *juror* though he had not been summoned as required by Section 276. There is no provision corresponding to that with regard to the selection of assessors. So, no person can be asked to act as an assessor unless he had been summoned under Sections 326 and 327 *infra*, to act as such[1] and such summons can be issued only to persons whose names have been included in the list prepared under Section 321 *infra*.[2] Where, however, an assessor summoned to appear on a particular day failed to appear on that day but appeared on a subsequent date during the same session when another trial had to commence, he could be selected to act as assessor in that trial.[3]

Where persons were summoned to act as *jurors* and the assessors with whose aid the case was tried were chosen from such persons, it was *held* that the trial was illegal.[4]

6. Objection as to assessors.

There is no Section, corresponding to Section 278 *supra*, providing for objections to the selection of any particular person as an assessor. It is, however, an elementary principle that assessors selected should be above suspicion inasmuch as their opinion is of great value both to the judge who tries the case, and to the superior Court. There is no reason therefore why an objection of presumed or actual partiality, when it is urged at the time of the selection of assessors, should not be allowed.[1]

7. Procedure when an assessor is discovered subsequently to be interested in the case.—*See* Section 285, *infra* and Notes thereto.

8. Power of appellate Court to appoint assessors.

The appellate Court has no power to appoint the assessors for the purposes of any trial in the Court below.[1]

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2. (1875) 23 Suth W R Cr 35 (39), *Empress* v. *Ram Dutt Chowdhry*.

Note 5.

1. (1894) 1894 All W N 207 (207), *Empress* v. *Badri*.
   (1913) 14 Cri L Jour 654 (654) : 35 All 570, *Man Singh* v. *Emperor*.
   (1910) 11 Cri L Jour 724 (725) : 13 Oudh Cas 337, *Khub Singh* v. *Emperor*.
   (1918) 1918 Pat 420 (420) : 3 Pat L Jour 141 : 19 Cri L Jour 363, *Balak Singh* v. *Emperor*.
2. (1886) Ratanlal 304 (304), *Queen-Empress* v. *Govind Rao*.
3. (1916) 1916 All 54 (56) : 17 Cri L Jour 17 (18), *Chutta* v. *Emperor*.
4. (1933) 1933 Oudh 351 (352) : 34 Cri L Jour 1093 : 1933 Cri Cas 994, *Sheopal* v. *Emperor*.

Note 6.

1. (1923) 1923 Pat 116 (119) : 22 Cri L Jour 262, *Shivadhim Singh* v. *Emperor*. Objection on the ground of the assessor being a tenant of other party.

Note 8.

1. (1868) 1868 Pun Re Cr No. 17, page 17, *Crown* v. *Syed Ahmud*.

Sec. 284 Note 9

9. Effect of non-compliance with the Section.

The provisions of this Section are *mandatory*. So where a trial commences and proceeds with less than minimum number of assessors[1] or where some of the required number of assessors are appointed out of persons not summoned to act as such[2] the Court is not properly constituted and the whole trial is illegal. But where an assessor summoned to appear on a particular date for the purpose of any particular case, appears only on a different date, and a different case is started with him as one of the assessors[3] or where only three assessors are chosen without giving reasons for not choosing four (after the amendment in 1923)[4] the trial is not illegal.

Sec. 284-A

284-A.*

Assessors for trial of European and Indian British subjects and others.

(1) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or, where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.

(2) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans.

*** (Code of 1898—S. 460.)**

Jury for trial of Europeans or Americans.

In every case triable by jury or with the aid of assessors, in which an European (not being a British subject) or an American is the accused person, or one of the accused persons, not less than half the number of jurors or assessors shall, if practicable and if such European or American so claims, be Europeans or Americans.

Note 9.

1. (1924) 1924 Oudh 417 (417), *Pragi* v. *Emperor*. Trial with two assessors after 1923.
   (1925) 1925 Oudh 110 (110) : 27 Oudh Cas 213 : 26 Cri L Jour 359, *Ram Narain* v. *Emperor*. (Do.)
   (1901) 25 Bom 694 (695), *Emperor* v. *Jayram*. Trial with one assessor where minimum number required was two.
   (1869) 2 Weir 340 (340) : 24 Mad 523, *Emperor* v. *Thirumallai Reddy*. Trial with only one assessor capable of acting, the other being deaf and dumb.
   (1899) 21 All 106 (107), *Empress* v. *Babu Lal*. (Do.)
   (1891) 15 Bom 514 (515), *Emperor* v. *Bastiano Bin Alexander Silva*. Trial with one assessor after the other though summoned, has been discharged.
2. (1894) 1894 All W N 207 (207), *Badri* v. *Queen-Empress*.
   (1918) 1918 Pat 420 (420) : 3 Pat L Jour 141 : 19 Cri L Jour 363, *Balak Singh* v. *Emperor*.
   (1913) 14 Cri L Jour 654 (654) : 35 All 570, *Man Singh* v. *Emperor*.
   (1910) 11 Cri L Jour 724 (725) : 13 Oudh Cas 337, *Khub Singh* v. *Emperor*.
3. (1916) 1916 All 54 (56) : 17 Cri L Jour 17 (18), *Chutta* v. *Emperor*.
4. (1925) 1925 Pat 381 (382) : 26 Cri L Jour 713, *Jamal Momin* v. *Emperor*.

Synopsis.

1. Scope of the Section.—*See* Note 1 to Section 275, *ante*.

2. Failure to claim privilege.—*See* Section 528-B, *infra*.

285.* (1) If in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

Procedure when assessor is unable to attend.

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.

Synopsis.

Other Topics.

Absentee assessor resuming. See Note 4, Pts. 2 to 6.
Address after discharge of assessors. ee Note 5, Pt. 4.
At least, one assessor to be present throughout. See Note 2, Pts. 2 and 3.
Evidence after discharge of assessors. See Note 5, Pt. 3.
Incapacity of assessors. See Sec. 284, Note 9, F-N (1).
Irregularities curable. See Note 4, Pt. 6.
Irregularities not curable. See Note 5, Pt. 5.
Section applies to defects after trial is begun. See Note 2, Pt. 1.
Subsequent discovery of incapacity. See Note 6.
"Sufficient cause." See Note 6.

1. Legislative changes.

1. There is no material difference between the corresponding Sections of the Codes of 1861 and 1872.
2. The words "prevented from attending throughout the trial" which occurred in Section 259 of the Code of 1872 have been sub-

* **(Code of 1882—S. 285**—Same.)

(Code of 1872—S. 259)

259. If, in the course of a trial with the aid of assessors, at any time prior to the finding, any assessor is, from any sufficient cause, prevented from attending through the trial, the trial shall proceed with the aid of the other assessor or assessors.

Procedure when assessor is unable to attend.

If all the assessors are prevented from attending through the trial, the proceedings shall be stayed, and a new trial shall be held with the aid of fresh assessors.

(Code of 1861—S. 353.)

Same as that of 1872 Code.

Sec. 285 Notes 1—4

stituted by the words "prevented from. . . . . attendance" in the Codes of 1882 and 1898.

2. Scope and applicability of the Section.

This Section applies only where *in the course of trial* an assessor is unable to attend. It contemplates the case of a trial which has *commenced with the requisite number* of assessors who at the commencement of the trial were capable of acting as competent assessors. It has no application to trials conducted *from the start* with less than the requisite number of competent assessors.[1]

There must be at least *one* assessor attending throughout the proceedings[2] and this requirement is a condition precedent to the exercise of jurisdiction by the Court.[3]

3. "Prevented from attending throughout the trial, or absents himself."

The words "prevented from attending, or absent themselves" in sub-section 2 of this Section should be read with sub-section 1 and should be understood to mean "prevented from attending *throughout the trial*, or absent themselves."[1]

4. "Shall proceed with the aid of the other assessor or assessors."

This procedure has to be adopted only when it is *not practicable* to enforce the attendance of the absentee assessor. Where the judge allowed one of two assessors to absent himself for one of the days of the trial, and proceeded to try the case with the other assessor, it was held that the judge ought not to have proceeded with the trial, but should have adjourned the trial till a day when both assessors could attend.[1] Where an assessor absents himself he should not be allowed to return and take part in the proceedings at a later stage.[2] The reason is that when once the trial is resumed by the judge in the absence of an assessor such assessor ceases to occupy the position of an assessor aiding at the trial..[3] If, consequently, he is allowed to return and take part in the proceedings and give his opinion the procedure is not in accordance with law,[4] and contrary to the intentions of this Section and Section 295.[5] The procedure is, however, only an irregularity which is cured by Section 537 *infra* unless it has occasioned a failure of justice.[6]

Section 285—Note 2.

1. (1899) 21 All 106 (107), *Empress* v. *Babu Lal.*
   (1891) 15 Bom 514 (515), *Empress* v. *Bastiano Bin Alexander.*
   (1894) 1894 All W N 207 (207), *Empress* v. *Badri.*
   (1901) 25 Bom 694 (696), *Emperor* v. *Jayram.*
   (1918) 1918 Pat 420 (420) : 3 Pat L Jour 141 : 19 Cri L Jour 363, *Balak Singh* v. *Emperor.*
   (1869) Weir's 3rd Edn. 927, 22nd July 1869. Where at the close of the trial one of the assessors was discovered to be so deaf and blind as to be incapable of understanding the proceedings, the trial was held to be null and void.
2. (1891) 13 All 337 (338), *Empress* v. *Muhammad Mahmud Khan.*
   (1902) 6 Cal W N 715 (716), *Emperor* v *Messeruddin Shikdar.*
3. (1901) 24 Mad 523 (536), *Emperor* v. *Therumalai Reddi.*

Note 3.

1. (1891) 13 All 337 (338, 339), *Empress* v. *Muhammad Mahmud Khan.*

Note 4.

1. (1894) Ratanlal 695 (695), *Empress* v. *Piso.*
2. (1901) 24 Mad 523 (532, 534), *Emperor* v. *Therumalai Reddi.*
   (1894) 8 C P L R 9 (12), *Empress* v. *Ghasia Chamar.*
   (1894) Ratanlal 695 (695), *Empress* v. *Piso.*
3. (1902) 6 Cal W N 715 (716), *Emperor* v. *Messeruddin Sheikh.*
4. (1894) 8 C P L R 9 (12), *Empress* v. *Ghasia Chamar.*
5. (1894) Ratanlal 695 (695), *Empress* v. *Piso.*
6. (1901) 24 Mad 523 (532, 534), *Emperor* v. *Therumalai Reddi.*

5. All assessors absent—Sub-section 2.

It has been seen already in Note 2, *ante* that for a valid trial at least one assessor must attend throughout the trial. If *all* the assessors are prevented from attending or no one assessor is able to attend throughout the trial, the proceedings should be stayed and a new trial held with the aid of fresh assessors.[1] In only one instance is a Sessions Judge authorised to record evidence in the absence of the jury or the assessors, and that is when *additional evidence* is called for by the appellate Court, vide Section 428, *infra*.[2] Where a material evidence was recorded after all the assessors were discharged, it was held that such evidence was recorded *coram non judice*,—that is, a tribunal which had no authority to record it.[3] The same principle will apply where there was no assessor present during the address on behalf of the accused.[4] The non-compliance with this sub-section affects the jurisdiction of the Court, and the irregularity is, therefore, not one curable under Section 537, *infra*.[5]

6. If assessor is an interested person—Procedure.

Where it is discovered after the trial had begun, in a case tried with the aid of assessors that one of them was interested or otherwise unfit to sit as an assessor, this Section does not apply as the said assessor is neither prevented from attending, nor absents himself. In such a case the Sessions Judge should ask the High Court under Section 438, *infra* to set aside the order by which the incompetent assessor was appointed as well as all the subsequent proceedings and then choose another assessor and proceed with the trial *de novo*.[1]

DD.—Joint Trials.

285-A. *In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European, Indian British subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of Section 275 or Section 284-A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter.*

Trial of European or Indian British subject or European or American jointly accused with others.

Synopsis.

Note 5.

1. (1891) 13 All 337 (338), *Empress* v. *Muhammad Mahmud Khan.*
2. (1893) 15 All 136 (137), *Empress* v. *Ram Lal.*
3. (1893) 15 All 136 (137), *Empress* v. *Ram Lal.*
   (1873) 5 N W P H C R 110 (112), *Empress* v. *Cheit Ram.*
4. (1891) 13 All 337 (339), *Empress* v. *Muhammad Mahmud Khan.*
5. (1893) 15 All 136 (137), *Empress* v. *Ram Lal.*

Note 6.

1. (1912) 13 Cri L Jour 473 (474) : 15 Ind Cas 313 (Mad), *Sessions Judge of Tanjore* v. *Thiagaraja Thevan.*
   (1933) 1933 Lah 926 (927) : 35 Cri L Jour 107 : 15 Lah 20 : 1933 Cri Cas 1385, *Emperor* v. *Lal Singh.* In such cases, High Court has power under S. 561-A to order retrial.

Sec. 285-A Notes 1—3

1. Legislative changes.

Compare Sections 452 and 461 of the Code of 1882, Section 242 of the Code of 1872 and Section 326 of the Code of 1861.

2. Scope and application.

This Section is new.

The undermentioned cases[1] under Section 452 of the Code which has now been repealed, are no longer of any importance.

3. Failure to claim separate trial—Effect.—*See* Section 528-B, *infra*.

E.—Trial to close of cases for prosecution and defence.

Sec. 286

286.* (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

Opening case for prosecution.

(2) The prosecutor shall then examine his witnesses.

Examination of witnesses.

Synopsis.

Other Topics.

* **(Code of 1882—S. 286—Same.)**

(Code of 1872—S. 247.)

Examination of witnesses.

247. The witnesses shall then be examined, cross-examined, and re-examined according to the law for the time being relating to the examination of witnesses.

(Code of 1861—S. 364.)

Provisions relating to examination of parties, &c., in trials before Magistrate to be applicable to trials before Court of Session.

364. The provisions of Ss. 195, 196, 197, 198, 199 and 200, of this Act, relating to the examination of the parties and witnesses, the mode of recording evidence, and the correction, attestation, and interpretation thereof in trials before the Magistrate, shall be applicable to trials before the Court of Session under this Chapter.

Section 285-A—Note 2.

1. (1890) 14 Bom 160 (162), *In re Job Solomon.* (1876) 1 Bom 232 (235), *Reg* v. *Lalubhai Gopaldas.*

1. Legislative changes.

This Section was first introduced in its present form by the Act of 1882 and it remains unaltered in the present Code.

2. When the jurors or assessors have been chosen.

A Sessions trial begins as soon as the accused person appears before the Court and the jurors or the assessors are chosen.[1] After the jurors are sworn the trial should proceed and cannot be postponed to enable the prosecution to examine a witness on commission.[2] If after the swearing in of the jury the Judge is unable to attend as where he falls ill suddenly, the trial can proceed further before a new judge with the same jury provided no evidence has been taken and if taken, the latter Judge does not act upon it.[3]

3. "The prosecutor shall open his case."

The opening of the prosecution must always be confined to matters which are necessary to enable the jury to follow the evidence. The prosecutor will have to state all that it is proposed to prove in the case, so that the jury may see if there is any discrepancy between the opening statement of the prosecutor and the evidence afterwards adduced in support thereof. It would be wholly improper for him to open any matter to the jury in respect whereof no evidence is intended to be read or can be adduced at the trial. Nor is it the stage where a doubtful question of admissibility should be raised or decided. Very great care must be taken by the prosecutor in the observations to be made to the jury and topics of prejudice connected with the character of the prisoner should be carefully excluded.[1]

The prosecutor should state in his opening address who the witnesses are, whom he proposes to call, and who have not already been examined. Though the mere fact that a witness has not been examined before the committing Magistrate is no ground for refusing to take the evidence of a relevant witness tendered for the prosecution, the examination of additional witnesses should not, as a general rule, be sprung as a surprise on the accused.[2] The Court should see that the prosecution puts forward a real case from the beginning and sticks to it up to the end.[3]

4. "By reading."

The accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, for, unless he has knowledge he may be seriously prejudiced in his defence.[1]

5. Examination of accused before opening of case.

Section 342 of the Code empowering the Court to examine the accused

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Section 286—Note 2.

1. (1925) 1925 Lah 446 (447) : 6 Lah 262 : 27 Cri L Jour 421, *Emperor* v. *Fitzmaurice.*
   (1889) 1889 Pun Re Cri No. 1 page (1, 3), *Khan Muhammad* v. *Empress.*
2. (1892) 19 Cal 113 (122), *Queen-Empress* v. *Jacob.*
3. (1927) 1927 Bom 161 (162) : 28 Cri L Jour 402, *Emperor* v. *Darabji Pestonji.*

Note 3.

1. (1929) 1929 Cal 617 (620, 625) : 30 Cri L Jour 993 : 1929 Cri Cas 228 (S B), *Padam Prasad* v. *Emperor.*
2. (1889) 1889 Pun Re Cri No. 1 page (4), *Khan Mahammad* v. *Empress.*
3. (1927) 1927 Mad 533 (535) : 28 Cri L Jour 285, *In re Biswanath Das.*
   (1928) 1928 All 696 (697) : 29 Cri L Jour 1084 : 51 All 463, *Bhan Deb* v. *Emperor.*

Note 4.

1. (1916) 1916 Cal 188 (192) : 16 Cri L Jour 497 (501) : 42 Cal 957, *Amritalal Hazra* v. *Emperor.*

Sec. 286 Notes 5—6

at any stage must be read subject to the provisions of this Section. Therefore a Court should not, before the prosecutor opens his case and examines his witnesses, under this Section, examine the accused under Section 342 *infra*.[1]

6. "Shall then examine his witnesses."

The prosecution witnesses should be called to prove events in their chronological order. It is entirely in the discretion of the Public Prosecutor to say what witnesses he will examine[1] and in what order. The judge cannot dictate to the prosecution, the order in which the witnesses are to be examined, though, he may suggest that the proper method and order of calling the witnesses should be observed.[2]

As a general rule the prosecutor is bound to call all available witnesses who prove their connection with the transaction in question and who also must be able to give important information,[3] unless he has reasonable grounds to believe that, if called the witness would not speak the truth or is unnecessary,[4]

Note 5.

1. (1922) 1922 All 266 (267) : 24 Cri L Jour 609, *Sukia* v. *Emperor*.

Note 6.

1. (1894) 16 All 84 (86, 87) (FB), *Empress* v. *Durga*.
   (1882) Weir's 3rd Edn. 941 (941), *Modkarow alias Kaka, In re*. Prosecution not bound to call a witness whose evidence would probably be hostile.
   (1935) 1935 Pat 95 (96) : 1935 Cri Cas 208 : 36 Cri L Jour 348, *Ebrahim* v. *Emperor*. The Public Prosecutor is not obliged to examine persons as prosecution witnesses, if he has reason to believe that they would not support the prosecution case. Nor is the Court bound to examine any person as a Court witness, unless the evidence of such person appears to be essential to the just decision of the case.
2. (1923) 1923 Cal 579 (581, 582), *Emperor* v. *Ahirannessa*.
   (1904) 8 Oudh Cas 55 (56) : 2 Cri L Jour 191, *Emperor* v. *Ali Mohammad*.
3. (1882) 8 Cal 121 (124, 125), *In the matter of Dhunno Kazi*.
   (1885) 7 All 904 (905, 906), *Empress* v. *Tulla*
   (1893) 15 All 6 (7), *Empress* v. *Ban Khandi*.
   (1923) 1923 Cal 517 (519) : 50 Cal 318 : 25 Cri L J 467, *Md. Yunus* v. *Emperor*.
   (1915) 1915 Cal 545 (546) : 16 Cri L Jour 170 (172) : 42 Cal 422, *Ram Ranjan Roy* v. *Emperor*.
   (1920) 1920 Pat 366 (371): 21 Cri L Jour 33, *Brahamdeo Singha* v. *Emperor*.
   (1929) 1929 Pat 343 (345, 346) : 8 Pat 625 : 30 Cri L Jour 1136: 1929 Cri Cas 155, *Mathura Tewary* v. *Emperor*.
   (1905-1906) 3 Low Bur Rul 133 (142, 144), *Emperor* v. *E Maung*.
   (1884) 10 Cal 1070 (1072), *Queen-Empress* v. *Ram Sahai Lall*.
   (1909) 10 Cri L Jour 321 (323) : 3 Ind Cas 622 (Lah), *Muzammal* v. *Emperor*.
   (1910) 11 Cri L Jour 410 (411) : 3 Sind L R 200, *Imperator* v. *Jumo*.
   (1867) 8 Suth W R Cr 87 (90), *Empress* v. *Nobokisto Ghose*.
   (1932) 1932 Lah 500 (501) : 33 Cri L Jour 497 : 1932 Cri Cas 679, *Lachhmi Narain* v. *Emperor*.
   (1924) 1924 Mad 239 (240) : 25 Cri L Jour 75, *Doraiswami Udayan* v. *Emperor*.
   (1927) 1927 Mad 475 (476) : 28 Cri L Jour 307, *Muthaya Thevan* v. *Emperor*.
   (1929) 1929 Mad 906 (909, 910) : 53 Mad 69 : 31 Cri L Jour 1006: 1929 Cri Cas 685, *Veera Koravan* v. *Emperor*.
   (1891) Ratanlal 581 (581, 582), *Empress* v. *Dhamba*.
   (1869) 11 Suth W R Cr 25 (27), *Empress* v. *Ahmed Ally*. The practice of not examining a Police officer who investigates a case condemned.
   (1933) 1933 Oudh 265 (267) : 34 Cri L Jour 1009 : 1933 Cri Cas 592, *Ghirrao* v. *Emperor*.
   [See also (1881) Ratanlal 173 (174), *Empress* v. *Rampuri*. Persons present at the search by investigating officer to be examined.
   (1920) 1920 Pat 42 (43): 21 Cri L Jour 743, *Keshwar Gope* v. *Emperor*.]
   [But see (1932) 1932 Cal 118 (119, 120) : 1932 Cri Cas 103: 58 Cal 1335 : 33 Cri L Jour 135, *Girish Chandra Namadas* v. *Emperor*.]
4. (1894) 16 All 84 (86, 87) (FB), *Empress* v. *Durga*. False or unnecessary.
   (1927) 1927 Mad 475 (476, 477) : 28 Cri L J 307 *Muthaya Thevan, In re*. (Do.)
   (1924) 1924 Mad 239 (240) : 25 Cri L Jour 75, *Doraiswami Udayan* v. *Emperor*.
   (1923) 1923 Pat 413 (416) : 2 Pat 309 : 24 Cri L Jour 801, *Ranjit Ahir* v. *Emperor*. (Do.)
   (1882) 8 Cal 121 (124, 125) *Dhunno Kazi* v. *Empress*. False.
   (1885) 7 All 904 (905, 906) *Queen-Empress*, v. *Tulla*. (Do.)

or is an accomplice himself.[4a] It is not proper to refuse to examine material witnesses on the ground that a witness may be favourable to the accused or may not be favourable to prosecution,[5] or that he has also been summoned by the defence[6] or that a serious charge is made against the witness by the accused.[7] At the same time, the prosecution should exercise a careful discrimination and avoid the piling up of evidence and the overburdening of the record and consequent waste of time.[7a] There is no provision in the Code entitling the prisoner to have a witness for the prosecution who is not called, put into the witness box for cross-examination. The accused may apply to have such witness examined under Section 291, *infra* if he so requires.[8] Nevertheless the Public Prosecutor in fairness should explain to the Court his reason for not calling his witnesses and offer to put them in the box for cross-examination by the accused[9] especially where the witness is a material one and whose evidence

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(1893) 15 All 6 (7) *Empress* v. *Bankhandi*, (Do.)
(1922) 1922 Cal 461 (461) : 49 Cal 277 : 23 Cri L Jour 742 *Emperor* v. *Reed*, (Do.)
(1923) 1923 Cal 517 (519) : 50 Cal 318 : 25 Cri L Jour 467 *Muhammdd Zanus* v. *Emperor*. (Do.)
(1929) 1929 Pat 343 (345, 346) : 8 Pat 625 : 30 Cri L Jour 1136; 1929 Cri Cas 155, *Mathura Tewari* v. *Emperor*. (Do.)
(1905-1906) 3 Low Bur Rul 133 (142, 144) *Emperor* v. *E Maung*. (Do.)
(1916) 1916 Lah 408 (409) : 17 Cri L Jour 267 (268) : 1916 Pun Re Cr No. 12, *Kaimi* v. *Crown*. (Do.)
(1931) 1931 Mad W N 727 (728), *Nagaratna Tevan* v. *Emperor*. (Do.)
(1922) 1922 Cal 382 (385) : 49 Cal 358 : 24 Cri L Jour 221 *Emperor* v. *Balram Das*. (Do.)
(1930) 1930 Cal 134 (135) : 31 Cri L Jour 918: 1930 Cri Cas 134, *Nayan Mandal* v. *Emperor*. (Do.)
(1930) 1930 Lah 82 (84) : 31 Cri L Jour 176: 1930 Cri Cas 93, *Amar Singh* v. *Emperor*. (Do.)
(1886) 2 Weir 378 (379) *Ramaswami Goundan In re*. (Do.)
(1901) 24 Mad 321 (324), *Empress* v. *Ramaswami*. (Do.)
(1891) Ratanlal 581 (581, 582), *Empress* v. *Dhanba*. (Do.)
(1924) 1924 Lah 241 (243) : 24 Cri L Jour 708, *Inder Singh* v. *Emperor*. Unnecessary.
(1928) 1928 Pat 46 (48) : 28 Cri L Jour 868, *Prabhu Dusadh* v. *Emperor*. (Do.)
[See also (1928) 29 Cri L Jour 999 (1001) : 112 Ind Cas 215 (216, 217) (Lah), *L. Bahadur* v. *Emperor*. (Do.)]
[But see (1934) 1934 All 908 (918) : 1934 Cri Cas 1167 : 36 Cri L Jour 152, *Nem Singh* v. *Emperor*. In a murder case where a witness has given evidence which supports a plea of *alibi* taken by the accused, the prosecution authorities have no right to take it upon themselves to decide whether a witness who gives vital evidence of this sort is or is not a reliable witness—That is the function of the Court which the prosecution has no right to usurp.]

4a (1918) 1918 Cal 314 (315) : 19 Cri L Jour 81, *Ashraj Ali* v. *Emperor*.

5. (1894) 16 All 84 (86), *Queen-Empress* v. *Durga*.
(1920) 1920 Pat 366 (371) : 21 Cri L Jour 33, *Brahamdeo Singha* v. *Emperor*.
(1904) 1 Cri L Jour 305 (309) : 28 Bom 479, *Emperor* v. *Bal Gangadhar Tilak*.
(1922) 1922 Pat 535 (539) : 1 Pat 401 : 24 Cri L Jour 129, *Chandrika* v. *Emperor*.

6. (1882) 8 Cal 121 (125), *Dhunno Kazi* v. *Empress*.

7. (1873) 21 Suth W R Cr 13 (16), *The Queen* v. *Madhub Chander*.

7a (1933) 1933 All 690 (695) : 34 Cri L Jour 967 : 55 All 1040 : 1933 Cri Cas 1202, *Jhabwala* v. *Emperor*.

8. (1868) 5 Bom H C R Cr 85 (96, 97), *Reg* v. *Fatehchand Vastachand*.
[See also (1887) 14 Cal 245 (248), *Empress of India* v. *Kaliprosonno Doss*.]

9. (1885) 7 All 904 (905, 906), *Queen-Empress* v. *Tulla*.
(1880) 5 Cal 614 (615), *Empress* v. *Girish Chander Talukoar*.
(1889) 2 Weir 379 (380), *In re Eruva Perayya*.
(1922) 1922 Pat 535 (539) : 1 Pat 401 : 24 Cri L Jour 129, *Chandrika* v. *Emperor*.
(1909) 10 Cri L Jour 538 (539) : 4 Ind Cas 273 (Bom), *Mavsang Bharan* v. *Emperor*.
(1910) 11 Cri L Jour 410 (411) : 3 Sind L R 200, *Imperator* v. *Jumo*.
(1923) 1923 Cal 717 (718) : 25 Cri L Jour 190, *Nagendra Chandra Dhar* v. *Emperor*.
(1930) 1930 Cal 134 (135, 136) : 31 Cri L Jour 918 : 1930 Cri Cas 134, *Nayan Mandal* v. *Emperor*.

Sec. 286 Note 6

has been relied upon by the committing Magistrate.[10] But where the Public Prosecutor is of opinion that a witness is a false one he need not even tender him for cross-examination.[11] Where any witness known to the prosecution is able to swear to facts very material to the case, the practice of merely allowing him to be tendered for cross-examination is not proper but he must be examined in the ordinary way as to the facts known to him.[12] In undefended cases the Court should in the interests of justice test the statement of the witnesses for the prosecution by questions in the nature of cross-examination.[13] It cannot however take upon itself the role of a prosecutor and ask the prosecution witnesses to explain discrepancies.[14] As to effect of non-examination by the prosecution of a material witness and the inference to be drawn therefrom, *see* Section 114, illustration (g) of Evidence Act and the following cases.[15]

Though there is nothing in the Code which says that the prosecutor at a Sessions trial can examine only such witnesses as have been examined before a committing Magistrate,[16] yet, the prosecutor cannot as of right

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10. (1892) 14 All 521 (523, 524), *Empress* v. *Starton.*
11. (1894) 16 All 84 (86, 87) (F B), *Queen-Empress* v. *Durga.*
12. (1929) 1929 Mad 906 (909, 910) : 53 Mad 69: 31 Cri L Jour 1006: 1929 Cri Cas 685, *Veerakoravan* v. *Emperor.*
13. (1885) 7 All 160 (162), *Empress* v. *Kallu.*
14. (1925) 1925 Oudh 726 (727) : 26 Cri L Jour 1236, *Sarju Singh* v. *Emperor.*
15. (1885) 7 All 904 (905, 906), *Queen-Empress* v. *Tulla.*
    (1932) 1932 All 185 (186) : 33 Cri L Jour 943 : 1932 Cri Cas 201, *Mohammad Bashir* v. *Emperor.*
    (1882) 8 Cal 121 (124, 125), *Empress* v. *Dhunno Kazi.*
    (1915) 1915 Cal 545 (547) : 16 Cri L Jour 170 (172) : 42 Cal 422, *Ram Ranjan Roy* v. *Emperor.*
    (1931) 1931 Lah 408 (415) : 32 Cri L Jour 818 : 1931 Cri Cas 648, *Inder Datt* v. *Emperor.*
    (1919) 1919 Pat 27 (29) : 4 Pat L Jour 74 : 20 Cri L Jour 161, *Kesar* v. *Emperor.*
    (1920) 1920 Pat 42 (43, 44) : 21 Cri L Jour 743, *Keshwar Gope* v. *Emperor.*
    (1920) 1920 Pat 366 (371) : 21 Cri L Jour 33, *Brahamdeo Singha* v. *Emperor.*
    (1929) 1929 Mad W N 587 (591, 592), *Kumaraswami Asari* v. *Emperor.*
    (1922) 1922 Pat 535 (539) : 1 Pat 401 : 24 Cri L Jour 129, *Chandrika Ram Kahar* v. *Emperor.*
    (1922) 1922 Pat 582 (584, 585) : 1 Pat 630 : 24 Cri L Jour 91, *Niru Bhagat* v. *Emperor.*
    (1928) 1928 Pat 98 (100) : 28 Cri L Jour 906, *Jogi Raut* v. *Emperor.*
    (1907) 6 Cri L Jour 304 (313) (Cal), *Nibaran Chandra Roy* v. *Emperor.*
    (1916) 1916 Lah 408 (409) : 17 Cri L Jour 267 (268): 1916 Pun Re Cr No. 12, *Kaimi* v. *Emperor.*
    (1930) 1930 Cal 184 (136) : 31 Cri L Jour 918 : 1930 Cri Cas 184, *Nayan Mandal* v. *Emperor.*
    (1919) 1919 Lah 158 (159) : 20 Cri L Jour 519, *Emperor* v. *Amolak Ram.*
    (1928) 1928 Lah 125 (128) : 29 Cri L Jour 212, *L. Taj Mohammad* v. *Emperor.*
    (1929) 1929 Pat 651 (654) : 9 Pat 647 : 31 Cri L Jour 306 : 1929 Cri Cas 379, *Krishna Maharana* v. *Emperor.*
    (1930) 1930 Lah 163 (165) : 31 Cri L Jour 181 : 1930 Cri Cas 171, *Jowaya* v. *Emperor.*
    (1932) 1932 Cal 118 (119, 120) : 58 Cal 1335 : 33 Cri L Jour 135 : 1932 Cri Cas 103, *Girish Chandra Namadas* v. *Emperor.*
    (1932) 1932 Cal 871 (875, 876) : 34 Cri L Jour 181 : 60 Cal 149 : 1932 Cri Cas 893, *Nafar Sardar* v. *Emperor.* Where prosecution have examined sufficient witnesses to prove their case the mere fact that they had not examined other witnesses who could have given evidence is not sufficient to set aside conviction.
    (1933) 1933 Cal 600 (602) : 60 Cal 1361 : 35 Cri L Jour 33 : 1933 Cri Cas 964, *Bhuban Bijah Singh* v. *Emperor.* Simply because the prosecution does not call certain witnesses, the Court need not raise the presumption under S. 114, Ill. (g) when the absence of the witnesses is explained properly.
    (1923) 1923 Oudh 217 (224) : 24 Cri L Jour 770, *Emperor* v. *Narotam.* Two eye-witnesses sent up by the police not examined by Court — *Held*, that there must be some limit to the number of witnesses a Court is asked to hear and no argument favourable to the accused could be based on the fact that the two witnesses had not been called.
16. (1889) 1889 Pun Re Cr No. 1, page (4),

demand that any witness who was not examined by the committing Magistrate either under Section 208 or under Section 219 should be called and examined; but the Court may call and examine such a witness if it considers it necessary in the interests of justice.[17] A Sessions Judge commits a material irregularity in procedure in refusing to take the evidence of the persons called as witnesses. Further, even if justified in so refusing, he should leave upon record clear and distinct reasons for adopting such a course.[18] Where a case is tried by jury, the witnesses cannot be examined in the absence of the jury and their evidence if taken cannot be acted upon.[19]

When a prosecution witness examined in the committing Magistrate's Court is not examined in the Sessions Court, it is open to the Judge either to draw an adverse inference against the Crown or to examine the witness as a Court witness. But the Judge cannot *compel* the prosecution to examine such witness as a prosecution witness or to tender him for cross-examination.[20]

7. Examination must be oral.

The examination referred to in this Section means oral examination of the witnesses present (except in cases where evidence is taken by commission or in any case where the witness is deaf or dumb). Oral examination is therefore, the general rule, and it is of utmost importance that the rule should be followed in all cases where the witness is present to be examined. The demeanour of the witness may be important for the assessor or Judge towards forming an opinion of his truth. "It is the rule, and it is founded on reason and justice."[1]

8. Using depositions given before the Magistrate.—*See* Sections 288 and 353, *infra* and the Notes thereunder.

9. Attendance of witnesses.—*See* Section 216.

10. Cross-examination to follow examination-in-chief.

The cross-examination of every witness should follow his examination-in-chief. *See* Section 138 of the Evidence Act of 1872. It is both irregular and inconvenient to allow all the witnesses to be examined one day and to

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Khan Muhammad, In re.

(1934) 1934 Bom 487 (489) : 36 Cri L Jour 344 : 1934 Cri Cas 1413, *Emperor* v. *Dhondiba Santoo Sinde.* Summary of evidence which a new witness is expected to give must be supplied to the Judge.

(1930) 1930 Sind 99 (103) : 24 Sind L R 96 : 31 Cri L Jour 117 : 1930 Cri Cas 282, *Nurkhan* v. *Emperor.* In committal proceedings there is no obligation on the part of the prosecution to get recorded by the Committing Magistrate every jot and title of the evidence which they intend to place before the Sessions Court.

(1935) 1935 Sind 31 (33) : 28 Sind L R 317 : 36 Cri L Jour 563 : 1935 Cri Cas 160, *Nandram Bhimbahadur* v. *Emperor.* Prosecution need not examine in committing Magistrate's Court all witnesses whom it is going to produce in Sessions Court. But the principal witnesses at least must be examined in the committing Magistrate's Court. [But see (1934) 1934 Lah 667 (672) : 1934 Cri Cas 990 : 15 Lah 331 : 36 Cri L Jour 169, *Sher Bahadur* v. *Emperor.* The prosecution has no right to produce at the trial any evidence which had not been produced before the Committing Magistrate.]

17. (1892) 14 All 212 (214), *Queen* v. *G. W. Hayfield.*

18. (1886) 1886 All W N 68 (68), *Empress* v. *Nathus.*

19. (1906) 3 Cri L Jour 42 (43) (Bom), *Emperor* v. *Ningappa Sayadappa.*

20. (1935) 1935 Sind 60 (62) : 36 Cri L Jour 869 : 1935 Cri Cas 248, *Emperor* v. *Dulo.*

Note 7.

1. (1886) 9 Mad 83 (84, 85), *Subba* v. *Queen.*

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reserve the cross-examination to a subsequent date.[1] The accused is therefore not entitled as of right to postponement of the cross-examination. The Court may, however, grant such a postponement on reasonable grounds as, for instance, where the counsel is unprepared[2] or where the accused were undefended the first day and put only a few questions, and applied the next day for cross-examination by his pleader, explaining why he was not engaged before[3] or where the pleader appointed to defend the accused who had no instructions till then, requested the Court to postpone the cross-examination of the prosecution witnesses till the next day after the chief-examinations were over.[4]

11. Improper examination.

As to the impropriety of putting leading questions to or cross-examining its own witness, by the prosecution or by the defence, *see* Sections 142 and 143 of the Evidence Act and the following cases.[1]

12. Questions by Judge, jury or assessors.

Under Section 166 of the Evidence Act, the jurors or assessors may put any question to the witness through or by leave of the Court which the Judge himself might put and which he considers proper. Section 165 of the same Act enables the Judge to put any questions to the witnesses, which he may consider necessary.

13. Duty of prosecution.

Though the legitimate object of the prosecution is to see that the prisoner is convicted,[1] it is not its duty to obtain a conviction *at any cost*[2] or obtain an unrighteous conviction.[3] The duty of the Public Prosecutor is to conduct the case fairly[4] and fearlessly and with a full sense of responsibility

Note 10.

1. (1890) 2 Weir 381 (382), *Gothuri Venkatappa, In re.*
2. (1914) 1914 Cal 834 (835) : 41 Cal 299 : 15 Cri L Jour 596, *Sadasiv Singh* v. *Emperor.*
   [See also (1920) 1920 Pat 351 (352) : 22 Cri L Jour 219 : 5 Pat L Jour 706, *Teka Ahir* v. *Emperor.* Application for recalling witnesses for cross-examination on ground that on previous occasion the defence was not prepared to cross-examine, having been misled as to the date of the trial by the Police—*Held*, that application should be granted.]
3. (1920) 1920 Pat 351 (352) : 22 Cri L Jour 219, *Teka Ahir* v. *Emperor.*
4. (1929) 1929 Cal 1 (5) : 30 Cri L Jour 494, *Bazlar Rahman* v. *Emperor.*

Note 11.

1. (1922) 1922 Pat 582 (584) : 1 Pat 630 : 24 Cri L Jour 91, *Niru Bhagat* v. *Emperor.*
   (1921) 1921 Pat 406 (407), *Dhannu Beldar* v. *Emperor.*
   (1923) 1923 Pat 62 (64) : 1 Pat 758 : 24 Cri L Jour 69, *Jagdeo Singh* v. *Emperor.*
   (1926) 1926 Cal 139 (143) : 53 Cal 372 : 27 Cri L Jour 266, *Khijiruddin* v. *Emperor.*
   (1897) 20 All 155 (156, 157), *Queen-Empress* v. *Zawar Husen.*
   (1921) 1921 Cal 269 (270) : 23 Cri L Jour 41, *Gandadhar Goala* v. *R. W. L. Reed.*

Note 13.

1. (1930) 1930 Cal 134 (136) : 31 Cri L Jour 918 : 1930 Cri Cas 134, *Nayan Mandal* v. *Emperor.*
2. (1932) 1932 Bom 279 (282) : 56 Bom 434 : 33 Cri L Jour 613 : 1932 Cri Cas 391, *Vasudeo Balwant Gogte* v. *Emperor.*
   (1916) 1916 Cal 524 (526) : 16 Cri L Jour 576 (577), *Emperor* v. *Nogendra Nath Sen Gupta.* Sessions case.
   [See also (1882) 8 Cal 121 (124), *Empress* v. *Dhunno Kazi.*]
3. (1894) 16 All 84 (86, 87) (F B), *Queen* v. *Durga.*
4. (1894) 16 All 84 (86, 87) (F B), *Queen* v. *Durga.*
   (1932) 1932 Bom 279 (282) : 56 Bom 434 : 33 Cri L Jour 613 : 1932 Cri Cas 391, *Vasudeo Balwant Gogte* v. *Emperor.*
   (1915) 1915 Cal 545 (546) : 16 Cri L Jour 170 (172) : 42 Cal 422, *Ram Ranjan Roy* v. *Emperor.*
   (1933) 1933 All 314 (317) : 55 All 379 : 34 Cri L Jour 689 : 1933 Cri Cas 480, *Sakul* v. *Emperor.* It is the duty of the prosecution to bring out in evidence everything in favour of an

that attaches to his position.[5] He should not act as the counsel for any particular person or party and should not aggravate the case against the prisoner or keep back a witness because his evidence may weaken the prosecution case. He should place before the Court all materials irrespective of the question as to whether they help the accused or go against him such as statements before the police[5a] and material documents.[5b] His only object should be to aid the Court in discovering the truth.[5c] He should avoid any proceeding likely to intimidate or unduly influence witnesses on either side. There should be on his part no unseemly eagerness for or grasping at a conviction.[6] The prosecution should take great care that nothing ambiguous is left on the records and to clearly explain by evidence, circumstances having material bearing on the case.[6a]

It is the duty of the Public Prosecutor to give opportunity to his witnesses to explain any discrepancies or contradictions in their depositions.[7] But he is not expected to call witnesses with reference to defence theories.[8] Nor is it open to him to call evidence to rebut and discredit the accused's defence before it is even known whether or not the accused intends to put forward that defence.[9]

14. Trial ought not to be stopped before the close of the prosecution.

Sessions cases cannot be tried piece-meal. Before commencing a trial, a Judge should satisfy himself that all necessary evidence is available. If it is not, he may postpone the case for some very pressing reason;[1a] but once having commenced, he should proceed *de die in diem* till the trial is finished,[1] the

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accused person and to lay before the Court all the evidence even though some of that evidence may result in an acquittal.

(1873) 20 Suth W R Cr 38 (38), *Queen-Empress* v. *Gunsha Moonda.* It is the duty of the prosecution to point out to the Court any glaring discrepancy between the evidence being given by a witness before the Court of Session and that previously recorded by the committing officer.

5. (1915) 1915 Cal 545 (546): 16 Cri L Jour 170 (172): 42 Cal 422, *Ram Ranjan* v. *Emperor.*

(1920) 1920 Pat 366 (371): 21 Cri L Jour 33, *Brahmdeo Singha* v. *Emperor.*

(1929) 1929 Pat 275 (283): 8 Pat 289: 30 Cri L Jour 675: 1929 Cri Cas 62, *Kunja Subudhi* v. *Emperor.*

5a (1929) 1929 Pat 275 (283): 8 Pat 289: 30 Cri L Jour 675: 1929 Cri Cas 62, *Kunja Subudhi* v. *Emperor.*

[See also (1888) 1888 Pun Re Cr No. 1, page 2, *Allah Baksh* v. *Empress.*]

5b (1907) 5 Cri L Jour 427 (429): 34 Cal 698, *Jatindra Nath Chatterji* v. *Emperor.*

(1894) 21 Cal 642 (653, 656), *Empress* v. *Sagal Samba Sajao.*

5c (1886) Ratanlal 229 (235), *Queen-Empress* v. *Nepal.*

6. (1871) 8 Bom H C R 126 (153, 154), *Reg* v. *Kashinath.*

(1916) 1916 Cal 524 (526): 16 Cri L Jour 576 (577), *Emperor* v. *Nagendra Nath.*

(1915) 1915 Cal 545 (546): 16 Cri L Jour 170 (172): 42 Cal 422, *Ram Ranjan Roy* v. *Emperor.*

(1917) 1917 Cal 123 (131): 18 Cri L Jour 385 (394): 44 Cal 477, *Fateh Chand* v. *Emperor.*

(1924) 1924 Nag 243 (245): 26 Cri L Jour 163, *Anant Wasudeo Chandekar* v. *King-Emperor.*

(1903) 8 Cal W N 17*n*, *Hurjimal* v. *Imamali.* Animosity in conducting case condemned.

[See also (1916) 1916 Cal 188 (208, 209): 16 Cri L Jour 497 (513): 42 Cal 957, *Amritlal Hazra* v. *Emperor.*]

6a (1929) 1929 Mad W N 395 (413), *Collett* v. *Emperor.*

[See also (1928) 1928 All 25 (27): 29 Cri L Jour 26, *A. Karan Singh* v. *Emperor.*]

7. (1894) 16 All 207 (209), *In re Nasiruddin.*

8. (1904) 1 Cri L Jour 718 (726) (Kathiawar), *Emperor* v. *Daya Shankar.*

9. (1927) 1927 Mad 533 (535): 28 Cri L Jour 285, *In re Biswanath Das.*

Note 14.

1a (1927) 1927 All 721 (723): 50 All 365: 28 Cri L Jour 950, *Sur Nath Bhudari* v. *Emperor.*

1. (1904) 8 Oudh Cas 55 (57): 2 Cri L Jour

Sec. 286 Notes 14—15

intention of the Code being that a trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish.[2]

Where, after the examination of some prosecution witnesses some more remain to be examined, it is not open to the Judge to ask the jury whether they wish to hear any more evidence and on their stating that they do not believe the evidence and wish to stop the case, to record a verdict of acquittal; such a procedure is not warranted by law and no final opinion as to the reliability or otherwise of the evidence ought to be arrived at by the Judge or jury until the whole evidence is before them and has been considered.[3]

15. Treatment of witnesses.

A Sessions Judge is not justified in stopping the cross-examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth. This course is not sanctioned by law and is one which ought not to be followed.[1]

It is also illegal for a Judge to threaten a witness with the penalties of the law and no Judge could allow anything in the nature of a threat to be administered to a witness unless and until he has shown by his evidence that he is wilfully saying what is false or is persistently refusing to give evidence on facts which must be within his knowledge.[2]

Sec. 287

Examination of accused before Magistrate to be evidence.

287.* The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

Synopsis.

	Note No.		Note No.
Scope of the Section.	1	"Duly recorded."	2
		"Committing Magistrate."	3

* (Code of 1882—S. 287—Same.)

(Code of 1872—S. 248.)

Examination of accused before Magistrate to be evidence.

248. The examination of the accused person before the committing Magistrate shall be given in evidence at the trial.

(Code of 1861—S. 366.)

Examination of accused before the Magistrate to be evidence at the trial.

Proof of such examination.

366. The examination of the accused person before the Magistrate shall be given in evidence at the trial. The attestation of the Magistrate shall be sufficient *prima facie* proof of such examination, and such attestation shall be admitted without proof of the signature to it, unless the Court shall see reason to doubt its genuineness.

191, *Emperor* v. *Ali Mohamed.*

2. (1912) 13 Cri L Jour 861 (862): 35 All 63, *Badri Prasad* v. *Emperor.*

3. (1896) 20 Mad 445 (445, 446), *Ramalingam, In re.*

Note 15.

1. (1900) 1900 All W N 149 (149): *Meharban Ali, In re.*

2. (1892) 14 All 242 (271): *Empress* v. *Hargobind Singh.*

Other Topics.

As against co-accused. See Note 1, Pt. 8.
Confessions. See Note 1.
Previous conviction. See Note 1.
Proof of statements. See Note 1, Pt. 6.
Record and committal by different Magistrates. See Note 3.
Section mandatory. See Note 1, Pt. 1.
Stage when read as evidence. See Note 1, Pt. 7.
Statement to be taken as a whole. See Note 1, Pt. 8.
Written statements of accused. See S. 256 Notes; S. 290, Note 6.

1. Scope of the Section.

This Section makes it *obligatory* on the prosecution in all cases to tender in evidence the statement of the accused made before the committing Magistrate and duly recorded by him under the provisions of the Code, *whether such statement tells for or against the accused.*[1] The statement so tendered and read as evidence has the same effect as any other evidence adduced before the Sessions Judge.[2] If the accused has confessed his guilt in such statement he can be convicted on the basis of such confession[3] though he may retract the confession before the Sessions Judge.[4] Similarly, the accused is entitled to rely on such statement to prove points in his favour though under the ordinary law of evidence, he would not be entitled to make use of self-serving statements by him as evidence in his favour.[5]

The Section does not contemplate that the committing Magistrate should be called as a witness in the Sessions Court and examined with reference to the recorded statement.[6] In fact, the record of the statement prepared by the committing Magistrate would be the only evidence admissible to prove the statement. (*See* Evidence Act, Section 91.) But, under Section 533 *infra*, if, in recording the statement any of the provisions of Section 364 are not complied with, evidence may be taken for the purpose of proving that the statement was made by the accused before the committing Magistrate.

The Section does not prescribe the stage at which the statement of the accused should be produced and read as evidence. But it has been held

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Section 287—Note 1.

1. (1894) Ratanlal 710 (713), *Empress* v. *Abdul Razak.*
   (1870) 13 Suth W R Cr 63 (64), *Queen* v. *Sheilh Meher Chand.*
2. (1866) 5 Suth W R Cr 1 (1), *Queen* v. *Sureechur.*
   (1892) 15 Mad 352 (353), *Empress* v. *Rama Tewan.*
3. (1866) 6 Suth W R Cr 83 (83), *Queen* v. *Hyder Jolaha.*
   (1866) 6 Suth W R Cr 73 (73), *Queen* v. *Ranjit Sontal.*
   (1921) 1921 Sind 129 (130): 16 Sind L R 67: 25 Cri L Jour 62, *Mahomed* v. *Emperor.*
   (1869) 12 Suth W R Cri 49 (49), *Queen* v. *Bhuthan Rujivan.*
   [See (1870) 14 Suth W R Cr 9 (10), *Queen* v. *Misser Sheikh.* It is not necessary to read out the confessions to the accused and specifically to ask them whether they had any objection to the reception of those confessions.]
4. (1881) 1881 All W N 89 (89), *Empress* v. *Bhagua.*
   (1885) 1885 All W N 221 (224), *Empress* v. *Rama Nand.*
   (1885) 1885 All W N 59 (59) (F B). *Empress* v. *Madar.*
   (1898) 20 All 133 (134), *Empress* v. *Maikan Lal.*
   (1896) 1896 All 78 (81), *Empress* v. *Mahabir.*
   (1874) 11 Bom H C R 137 (138), *Reg.* v. *Balvant Pardharkar.*
   (1915) 1915 Bom 249 (250, 253): 40 Bom 220: 17 Cri L Jour 133, *Fakira Appayya* v. *Emperor.*
   (1867) 8 Suth W R Cr 40 (40), *Queen* v. *Mt. Jena.*
5. (1893-1900) 1893-1900 Low Bur R 207 (208), *Aung Myat alias Aung Ya* v. *Empress.* Statement read as evidence under this Section can be taken into consideration in determining whether the accused has discharged the *onus* of proving that his case comes within one of the exceptions provided by law.
6. [See (1900-01) 5 Cal W N 47*n* (48*n*), *Empress* v. *Mungroo Bhoojah.* It was remarked that the practice of calling

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that the statement should be read as part of the case for the prosecution, before the accused enters upon his defence.[7]

The statement of the accused must be read as a *whole*. Thus, where there are several accused in a case, and the statement made by one of them in the committing Magistrate's Court is read in the Sessions Court under this Section, the portions touching the other accused cannot be omitted.[8] But, under Section 310 *infra*, if any portion of the statement bears on an alleged previous conviction charged against the accused, for the purpose of affecting the sentence to be passed on him in case of conviction, such portion should not be read or referred to unless and until the accused has been convicted of the subsequent offence or the verdict of the jury has been delivered or the opinion of the assessors has been recorded.

As to the weight to be attached to confessions, conviction on the confession of a co-accused, and the value of retracted confessions, *see* Notes under Sections 164, 364 and 337.

2. "Duly recorded."

An accused person made a confession under improper inducement by the police. The committing Magistrate admitted the confession in evidence and examined the accused with regard to it. It was held that as the confession was not admissible in evidence (Evidence Act, Section 24) the committing Magistrate ought not to have questioned the accused with reference to it and that the examination of the accused under the circumstances could not be said to be "duly recorded" within the meaning of this Section and could not be produced in evidence in the Sessions Court under this Section.[1]

As to the mode of recording the examination of the accused, *see* Section 364 and the Notes thereunder. As to the effect of irregularities in the mode of recording the examination, *see* Section 533 and Notes thereunder.

3. "Committing Magistrate."

The words "committing Magistrate" in the Section include the Magistrate who held the preliminary enquiry on which the commitment was based, although the actual order of commitment was made by some other Magistrate. Hence, the statement of the accused recorded by a Magistrate who held the preliminary enquiry is admissible under this Section although the case was actually committed to the Sessions by some other Magistrate.[1] Thus, where a Magistrate who succeeds to the jurisdiction of another Magistrate commits a case to the Sessions under Section 350 *infra* on evidence recorded by his predecessor, the statement of the accused recorded by such predecessor is admissible under this Section.[2]

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the committing Magistrate would be open to the gravest objection.]

7. (1887) 2 Weir 361 (361) : 10 Mad 295, *Queen-Empress* v. *Rangi*.
   (1867) 8 Suth W R Cr Cir 6 (6), *Queen* v. *Gaub Gorah Cacharee*.
8. (1869) 5 Mad H C R App 4 (4).

Note 2.

1. (1908) 8 Cri L Jour 62 (63, 64) : 4 Low Bur R 244, *Gaung Gyi* v. *Emperor*.
   [See also (1915) 1915 Bom 249 (250) : 17 Cri L Jour 133 (134, 135, 137, 138) : 40 Bom 220, *Fakira Appayya* v. *Emperor*, Confession before committing Magistrate induced by threat—Inducement or promise proceeding from person in authority—Question as to the admissibility of such confession before the Sessions Court left open.]

Note 3.

1. (1908) 7 Cri L Jour 29 (29, 30) : 31 Mad 40, *The Sessions Judge of Mangalore* v. *Malinga*.
2. (1926) 1926 Lah 271 (271) : 7 Lah 70 : 27 Cri L Jour 627, *Ghulam Jannat* v.

288. The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case.

Evidence given at preliminary inquiry admissible.

288.* The evidence of a witness *duly recorded in the presence of the accused under Chapter XVIII* may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case *for all purposes subject to the provisions of the Indian Evidence Act, 1872.*

Evidence given at preliminary inquiry admissible.

Synopsis.

Other Topics.

Absence of cross-examination. See Note 3, Pts. 2 and 3.
Admissibility to be decided then and there. See Note 9, F-N. (3).
Applicable to Sessions trials and not trials by Magistrates. See Note 2, Pt. 5.
Committing Magistrate and not other Magistrates. See Note 4, F-N. (1).
Deposition of jointly-committed person. See Note 6, F-N. (1).
Depositions retracted. See Note 7, Pt. 5; Note 10, Pts. 1 and 2; Note 5, F-N. (4) and (5); Note 7, F-N. (4).
Evidence of one witness and not of all witnesses. See Note 2, Pt. 4.
Sections 33, 155, 157 and 145, Evidence Act. See Note 2; Note 2, F-N. (3).
Statements taken under S. 164 and S. 162. See Note 8, Pts. 2, 3 and 4; Note 4, F-N. (1).
Whole deposition and not portions alone. See Not 7, Pt. 6.
Weight of evidence, See Note 7, Pts. 3 and 4.

* **(Code of 1882—S. 288**—Same as that of 1898 Code.)

(Code of 1872—S. 249.)

Evidence given at the preliminary inquiry admissible.

249. When a witness is produced before the Court of Session or High Court, the evidence given by him before the committing Magistrate may be referred to by the Court if it was duly taken in the presence of the accused person, and the Court may, if it think fit, ground its judgment thereon, although the witnesses may at the trial make statements inconsistent therewith.

Explanation.—This Section shall not authorize the Court to refer to the record of the evidence given by a witness who is absent, except in the cases in which such evidence may be referred to under the Indian Evidence Act, 1872, or other law in force for the time being upon the subject of evidence.

(Code of 1861—Nil.)

Emperor.
(1908) 7 Cri L Jour 29 (29, 30) : 31 Mad 40,

The Sessions Judge of Mangalore v. *Malinga.*

Sec. 288 Notes 1—2

1. Legislative changes.

There was no corresponding Section in the Code of 1861. The Section was first enacted in the Code of 1872. The undermentioned are cases decided under the Code of 1861.[1]

2. Scope, object and applicability of the Section.

This Section provides that when a witness is produced and examined in the Sessions Court, his evidence in the commitment proceedings may, in the discretion of the presiding Judge, be treated as evidence at the trial for all purposes. But for this Section, such evidence would, under the Evidence Act, be only admissible for the purpose of corroborating or contradicting the witness (*see* Sections 145, 155 and 157 of the Evidence Act). It would not be admissible as *substantive* evidence, *i. e.*, for proving the truth of the facts deposed to, except when the witness is not produced in the Sessions Court for any of the reasons specified in Section 33 of the Evidence Act. The present Section vests a discretion in the Sessions Judge to treat such evidence as *substantive* evidence in the case though none of the conditions laid down in Section 33 of the Evidence Act is present.[1] The object of the Section is to reduce the danger of witnesses being tampered with between the commitment and trial.[2]

The Section does not *ipso facto* make the evidence before the committing Magistrate evidence at the trial. It only confers a discretion on the Sessions Judge to treat as evidence before himself the evidence of a witness given before the committing Magistrate.[2a] But, where under the Evidence Act, the evidence given before the committing Magistrate can be used at the Sessions trial for any purpose, this Section in no way restricts such user.[3]

The power conferred by the Section is intended to be exercised with reference to each witness *individually*. The Section does not contemplate a general order being passed with reference to the evidence of all the witnesses or a number of them *together*.[4]

The Section applies only to Sessions trials and not to trials before Magistrates.[5] But it applies to trials with assessors as well as to trials by jury.[6] In the undermentioned case,[7] it was remarked that the Section applies

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Section 288—Note 1.

1. (1870) Ratanlal 39 (40), *Reg* v. *Hiroochima*.
   (1864) 1 Suth W R Cr 14 (14), *Queen* v. *Radhy Dharee*.
   (1867) 7 Suth W R Cr 114 (114), *Queen* v. *Bheekun Doss*.

Note 2.

1. (1887) 1887 Pun Re Cr No. 51, page 134 (135), *Umar* v. *Empress*.
2. (1893-1900) 1893-1900 Low Bur Rul 280 (280), *Nga Ku De* v. *Empress*.

2a (1874) 11 Bom H C R 281 (282), *Reg* v. *Arjun Megha*. Depositions given before Magistrates in the preliminary enquiry are evidence in the trial before the Court of Session, only when the Sessions Judge determines, in the exercise of his discretion, that they are to be used in this way.

3. [See (1925) 1925 Lah 483 (485): 27 Cri L Jour 289, *Ram Karan* v. *Emperor*. In absence of any order under Criminal P. C., S. 288, the statements made to the committing Magistrate can be used only for the purpose of contradicting or corroborating that testimony.]
   [See also (1934) 1934 Lah 212 (214): 1934 Cri Cas 447: 35 Cri L Jour 349, *Emperor* v. *Nathu Singh*. Evidence may be admitted under S. 33, Evidence Act, if requisites of that Section are satisfied.]
4. (1885) Weir 3rd Edn. 934 (936), *In re Subba Naik*.
   [See also (1874) 21 Suth W R Cr 49 (51), *Queen* v. *Amanullah*.]
5. (1894) Ratanlal 728 (728), *Queen* v. *Ramdin*.
6. (1887) 1887 Pun Re Cr No. 51, page 134, *Umar* v. *Empress*.
7. (1887) 1887 Pun Re Cr No. 51, page 134, *Umar* v. *Empress*.

only to prosecution witnesses and that the position of the Section shows this.

The reasons given by the Magistrate in discharging the accused at first and the contents of the Sessions Judge's order in revision directing further inquiry are not admissible in evidence in the Sessions Court when the case is committed to Sessions subsequently.[8]

3. "Duly recorded in the presence of the accused."

This Section applies only to the evidence of a witness duly recorded in the presence of the accused by the committing Magistrate. Hence, the existence of a *record* or memorandum of evidence is a condition precedent to the applicability of the Section.[1]

Further, the evidence must have been *duly* recorded. (As to the mode of recording evidence in commitment proceedings, *see* Chapter 25 of the Code.) Under Section 209 *ante* and on general principles, the accused is entitled as of right to cross-examine the prosecution witnesses (in commitment proceedings). Hence, the evidence of prosecution witnesses recorded without the accused being allowed to cross-examine them is not "duly recorded" and cannot be introduced into the record under this Section.[2] But where the accused has declined to cross-examine the prosecution witnesses in spite of opportunity being given to him to do so, the absence of cross-examination by him does not affect the admissibility of the evidence under this Section.[3]

The Section requires also that the evidence in the committing Magistrate's Court should have been recorded in the *presence of the accused*. Hence, evidence recorded in the absence of the accused cannot be admitted under this Section.[4]

See also the undermentioned case.[5]

4. "Under Chapter XVIII."

This Section applies only to the evidence of a witness recorded under Chapter 18. The statement of a witness made on any other occasion is not within the Section.[1]

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8. (1910) 11 Cri L Jour 538 (539): 7 Ind Cas 915 (Cal), *Harendra Pal* v. *Emperor*.

Note 3.

1. (1887) 1887 Pun Re Cr No. 51, page 134 (135), *Umar* v. *Empress*.
2. (1894) 21 Cal 642 (665), *Queen* v. *Sagal Samba Sajao*.
   (1930) 1930 Sind 54 (55): 31 Cri L Jour 121: 1930 Cri Cas 70, *Emperor* v. *Mahrale*.
3. (1930) 1930 Sind 54 (55): 31 Cri L Jour 121: 1930 Cri Cas 70, *Emperor* v. *Mahrale*.
   (1926) 1926 Lah 590 (593, 594): 28 Cri L Jour 33, *Muhammad Aslam Khan* v. *Emperor*.
   [See also (1880) 6 Cal L R 53 (56), *In the matter of Dham Mundul*. In this case it was held that opportunity to cross-examine was not denied.
   (1925) 1925 Oudh 726 (727): 26 Cri L Jour 1236, *Sarju Singh* v. *Emperor*. Absence of cross-examination in spite of opportunity—Though technically admissible, evidence loses its weight.]
4. (1904) 1 Cri L Jour 499 (500): 1904 Pun Re Cri No. 3, *Pathana* v. *Emperor*. Approver's evidence taken in accused's absence.
   (1913) 14 Cri L Jour 211 (212): 35 All 260, *Emperor* v. *Gulabu*.
   (1914) 1914 Oudh 388 (389): 16 Cri L Jour 132 (133): 17 Oudh Cas 363, *Putiu* v. *Emperor*.
   (1894) Ratanlal 728 (728), *Queen* v. *Ramdin*.
   (1887) 1887 Pun Re Cr No. 51, page 134, *Umar* v. *Empress*.
   (1874) 21 Suth W R Cr 5 (5), *Queen* v. *Nussuruddin*.
   (1896) 23 Cal 361 (365), *Alimuddin* v. *Empress*.
5. (1886) 13 Cal 121 (124), *Adyan Singh* v. *Empress*. No objection taken by opposite party—*Held* that there was no reason to reject the evidence.

Note 4.

1. (1912) 13 Cri L Jour 226 (229): 36 Mad 159, *In re, Basrur Venkata Rao*. Statement of a witness, made during a

Sec. 288 Notes 4—5

Prior to the amendments of 1923 the words "before the committing Magistrate" occurred in the Section in the place of the words "under Chapter 18." The amendment makes it clear that evidence recorded under Chapter 18 falls within the Section although it is not recorded *with a view to commitment.* Thus, evidence recorded under Section 219, *ante*, *after* commitment, would fall within the Section.[2]

There is no special procedure provided for the recording of evidence under Chapter 18. Hence, the evidence recorded by a Magistrate in a case which he starts with a view to trial by himself but which he subsequently decides to commit to the Sessions can be held to be evidence recorded under Chapter 18.[3]

5. "Discretion of the presiding Judge."

The Section leaves it to the discretion of the presiding Judge whether or not to admit the evidence referred to in it.[1] But the power being one in derogation of the general principle that a Court can only act on the evidence given before it, (*see* definition of evidence in Evidence Act, Section 3), the decision to let in the previous deposition of a witness under this Section should be arrived at after careful consideration and only where there are sound and reasonable grounds for such a decision.[2] The desire to expedite the trial or the fact that the counsel for both the sides have agreed to the course is not a sufficient reason for acting under the Section.[3] The power should be confined to cases where the Judge has reason to think that a witness has deposed truly before the committing Magistrate but is not telling the truth before himself and that it is desirable in the interests of justice that the previous deposition of the witness should be brought on the record of the trial.[4] When the witness alleges that his statement before the committing

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(1908) 7 Cri L Jour 325 (328): 31 Mad 127, *In re, Sankappa Rai.* Statement to Police Officer or to an investigating Magistrate.

(1904) 1 Cri L Jour 499 (500): 1904 Pun Re Cr No. 3, *Pathana* v. *Emperor.* Approver's statement before District Magistrate, not committing Magistrate, not admissible under this Section.

(1889) Ratanlal 468 (470), *Queen* v. *Nana Raju.* Statements to Magistrates not empowered to commit, do not fall under S. 288.

(1922) 1922 Mad 303 (303): 23 Cri L Jour 262, *Malaya Goundan* v. *Emperor.* Signed statement given before *monigar* cannot be admitted as substantive evidence.
[See (1932) 1932 Cal 683 (685): 33 Cri L Jour 770: 1932 Cri Cas 636, *Nagendra Nath Sarkar* v. *Emperor.*]

2. (1926) 1926 Cal 235 (237): 53 Cal 181: 26 Cri L Jour 1577, *Abdul Gani Bhuya* v. *Emperor.*

3. (1926) 1926 Cal 235 (237): 53 Cal 181: 26 Cri L Jour 1577, *Abdul Gani Bhuya* v. *Emperor.*

Note 5.

1. (1922) 1922 Lah 1 (12): 3 Lah 144: 23 Cri L Jour 513, *Narain Das* v. *Emperor.*
(1885) Weir 3rd Edn. 934 (936), *In re, Subba Naik.*
(1887) 1887 Pun Re Cri No. 51, page 134, *Umar* v. *Empress.*

2. (1874) 21 Suth W R Cr 49 (51), *Queen* v. *Amanullah.* Discretion is to be exercised upon substantial materials rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not upon mere speculation or conjecture.
(1930) 1930 Cal 706 (707): 57 Cal 940: 32 Cri L Jour 180: 1930 Cri Cas 1106, *Khadem* v. *Emperor.*
(1896) 9 C P L R 24 (25), *Empress* v. *Tularam Brahmin.*

3. (1885) Weir 3rd Edn. 934 (936, 937), *In re Subba Naik.*

4. (1930) 1930 All 746 (747): 1930 Cri Cas 1002: 32 Cri L Jour 152, *Abdul Jalilkhan* v. *Emperor.*
(1896) 9 C P L R 24 (25), *Empress* v. *Tularam Brahmin.*
(1885) Weir's 3rd Edn. 934 (936), *In re Subha Naik.*
(1929) 1929 Lah 111 (112): 29 Cri L Jour

Magistrate was the result of improper influence or pressure, the Sessions Judge should investigate into the truth of his allegation before coming to the conclusion that his deposition in the Sessions Court (which contradicts that in the committing Magistrate's Court) is false.[5] *See also* Note 7, *infra*.

6. "If such witness is produced and examined."

It is a condition precedent to the incorporation of the previous deposition of a witness under this Section that he should be produced and examined as a witness at the Sessions trial.[1] The examination contemplated is examination of the witness in the ordinary way. Hence, mere cross-examination of a witness or merely tendering a witness for cross-examination is not sufficient to satisfy the requirements of the Section in this respect.[2] So also, the mere examination of a witness as to the fact of his having made the previous deposition is not enough for allowing action under this Section.[3]

7. "May be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act."

By force of this expression the previous deposition of a witness admitted under this Section can be treated as *substantive* evidence in the case and not merely as evidence useful for the purpose of corroborating or contradicting a witness.[1] The words "*for all purposes* subject to the provisions of the

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1047, *Sadar* v. *Emperor*. Only one divergence though unexplained is not sufficient for making use of Section.
[See (1935) 1935 Mad 479 (482) : 36 Cri L Jour 1107 : 1935 Cri Cas 742, *Krishna Iyer, In re*. Statements in committing Magistrate's Court by relatives of accused but retracted in Sessions Court are admissible.]
[See also (1929) 1929 Mad 837 (839) : 31 Cri L Jour 768 : 53 Mad 160 : 1929 Cri Cas 485, *Kesava Pillai* v. *Emperor*. Witness retracting statement before Sessions Judge—Reason to think that he is not telling truth—Section can be applied.]
(1924) 1924 Mad 379 (381) : 47 Mad 232 : 25 Cri L Jour 715, *Pedda Somadu* v. *Appi Gadu*. (Do.)

5. (1900) 4 Cal W N 49 (55), *Barangi Lall* v. *Empress*.
[See also (1903) 7 Cal W N 345 (349), *Emperor* v. *Bhut Nath Ghose*. Repudiation of prior statement at the Sessions—Improper influence—Allegations of, as regards prior statement—Prior statement not to be relied upon.]

Note 6.

1. (1920) 1920 Nag 170 (171) : 16 Nag L R 30 : 21 Cri L Jour 486, *Ajodhi* v. *Emperor*.
(1875) 24 Suth W R Cr 11 (12), *Queen* v. *Majohur Roy*.
(1885) Weir 3rd Edn. 934 (935), *Subba Naik, In re*. S. 288 is not an exception to the Rule in S. 286. It does not dispense with examination of the witness as directed by S. 286.
(1887) 1887 Pun Re Cr No. 51, page 134, *Umar* v. *Empress*.
(1934) 1934 Lah 212 (214) : 35 Cri L Jour 349 : 1934 Cri Cas 447, *Emperor* v. *Natha Singh*. Witness produced but not examined—Section does not apply.
(1883) 1883 Pun Re Cr No. 23, page 54 (55), *Saib Dyal* v. *Empress*. Magistrate committing witness along with accused for same offence—His statement at enquiry not admissible.
2. (1885) Weir 3rd Edn. 934 (935), *Subba Naik, In re*.
(1916) 1916 Mad 582 (583) : 16 Cri L Jour 615 (615), *In re Kotaigadu*.
(1930) 1930 Cal 706 (707) : 57 Cal 940 : 32 Cri L Jour 180 : 1930 Cri Cas 1106, *Khadem* v. *Emperor*. Evidence of a witness merely tendered for cross-examination and who was not cross-examined on the important point in the case.
3. (1885) Weir 3rd Edn. 934 (936), *In re Subba Naik*.

Note 7.

1. (1925) 1925 All 185 (186) : 47 All 276 : 26 Cri L Jour 450, *Tulli* v. *Emperor*.
(1924) 1924 Mad 379 (381) : 47 Mad 232 : 25 Cri L Jour 715, *Bachala Peda Somadu* v. *Nelki Pudi Appigadu*.
(1925) 1925 Lah 399 (399) : 6 Lah 171 : 27 Cri L Jour 438, *Rakha* v. *Emperor*.
(1925) 1925 Lah 452 (453) : 6 Lah 199 : 26 Cri L Jour 1245, *Amir Zaman* v. *Emperor*.
(1933) 1933 Rang 57 (59) : 11 Rang 4 : 34 Cri L Jour 286 : 1933 Cri Cas 452,

Sec. 288 Note 7

Indian Evidence Act, 1872" did not occur in the Section as it stood prior to the amendments of 1923. Hence, the view taken in some of the decisions prior to the said amendments that the evidence admitted under this Section could only be used for the purpose of corroboration or contradiction of a witness and not as a substantive evidence[2] is now no longer law.

The words "subject to the provisions of the Indian Evidence Act" do not mean that the previous statements of a witness admitted under this Section can be treated as evidence only in those cases in which such a course is expressly provided for by the Evidence Act. Nor does the expression mean that the prior depositions can be used as evidence in every case in which there is no express provision in the Evidence Act prohibiting such a course. The expression only means that the evidence admitted under this Section is subject to the same rules as to admissibility and relevancy as any other evidence and that a Judge is not at liberty to admit irrelevant evidence under this Section merely because it happens to be the deposition of a witness given before the committing Magistrate.[3]

As seen already, the evidence admitted under this Section constitutes substantive evidence in the case quite as much as any other evidence. There is no legal objection to a conviction being based purely on the prior de-

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Nga Nyein v. *Emperor.*
(1927) 1927 All 479 (480) : 27 Cri L Jour 1365 : 49 All 251, *Behari* v. *Emperor.*
(1923) 1923 Pat 550 (554) : 2 Pat 517 : 24 Cri L Jour 641, *Gansa Oragon* v. *Emperor.*
(1930) 1930 Pat 545 (547, 548) : 9 Pat 592 : 32 Cri L Jour 66 : 1930 Cri Cas 1089, *Bhikari Bati* v. *Emperor.* If truthful and corroborated suffic ently, it may be preferred to statement in Sessions Court.
(1928) 29 Cr L Jour 73 (75): 106 Ind Cas 585 (587) (Lah), *Ala Singh* v. *Emperor.*
(1923) 1923 Mad 20 (23) : 45 Mad 466 : 24 Cri L Jour 417, *Velliah Kone* v. *Emperor.*
(1904) 1 Cri L Jour 184 (190) : 2 Low Bur R 125, *Shwe Hlan* v. *Emperor.*
(1906) 4 Cri L Jour 61 (65) : 28 All 683, *Dwaraka Prasad* v. *Emperor.*
(1927) 1927 All 479 (480) : 49 All 251 : 27 Cri L Jour 1365, *Behari* v. *Emperor*
(1922) 1922 Bom 108 (109) : 46 Bom 97 : 22 Cri L Jour 636, *Maruti Joti Shinde* v. *Emperor.*
(1925) 1925 Bom 266 (267) : 26 Cri L Jour 705, *Basappa Rudrappa Dhamargi* v. *Emperor.*
(1926) 1926 Cal 105 (106) : 26 Cri L Jour 1553, *Fazaruddin* v. *Emperor.*
(1926) 1926 Cal 235 (238) : 53 Cal 181 : 26 Cri L Jour 1517, *Abdul Gani Bhuya* v. *Emperor.*
(1930) 1930 Cal 228 (230) : 31 Cri L Jour 916 : 1930 Cri Cas 196, *Tafiz Pramanik* v. *Emperor.*
(1901) 24 Mad 414 (416), *Queen* v. *Dorasami Ayyar.* Such evidence may be used as much in favour of the defence as in support of the prosecution.
(1934) 1934 Lah 743 (745) : 15 Lah 765 : 35 Cri L Jour 1005 : 1934 Cri Cas 1095, *Puran Singh* v. *Emperor.*
(1917) 1917 Lah 331 (332, 333): 18 Cri L Jour 703 (705): 1917 Pun Re Cr No. 37, *Pirthi* v. *Emperor.*
(1885) 2 Weir 375 (375), *In re Vellaya Tevan.*
(1887) 1887 Pun Re Cr No. 51, page 135 (136), *Umar* v. *Empress.*
(1930) 1930 Mad W N 345 (346), *Guruswamy Pillai* v. *Emperor.*

2. (1906) 10 Cal W N 243*n* (243*n*), *Emperor* v. *Gholam Khadhir.*
(1885) 7 All 862 (863), *Queen* v. *Dau Sahai.*
(1899) 21 All 111 (112), *Queen* v. *Jeochi.*
(1900) 22 All 445 (446, 447), *Queen* v. *Nirmal Das.*

3. (1925) 1925 Sind 289 (292): 19 Sind L R 71 : 26 Cri L Jour 1063, *Bahadur walad Rano Khaskheli* v *Emperor.* Intention of legislature was to prevent the admission of irrelevant evidence in the Sessions Court merely on the ground that it had been recorded by the committing Magistrate.
(1925) 1925 Lah 452 (453): 6 Lah 199: 26 Cri L Jour 1245, *Amir Zaman* v. *Crown.* For instance, evidence, which had been wrongly admitted by the committing Magistrate, in violation of the provisions of the Evidence Act, could not be transferred to the Session's file.
(1925) 1925 Pat 51 (53): 3 Pat 781: 26 Cri L Jour 270, *Jehal Teli* v. *Emperor.*
(1926) 1926 Pat 440 (442): 27 Cri L Jour 594, *Bigna Kumhar* v. *Emperor.*

position of a witness admitted under this Section.[3a] But as a matter of prudence, before preferring the evidence given before the committing Magistrate to that given before himself and acting on such evidence a Judge should have very substantial grounds for doing so.[4] Especially, it would be highly unsafe to use as corroboration of a retracted confession the retracted deposition of a witness admitted under this Section.[5]

The *whole* of the prior statement of a witness and not merely portions of it should be treated as evidence in the case.[6]

8. Corroboration of evidence admitted under this Section.

The prior deposition of a witness before the committing Magistrate admitted under this Section stands on the same footing as any other evidence in the case (*see* Note 7, *ante*): Hence, it is "testimony" within the meaning of Section 157 of the Evidence Act, and can be corroborated by means of prior statements of the witness of the kind mentioned in that Section.[1] Thus, when the evidence of a witness in the committing Magistrate's Court is transferred to the file of the Sessions Court under this Section, a prior statement of the

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(1926) 1926 Cal 105 (105, 106): 26 Cri L Jour (1553), *Fazaruddin* v. *Emperor*.
(1927) 1927 All 479 (480): 49 All 251 : 27 Cri L Jour 1365, *Behari* v. *Emperor*.
(1925) 1925 Bom 266 (267) : 26 Cri L Jour 705: 50 Bom 215, *Basappa Rudrappa Dhamangi* v. *Emperor*.

3a (1935) 1935 All 691 (692). 36 Cri L Jour 823: 1935 Cri Cas 788, *Raja Ram* v. *Emperor*. Independent corroboration is not invariably necessary.

(1934) 1934 Oudh 222 (224): 35 Cri L Jour 894: 1934 Cri Cas 673, *Emperor* v. *Sankar*.

4. (1924) 1924 Mad 379 (382): 47 Mad 232 : 25 Cri L Jour 715, *Bachala Peda Somadu* v. *Nethipudi Appigadu*.
(1925) 1925 Lah 399 (400): 6 Lah 171: 27 Cri L Jour 438, *Rakha* v. *Emperor*.
(1919) 1919 Lah 238 (240): 1919 Pun Re Cr No. 17: 20 Cri L Jour 792, *Sher Dil* v. *Emperor*.
(1925) 1925 Pat 51 (55): 3 Pat 781: 26 Cri L Jour 270, *Jehal Teli* v. *Emperor*.
(1926) 1926 Pat 440 (443): 27 Cri L Jour 594, *Bigna Kumhar* v. *Emperor*.
Sel Cas 229 (Oudh), *Queen* v. *Ahbaran Singh*.
(1922) 1922 Bom 108 (109) : 46 Bom 97: 22 Cri L Jour 636, *Maruti Joyoti Shinde* v. *Emperor*.
(1897) Ratanlal 894 (894), *Queen* v. *Subraya*. Conviction based on such evidence alone, specially when it was retracted before the Sessions Court, would not be justified.
(1898) Ratanlal 966 (966), *Queen* v. *Mallaya Sau Mukhya*.
(1934) 1934 Oudh 182 (183): 35 Cri L Jour 797: 1934 Cri Cas 578, *Pahalwan Singh* v. *Emperor*.
(1900) 4 Cal W N 49 (55), *Bajrangi Lal* v. *Empress*. It is improper to bring on the record without further inquiry the evidence of a witness before the committing Magistrate who says that his evidence in the lower Court was given under pressure and threat by the Police.
(1885) Weir 3rd Edn. 939 (940), *Nukala Subbaiya, In re*.
(1874) 21 Suth W R Cr 49 (51), *Queen* v. *Amanullah*.
(1887) 10 Mad 295 (313, 314), *Queen* v. *Rangi*. A perjured man, the witness must be, whichever statement is true and the responsibility of relying on it is great. It must not be relied on unless corroborated.

5. (1900) 27 Cal 295 (306), *Queen* v. *Jadub Das*.
(1892) 2 Weir 509 (509), *In re Karreti Venkatasami*.
(1888) 12 Mad 123 (124), *Queen* v. *Bharmappa*.
(1900) 13 C P L R 107 (109, 110), *Empress* v. *Chutia*.
(1917) 1917 Lah 331 (333): 18 Cri L Jour 703 (705): 1917 Pun Re Cr No. 37, *Pirthu* v. *Emperor*.

6. (1929) 1929 Nag 233 (235): 30 Cri L Jour 333, *Musa* v. *Emperor*.
(1925) 1925 Mad 879 (880): 27 Cri L Jour 18: *Ayyam Perumal Pillai* v. *Emperor*.

Note 8.

1. (1924) 1924 Lah 609 (610): 5 Lah 324: 25 Cri L Jour 1201, *Mam Chand* v. *Emperor*.
(1925) 1925 Lah 399 (400): 6 Lah 171: 27 Cri L Jour 438, *Rakha* v. *Emperor*. [But see (1910) 11 Cri L Jour 542 (542, 543): 34 Bom 599, *Emperor* v. *Akbar Badu*.
(1923) 1923 Mad 20 (23): 45 Mad 766: 24 Cri L Jour 417, *Velliah Kone* v. *Emperor*.
(1934) 1934 Cal 124 (125): 60 Cal 1339: 35 Cri L Jour 567: 1934 Cri Cas 169,

Sec. 288 Notes 8—9

witness recorded under Section 164 can be used to corroborate the evidence.[2] But under Section 162 *ante*, a statement made to the *police* would not be admissible for such a purpose.[3] Further, a statement of the witness recorded under Section 164 which corroborates his deposition before the committing Magistrate admitted under this Section cannot be treated as *substantive* evidence.[4]

9. Practice and procedure.

Before introducing into the record the statement of a witness before the committing Magistrate, the Judge is bound to inform the accused and the prosecution of his intention to do so. The reason is that otherwise, the parties will have no opportunity of testing the statement by cross-examination or of otherwise dealing with it as part of the material which may influence the decision of the Court.[1]

When the evidence of a witness before the committing Magistrate is inconsistent with his evidence in the Sessions Court and it is proposed to use his previous statement under this Section, it is the duty of the Judge to draw his attention to his previous statement and afford him an opportunity of explaining the inconsistency between his two statements.[2] (*See* Evidence Act, Section 145.)

See also the undermentioned cases.[3]

Manar Ali v. *Emperor*.]

2. (1923) 1923 Mad 20 (23): 45 Mad 766: 24 Cri L Jour 417, *Velliah Kone* v. *Emperor*.
   (1934) 1934 Cal 124 (125): 60 Cal 1339: 35 Cri L Jour 567: 1934 Cri Cas 169, *Manar Ali* v. *Emperor*.
3. (1925) 1925 Lah 399 (400): 6 Lah 171: 27 Cri L Jour 438, *Rakha* v. *Emperor*. [But see (1924) 1924 Lah 609 (610): 5 Lah 324: 25 Cri L Jour 1201, *Mam Chand* v. *Emperor*. Submitted not good law.]
4. (1927) 1927 Mad 1112 (1112): 28 Cri L Jour 279, *In re Karuppanna Pillai*.

Note 9.

1. (1886) 1886 All W N 256 (256, 257), *Empress* v. *Jawahar*.
   (1921) 1921 All 215 (216): 27 Cri L Jour 813, *Nagina* v. *Emperor*.
   (1929) 1929 Nag 233 (235): 30 Cri L Jour 333: 1929 Cri Cas 257, *Musa* v. *Emperor*. Whole statement to be put to witness.
2. (1881) 1881 All W N 74 (74), *Empress* v. *Nazzara*.
   (1929) 1929 Lah 111 (112): 29 Cri L Jour 1047, *Sadar* v. *Emperor*.
   (1885) 7 All 862 (863), *Empress* v. *Dan Sahai*.
   (1922) 1922 Pat 40 (42): 23 Cri L Jour 218, *Lachmi Lal* v. *Emperor*.
   (1930) 1930 Pat 336 (339, 344): 32 Cri L Jour 438: 1930 Cri Cas 710, *Nanhu Mahton* v. *Emperor*.
   (1904) 1 Cri L Jour 86 (88): 31 Cal 142, *Emperor* v. *Zawar Rahman*.
   (1915) 1915 Bom 237 (241): 16 Cri L Jour 754, *Lakshman Totaram* v. *Emperor*.
   (1897) Ratanlal 924 (925), *Empress* v. *Soma Dalji*.
   (1892) 2 Weir 509 (509), *In re Sokkan*.
   (1902) 6 Cal W N 276*n* (276*n*), *Emperor* v. *Moni Lal*.
   (1904) 31 Cal 142 (144), *Emperor* v. *Zawar Rahman*. Overruling 6 Cal L R 390.
   [See also (1896) 10 C P L R 15 (15), *Empress* v. *Baddoo Ahir*. It is the duty of the Sessions Judge to notice all important variations and discrepancies in the deposition of the witness as given before him and as given before the committing Magistrate, and, during the examination of each witness, he should bring such discrepancies or variations to the notice of the witness and call upon him to reconcile or explain them.]
3. (1885) Weir 3rd Edn. 934 (936), *In re Subba Naik*. Rule appears to contemplate that the witness shall *first* have been examined and that after that his evidence before the Magistrate may be treated as evidence.
   (1887) 1887 Pun Re Cr No. 51, page 134 (135), *Umar* v. *Empress*. Judge can treat deposition as part of the material on which he sums up to the jury — The deposition should however be known to the jury or the assessors in the same way as other documentary evidence, that is, by reading the whole or such part to the

10. Approver's evidence.

Sec. 288 Note 10

The Section is wide enough to include the testimony of an approver. Hence, where an approver is examined as a witnesss in the committing Magistrate's Court and is again examined as a witness in the Sessions Court, his evidence before the committing Magistrate can be introduced under this Section into the record of the Sessions case, notwithstanding that he has repudiated his former statement.[1] But it would be unsafe to base a conviction on the retracted statement of an approver in the absence of any corroboration.[2]

Sec. 289

289.* (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

Procedure after examination of witnesses for prosecution.

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* **(Code of 1882—S. 289—Same.)**

(Code of 1872 — S. 251, Paras 1 and 2.)

251. When the examination of the witnesses for the prosecution and the examination of the accused person is concluded, the accused person shall be asked whether he means to call witnesses. If he says that he does not, the Prosecutor may sum up his case. The Court may then if it thinks that there are no grounds for proceeding, in a case tried with assessors, record a finding, or, in a case tried by a jury, instruct the jury to return a verdict of acquittal.

Defence.

If the Court considers that there are grounds for proceeding it shall call on the accused person to state his grounds of defence and produce his witnesses.

(Code of 1861—S. 372.)

372. When the case for the prosecution has been brought to a close, the accused person shall be called upon to enter upon his defence, and to produce his evidence.

Defence

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jury or assessors and if necessary showing it to them.

(1899) 1 Bom L R 156 (157), *Empress* v. *Vithu valad Rayaji.* Question of admissibility of previous deposition, should be determined then and there on its tender, and reasons recorded for the admission.

(1892) 2 Weir 509 (509), *In re Sokkan.* Depositions should be put in and proved in the course of examination of each witness.

(1897) Ratanlal 924 (925), *Empress* v. *Soma Dalji.* The Sessions Judge should record the statements as exhibits in his own proceedings.

(1887) Ratanlal 343 (343), *Empress* v. *Govardhan.* Sessions Judge should in his proceedings, distinctly note that he has admitted the deposition and give the deposition a number in his proceedings and translate it or the material portions of it in his English minute of the proceedings.

(1922) 1922 Lah 1 (12) : 3 Lah 144 : 23 Cri L Jour 513, *Mahant Narain Das* v. *Emperor.* Time for transfer of depositions. Court should not allow statements of approver to be read out to the witness before the defence had had an opportunity of cross-examining him.

Note 10.

1. (1930) 1930 Pat 545 (547, 548) : 9 Pat 592 : 32 Cri L Jour 66 : 1930 Cri Cas 1089, *Bhikari Pati* v. *Emperor.*
(1894) 1894 Pun Re Cr No. 14 page 42 (44), *Mamun* v. *Empress.*
(1920) 1920 Mad 741 (742) : 22 Cri L Jour 385, *Dammur Veerabhadra* v. *Emperor.*
(1899) 21 All 175 (177), *Empress* v. *Sonagir.*
(1903-1904) 2 Low Bur R 214 (215), *Shwe Huit* v. *Emperor.*
[But compare (1881) 1881 All W N 74 (74), *Empress* v. *Nazzara.* In the following cases, however, it was doubted whether this Section applies to the evidence of an approver who has forfeited his pardon. It is submitted that so long as the approver is examined as witness, his evidence may be admitted under this Section.
(1883) 13 Cal L R 326 (327), *Nanha Malla* v. *Empress.*
(1881) 7 Cal L R 66 (68), *In the matter of Joyudee Parmanick.*]

2. (1891) 1891 All W N 184 (185), *Nagu* v. *Empress.*

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(2) If he says that he does not, the prosecutor may sum up his case ; and, if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

Synopsis.

Other Topics.

Accused not adducing evidence — Not prejudiced. See Note 9, Pt. 7.
Acquittal where there is no prosecution evidence. See Note 6, Pt. 6.
"Not proven"—Finding of. See Note 7, Pt. 3
Re-calling of prosecution evidence. See Note 2, Pt. 5.
Record of the defence. See Note 9, Pt. 8.

1. Legislative changes.

1. The corresponding Section 372 of the Code of 1861 contained a single clause that the accused should be called upon to enter on his defence after the close of the prosecution evidence.

2. The first two clauses of Section 251 of the Code of 1872 contained similar provisions, Clause 1 thereof corresponding to sub-sections 1 and 2 and Clause 2, to sub-section 4 of the present Section.

3. Section 289 of the Code of 1882 is the same as the present Section.

2. When the examination of witnesses for prosecution is concluded.

The general principle is that an accused person is entitled to know what the evidence against him is before he is called upon to enter on his defence.[1]

Section 289—Note 2.

1. (1923) 1923 All 322 (323) : 45 All 323 : 25 Cri L Jour 305, *Mahadeo Prasad* v. *Emperor*.

This Section accordingly provides that he is to be called upon to enter on his defence only after the examination of the prosecution witnesses is concluded.[2] The closing of the case for the prosecution is thus not mere form but with certain exceptions, closes the door to any further evidence against the accused; the prosecutor cannot re-open his case and make additions to it except such voluntary additions as the accused may make himself,[3] and except for the purpose of contradicting any new case set up by the accused in his defence.[4] If for any reason the Court re-calls any prosecution witness after the accused has made his defence the accused should be given a further opportunity of calling evidence with reference to the evidence so recorded.[5] The Court should wait before proceeding under this Section till *all* the evidence on the side of the prosecution is concluded;[5a] it cannot proceed under this Section in the course of the prosecution evidence because it does not believe the evidence so far tendered.[6]

3. After the examination, if any, of the accused.

The words "*if any*" would appear to suggest that the examination of the accused is not always necessary in a Sessions trial.[1] This, however, is not so. The words are intended to cover only those cases where the accused has no circumstances to explain, as for instance, where he has admitted his guilt, and are not intended to relax the imperative provisions of Section 342 *infra* in Sessions trials.[2]

Consequently, before an accused person is called upon to enter on his defence, he should be examined as to whether he has anything to say regarding the evidence against him,[3] even if he had been examined with great care before the committing Magistrate, because it makes a considerable difference to listeners like the jury whether a previous statement is read over to them or the accused is examined in their presence so that they may see his demeanour.[4]

4. The accused shall be asked whether he means to adduce evidence.

After the conclusion of the prosecution evidence the Court is bound to ask the accused person if he means to adduce evidence[1] and the accused himself cannot waive the benefit of such a provision.[2] The words "adduce evidence"

2. (1920) 1920 Bom 339 (341) : 22 Cri L Jour 58, *Alex Pimento* v. *Emperor.*
(1911) 12 Cri L Jour 7 (8) : 9 Ind Cas 46 (Cal), *Radha Madhab Pakra* v. *Emperor.*
(1879) 4 Cal L R 338 (340), *Empress* v. *Turibullah.*
(1928) 1928 Lah 953 (953) : 29 Cri L Jour 844, *Karam Chand* v. *Emperor.*
3. (1923) 1923 All 322 (323) : 45 All 323 : 25 Cri L Jour 305, *Mahadeo Prasad* v. *Emperor.*
4. (1871) 3 N W P H C R 271 (272), *Queen* v. *Choteylal.*
5. (1870) 13 Suth W R Cri 15 (15), *Queen* v. *Assanoollah.*
[See also (1925) 1925 Lah 531 (532): 26 Cri L Jour 1035, *Shugan Chand* v. *Emperor.* Case relating to trial before a Magistrate].
5a (1892) 14 All 212 (214), *Queen-Empress* v. *G. W. Hayfield.*
6. (1889) 2 Weir 384 (384) : 20 Mad 445, *Queen-Empress* v. *Ramalingam.*
(1898) 1 Oudh Cas 84 (86), *Queen* v. *Bharat Singh.*

Note 3.

1. (1909) 10 Cri L Jour 325 (339) : 3 Ind Cas 625 (Cal), *Khudiram Bose* v. *Emperor.*
2. (1903-04) 2 Low Bur Rul 115 (116), *Nga Thet U* v. *Emperor.*
(1933) 1933 All 690 (695) : 55 All 1040 : 34 Cri L Jour 967 : 1933 Cri Cas 1202, *S. H. Jhabwala* v. *Emperor.*
3. (1866) 1866 Pun Re Cr No. 57 page 65, *Azeem* v. *Empress.*
4. (1926) 1926 Oudh 57 (58) : 26 Cri L Jour 1576, *Emperor* v. *Mahommad Shafi.*

Note 4.

1. (1868) 10 Suth W R Cr 7 (7), *Bhagwan* v. *Doyal Gope.*
2. (1908) 8 Cri L Jour 152 (153) (Mad), *In re Rangaswamy Chetty.*

Sec. 289 Notes 4—7

in sub-section 1 do not mean the same thing as the words "enter on his defence" in sub-section 4. It is only where at a later stage, the Court *considers that there is evidence that the accused person committed the offence* that the accused is to be called upon to enter on his defence.[3]

5. The Prosecutor may sum up his case—Sub-section 2.

The prosecutor may sum up his case only if the accused says he does not mean to adduce evidence. In a case where *several* persons are tried together the word "he" in the second and fourth sub-sections should be construed to apply to *all* the accused together and so a prosecutor may sum up only if all the accused say they do not mean to adduce evidence.[1]

6. Where there is no evidence that the accused committed the offence.

The words "no evidence" in sub-section 1 mean merely that there is not on the record *any* evidence which *even if true*, would amount to legal proof of the offence charged against the accused; they cannot be extended to mean *no satisfactory, trustworthy or conclusive* evidence.[1] The real test in deciding whether there is evidence or not is to see whether a Judge at a trial held with the aid of jurymen, could say there was no evidence which could go before the jury.[2] However, a mere *scintilla* of evidence is not enough to justify the Judge in leaving a case to the jury. There must be evidence in which they might reasonably conclude the fact to be established.[3] The "evidence" referred to is the evidence let in on behalf of the prosecution. So where the only evidence is the confession of a co-accused[4] or the evidence of witnesses of a co-accused[5] it is a case of "no evidence" within the meaning of this Section. The words "no evidence" do not, however, mean absence of evidence on behalf of the prosecution *owing to failure of witnesses to attend*. So where the prosecution could not adduce evidence owing to failure of witnesses to attend, the Court cannot treat it as a case of "no evidence" and proceed under this Section.[6]

7. Record a finding of not guilty.

If the Court considers that there is *no* evidence, it can, in a case tried with the aid of assessors, itself record a finding of not guilty even without taking the opinion of the assessors, but if there is some evidence, though not trustworthy, satisfactory or conclusive, the Court must record the opinion of assessors

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3. (1920) 1920 Pat 471 (474, 478) : 21 Cri L Jour 705 : 5 Pat L Jour 430, *Raghu Bhumiji* v. *Emperor*.

Note 5.

1. (1894) 18 Bom 364 (365), *Queen* v. *Sadanand Narayan*.

Note 6.

1. (1888) 1888 All W N 153 (153), *Queen* v. *Nanha*.
   (1888) 10 All 414 (416, 417), *Queen* v. *Munna Lal*.
   (1892) 16 Bom 414 (422), *Queen* v. *Vajiram*.
   (1883) 9 Cal 875 (877), *Shadulla Howladar* v. *Empress*.
   (1925) 1925 Cal 1055 (1055) : 26 Cri L Jour 1151, *Rahamali Howladar* v. *Emperor*.
   (1889) 2 Weir 391 (392).
   (1929) 1929 Pat 121 (124) : 30 Cri L Jour 519, *Emperor* v. *Nawal Kishore Misser*.
   Sel Cas 274 (Oudh), *Joga Singh* v. *Ganesh Singh*.
2. (1927) 1927 All 90 (91) : 49 All 181 : 27 Cri L Jour 1369, *Balchand* v. *Emperor*.
3. (1915) 1915 Cal 773 (777) : 16 Cri L Jour 561 (565), *Emperor* v. *Upendra Nath Das*.
4. (1871-74) 7 Mad H C R App 15 (15).
   (1909) 9 Cri L Jour 404 (405) : 33 Mad 46, *In re Giddigadu*.
5. (1909) 10 Cri L Jour 68 (68, 69) : 2 Ind Cas 525 (Mad), *In re Raghavaraju*.
   (1916) 1916 Mad 851 (853) : 39 Mad 449 : 16 Cri L Jour 294 (297), *Annavi Muthiriyan* v. *Emperor*.
6. (1926) 1926 Cal 584 (585) : 27 Cri L Jour 125, *Superintendent and Remem-*

before recording a finding of not guilty.[1] But the Court cannot, purporting to act under this Section, record a finding of not guilty where it considers the charge itself improper.[2] Where there is no evidence the Judge should enter a verdict of acquittal; there is no warrant for a finding of "not proven".[3]

8. Direct the jury to return a verdict of not guilty.

If in a case tried by a jury there is no legal evidence, the Court should direct the jury to return a verdict of "not guilty." It must not leave it to the jury to express their opinion since a finding of guilty by the jury under such circumstances cannot be sustained,[1] even if there is some evidence available but not called by the prosecution.[2] The Court cannot forbear from directing a return of a verdict of not guilty if there is no evidence, even on the ground that the case of a co-accused is likely to be prejudiced thereby.[3] But if there is some evidence the case must go before the jury and the Court cannot direct a verdict of not guilty because it *disbelieves* the evidence.[4]

9. Shall call on the accused to enter on his defence—Sub-section 4.

The calling upon an accused person to enter on his defence under this sub-section is not a mere formality but is an essential part of a criminal trial, any defect in which may occasion a failure of justice.[1] So where there is some evidence on behalf of the prosecution which might go before a jury the Court should call upon the accused to enter on his defence[2] *after* the close of the prosecution evidence and summing up by the prosecutor.[3]

Where several persons are tried together, even if one of them offers

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brancer of Legal Affairs v. *Sardar Saik.*

Note 7.

1. (1896) 9 C P L R 24 (25), *Empress* v. *Tularam Brahmin.*
   (1899) 2 Weir 776 (777), *Public Prosecutor* v. *Sarabu Chennayya.*
   (1881) 2 Weir 382 (382), *Public Prosecutor* v. *Nalli Goundan.*
   (1868-69) 4 Mad H C R App 39 (39).
   (1870) 7 Bom H C R 82 (82), *Reg* v. *Parvati.*
   (1892) 16 Bom 414 (422), *Queen* v. *Vaji Ram.*
   (1888) 10 All 414 (416, 417), *Queen* v. *Muna Lall.*
2. (1890) 12 All 551 (552), *Dwarake Lail* v. *Mahadeo Rai.*
3. (1885) 2 Weir 381 (381), *In re Korada Gummanna.*

Note 8.

1. (1867) 7 Suth W R Cri 39 (39), *Queen* v. *Greedhary.*
   (1867) 8 Suth W R Cri 87 (92), *Queen* v. *Nobokisro Ghose.*
   (1871) 16 Suth W R Cri 19 (20), *Queen* v. *Rutton Dass.*
   (1871) 15 Suth W R Cri 46 (46), *Queen* v. *Bahar Ali Kahar.*
   (1899) 2 Weir 515 (516), *In re Mammadi.*
   (1929) 1929 Pat 121 (123) : 30 Cri L Jour 519, *Emperor* v. *Nawal Kishore Misser.*
   (1920) 1920 Cal 698 (699) : 22 Cri L Jour 60, *Asimuddin Sardar* v. *Emperor.*
2. (1871) 15 Suth W R Cri 11 (11), *In re Sheikh Zenoo.*
   (1891) 2 Weir 382 (383), *Public Prosecutor* v. *Nalli Goundan.*
3. (1926) 1926 Cal 728 (729) : 27 Cri L Jour 398, *Haricharan Das* v. *Emperor.*
4. (1872) 16 Suth W R Cri 20 (20, 21), *In re Huroo Shaha.*
   (1927) 1927 Pat 370 (374) : 7 Pat 15 : 28 Cri L Jour 692, *Ramchariter Singh* v. *Emperor.*
   (1931) 1931 Pat 172 (175) : 10 Pat 140 : 32 Cri L Jour 975 : 1931 Cri Cas 460, *Rup Narain Kurmi* v. *Emperor.*
   (1929) 1929 Pat 121 (123) : 30 Cri L Jour 519, *Emperor* v. *Nawal Kishore Misser.*
   (1924) 1924 Cal 809 (811) : 25 Cri L Jour 1048, *Emperor* v. *Osmani Sardar.*
   (1925) 1925 Cal 1055 (1055) : 26 Cri L Jour 1151, *Rahamali Howladar* v. *Emperor.*

Note 9.

1. (1896) 23 Cal 252 (253), *Queen* v. *Imam Ali Khan.*
   (1903-04) 2 Low Bur Rul 115 (116), *Nga Thet* v. *King-Emperor.* Omission not cured by S. 537.
   [But see (1935) 1935 Mad W N 1091 (1092), *Thoppa* alias *Sheik Abdul Kadir* v. *Emperor.* Omission to call on accused to enter on his defence is mere irregularity covered by S. 537.]
2. (1892) 16 Bom 414 (423), *Queen* v. *Vaji Ram.*
3. (1891) Ratanlal 581 (582), *Queen* v. *Dhamba.*

Sec. 289 Notes 9—11

to adduce evidence, all of them should be called upon to enter on their defence and they must follow one another in their defence since there cannot be a summing up only in the case of accused not adducing evidence and a right of reply as against others.[4] Since in a criminal case the burden of proof is on the prosecution and the conviction must be based on evidence which excludes the theory of innocence[5] the accused should be called upon to enter on his defence only if the evidence is such as to enable the Court to 'judge' rather than conjecture.[6] For the same reason no adverse inference can be drawn against the accused if he fails to adduce evidence even if he had, in answer to a question under the first part of this Section, undertaken to adduce evidence.[7] If the accused makes any statement in his defence it ought to be recorded. If he does not voluntarily make any statement or declines to answer questions under Section 342, the facts should be noted. When there is nothing else to show the nature of the defence, a note of the address to the Court under Section 290, if any, should be recorded. The record is not complete unless it shows the nature of the defence set up.[8]

Where the accused calls no witnesses, the clause means that he or his pleader is to make his final address to the Court.[9]

10. Procedure where the witnesses for the accused are absent.

Where due to a mistake the witnesses for the defence were not in attendance, not having been summoned by the Magistrate, it was held, that the trial should be adjourned and the accused should be given an opportunity to examine his witnesses by summoning them if necessary,[1] after calling upon him to enter on his defence.[2]

11. Effect of non-compliance with the Section.

The criminal proceedings are bad unless they are conducted in the manner prescribed by law and if they are substantially bad in themselves, the defect will not be cured by any consent or waiver on the part of the accused.[1] Thus it is irregular to record the prosecution evidence after the accused has entered on his defence[2] but it is only an irregularity which does not vitiate the trial if there has been no prejudice to the accused by reason of such irregularity.[3]

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4. (1894) 18 Bom 364 (365), *Queen* v. *Sadanand Narayan.*
5. (1895) Ratanlal 779 (783), *Queen* v. *Narayan Nathu.*
6. (1895) Ratanlal 772 (773), *Queen* v. *Ganesh Bhikaji.*
7. (1884) 10 Cal 140 (149). *Hurry Churn Chucker Butty* v. *Empress.*
8. (1871) 15 Suth W R Cr 16 (17), *In re, Gopal Hajjan.*
   (1886) 9 Mad 224 (244), *Queen* v. *Viran.*
   Sel Cas 95 (Oudh), *Queen* v. *Mt. Hardai.*
   (1903-04) 2 Low Bur Rul 115 (116), *Nga Thet U* v. *Emperor.*
9. (1935) 1935 Mad W N 1091 (1092): *Thoppa* alias *Sheik Abdul Kadir* v. *Emperor.*

Note 10.

1. (1869) 12 Suth W R Cr 22 (22), *Queen* v. *Mookun.*
   (1871) 15 Suth W R Cr 34 (35), *Queen* v. *Ishan Dutt.*
2. (1875) 23 Suth W R Cr 58 (59), *Queen* v. *Jumiruddin.*

Note 11.

1. (1876) 2 Cal 23 (30), *Queen* v. *Bholanath Sen.*
2. (1870) 13 Suth W R Cr 36 (37), *Queen* v. *Sham Kishore Holdar.* In the case however, it was held that the accused knew the evidence to be given, anticipated the same in his defence —So no prejudice.
   (1928) 1928 Lah 953 (953): 29 Cri L Jour 844, *Karam Chand* v. *Emperor.*
   (1870) 13 Suth W R Cr 15 (15), *Queen* v. *Assanoollah.* Prosecution witness recalled after defence of the accused without giving him further opportunity.
3. (1882) 8 Cal 154 (156), *Queen* v. *Kalichurn Chunari.*

Where the Court records a finding of not guilty or directs the jury to return a verdict of not guilty without recording the opinion of the assessors, or the verdict of the jury as the case may be, in a case where there is enough evidence to go to the jury, the Court acts without jurisdiction and the trial is illegal.[4] But the Calcutta High Court has held, under similar circumstances, that it is only an irregularity which does not vitiate the trial if there is no prejudice to the accused.[5] Where there is no evidence and the jury returns a verdict of guilty by reason of the Judge not directing them to give a verdict of not guilty, the conviction is bad in law.[6] Entering upon defence on being called upon to do so marks a special stage in, and is an essential part of, a criminal trial. Omission to call upon the accused to enter on his defence, according to the Calcutta High Court[7] and the Chief Court of Lower Burma[8] cannot but occasion failure of justice and convictions consequent thereon must be set aside. But the Allahabad High Court has taken the view that it is only an irregularity which does not vitiate the trial if there has been no prejudice to the accused.[9] Where the accused is not asked if he means to adduce evidence, his conviction is liable to be set aside.[10]

Sec. 289 Note 11

290.* The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

Sec. 290

Defence.

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* **(Code of 1882—S. 290—Same.)**

(Code of 1872—S. 251, Para. 3.)

251. * * * * * *

Defence.

The accused person, or his Counsel or authorized agent, may then state the case for the defence, and may examine the witnesses, if any produced for the defence, and at the conclusion of such examination may sum up his case.

(Code of 1861—S. 374.)

374. The accused person or his Counsel or Agent, may, at his option, address the Court at the close of the case for the prosecution, or at the close of any evidence that may be adduced on his behalf, or if any question shall be put to the accused person by the Court, after such question shall have been so put.

When accused may address the Court.

(1879) 4 Cal L R 338 (341), *In the matter of Turibullah.*

4. Sel Cas 274 (Oudh), *Joga Singh* v. *Ganesh Singh.*
(1888) 10 All 414 (417), *Queen* v. *Munnelal.*
(1889) 2 Weir 391 (391).

5. (1925) 1925 Cal 1055 (1055): 26 Cri L Jour 1151, *Raham Ali Howldar* v. *Emperor.*

6. (1867) 8 Suth W R Cr 87 (92), *Queen* v. *Nobokisto Ghose.*
(1871) 15 Suth W R Cr 46 (46), *Queen* v. *Bahar Ali Kahar.*

7. (1896) 23 Cal 252 (253), *Queen* v. *Imam Ali Khan.*

8. (1903-04) 2 Low Bur Rul 115 (117), *Nga Thet U* v. *Emperor.*

9. (1918) 1918 All 298 (299): 19 Cri L Jour 209, *Premgir* v. *Emperor.*

10. (1868) 10 Suth W R Cr 7 (7), *Bhugwan* v. *Doyal Gope.*

Sec. 290 Note 1

Synopsis.

Other Topics.

Adverse inferences against accused. See Note 5, Pt. 3.
Burden of proof. See Note 1, Pt. 7 ; Note 5, Pt. 1.
Duty to explain incriminating facts. See Note 5, Pt. 6, F-N (2) and (6).
Record of defence set up. See Note 1, Pt. 5.
Witnesses for co-accused — Cross-examination. See Note 3, Pt. 1.

1. Defence.

The last Section (S. 289) provides that if after the prosecution evidence is taken in a Sessions trial the Court considers that there is evidence that the accused committed the offence, he should be called upon to enter on his defence. This and the next Section provide for the procedure to be followed in conducting the defence.

The accused is entitled to set up any defence, technical or otherwise.[1] There is no legal bar to his raising even inconsistent defences.[2] Thus, he can raise a defence of *alibi* as well as of private defence.[3] But the defence will become weaker by inconsistent pleas being raised.[4]

The record of the trial should show the nature of the defence set up.[5] The nature of the defence is to be gathered not only from the statement of the accused but also from the trend of cross-examination of the prosecution witnesses and the arguments of the defence pleader.[6]

Though under Section 105 of the Evidence Act, the burden of proving that the case of the accused falls within one of the General Exceptions in the Penal Code is on him, it is not necessary that he should specifically raise such a plea. Thus, a Court is bound to give effect to a plea of private defence if it is made out on the evidence, though it is not specifically raised by the accused.[7]

Section 290—Note 1.

1. (1914) 1914 Cal 456 (459): 41 Cal 350: 15 Cri L Jour 385, *Rámesh Chandra* v. *Emperor.*
2. (1923) 1923 Cal 717 (718): 25 Cri L Jour 190, *Nagendra* v. *Emperor.*
[But see (1910) 11 Cri L Jour 374 (376): 32 All 451, *Emperor* v. *Wajid Hussain.* Where accused has raised pleas inconsistent with a defence which would bring his case within one of the general exceptions he cannot in appeal set up a case upon the evidence taken at his trial that his act came within such general exception.
See cases cited in Foot-Note (3), *infra.*]
3. (1918) 1918 All 189 (190): 40 All 284: 19 Cri L Jour 371, *Yusuf Husain* v. *Emperor.*
(1919) 1919 Cal 439 (441): 20 Cri L Jour 661, *Afiruddi Chakdar* v. *Emperor.*
[See also (1920) 1920 Pat 843 (844): 5 Pat L Jour 64: 21 Cri L Jour 799 *Faudi Keot* v. *Emperor.*]
4. (1923) 1923 Cal 717 (718): 25 Cri L Jour 190, *Nagendra* v. *Emperor.*
5. (1871) 15 Suth W R Cr 16 (17), *In re Gopal Hajjan.*
6. (1930) 1930 Cal 442 (442, 443): 31 Cri L Jour 1203: 1930 Cri Cas 750, *Kuti* v. *Emperor.*
7. (1915) 1915 Mad 532 (533): 15 Cri L Jour 710, *In re Pachai Gounden.*
(1933) 1933 Oudh 63 (66): 34 Cri L Jour 373: 1933 Cri Cas 103, *Bahadur Khan* v. *Emperor.*
(1920) 1920 Pat 843 (844): 5 Pat L Jour 64: 21 Cri L Jour 799, *Faudi Keot* v. *Emperor.*
(1882) 11 Cal L R 232 (233), *In the matter of Kali Charan Mukerjee.*
(1930) 1930 Cal 442 (442, 443): 31 Cri L Jour 1203 : 1930 Cri Cas 750, *Kuti* v. *Emperor.*
(1924) 1924 All 645 (651): 26 Cri L Jour 501, *Emperor* v. *Kishen Lal.*

The accused is not bound to disclose the nature of his defence in the committing Magistrate's Court.[8] Nor is he bound to disclose his defence in the Sessions Court till he is called upon to enter upon his defence.[9] But if he means to bring any charges against the prosecution (e. g., a charge of fraud) as part of his defence, there is an equitable rule that he should disclose his intention during the cross-examination of the prosecution witnesses so that the prosecution may have an opportunity of explaining matters. Unless such an opportunity is given to the prosecution, the defence so far as it is based on the allegations against the prosecution, must fail.[10]

The accused can raise a new defence at a late stage of the case; but unless it can be said that such a defence could not have been raised earlier the weight to be attached to it will suffer.[11]

2. Accused's right to examine witnesses.

When a prisoner puts forward a distinct defence and cites witnesses but such witnesses on their appearance in Court say that they know nothing in prisoner's favour, it is the duty of the Judge instead of dismissing them at once to question them with a view to see if there is any truth in the defence.[1]

It is no part of the duty of a Judge to examine a witness for the accused when his pleader has refused to do so and the accused has not raised any objection.[2]

See Section 291 and Notes thereunder.

3. Accused's right to cross-examine witnesses.

An accused is entitled to cross-examine the witnesses of a co-accused whose case is adverse to his own.[1]

Where a witness examined by the prosecution in the committing Magistrate's Court is given up by the prosecution and the accused thereafter calls him as his own witness, the accused cannot cross-examine him, the reason being that the Evidence Act gives the right of cross-examination only to the adverse party except in certain cases (Evidence Act, Sections 138 and 154).[2]

4. Summing up after evidence—Right of.

When there are more than one accused in a case, their pleaders should be

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(1912) 13 Cri L Jour 470 (471): 15 Ind Cas 310 (Mad), *Veerana Nadan* v. *Emperor.*

8. (1930) 1930 Cal 188 (189): 31 Cri L Jour 695: 1930 Cri Cas 145, *Kali Bailash Hazra* v. *Emperor.*

9. (1927) 1927 Sind 104 (107): 27 Sind L R 356: 28 Cri L Jour 66, *Emperor* v. *Saran.*

10. (1927) 1927 Sind 104 (107): 27 Sind L R 356: 28 Cri L Jour 66, *Emperor* v. *Saran.* There is a well-known equitable rule that Crown witnesses must be given opportunity of denying any allegations against them which form part of the defence.

(1914) 1914 Cal 456 (466): 41 Cal 350: 15 Cri L Jour 385, *Ramesh Chandra Banerjee* v. *Emperor.*

(1928) 1928 All 222 (225): 30 Cri L Jour 530, *Emperor* v. *Jhabbar Mal.*

11. (1933) 1933 Pat 481 (483): 34 Cri L Jour 828: 1933 Cri Cas 1010, *Emperor* v. *Kameshwar Lal.*

Note 2.

1. (1869) 11 Suth W R Cr 9 (9), *Queen* v. *Bhugner Putwa.*

2. (1883) 1883 All W N 189 (190), *Empress* v. *Harpat.*

Note 3.

1. (1894) 21 Cal 401 (403), *Ram Chand Chatterjee* v. *Hanif Sheikh.*
[But see (1869) 12 Suth W R Cr 75 (76, 77), *Queen* v. *Surroop Chand Paul.*]

2. (1898) 20 All 155 (157), *Queen* v. *Zawar Husen.*
[But compare (1923) 1923 Cal 717 (718): 25 Cri L Jour 190, *Nagendra Chandra Dhar* v. *Emperor.* Witness not given up by prosecution but not examined in the Sessions Court—Accused is entitled to cross-examine such witness.]

Sec. 290 Notes 4—6

allowed to sum up their respective cases after the evidence for all the accused has been taken.[1]

5. Evidence in Criminal Cases.

The burden of proving the guilt of the accused in all criminal cases is on the prosecution.[1] There is no obligation on the accused to produce any evidence in his defence in the first instance.[2] Unless and until the prosecution has established a *prima facie* case against the accused, no adverse inference can be drawn against him from the non-production of any evidence by him.[3] Similarly, the accused cannot be convicted *merely* on the ground of the weakness or falsity of his defence.[4] A conviction cannot be based merely on suspicions.[5] But where the prosecution has established a *prima facie* case against the accused it is for him to explain the incriminating circumstances appearing against him.[6]

6. Written statement.

There is no provision for filing a written statement by the accused in Sessions trials.[1] (*See* Section 256 and Notes thereunder. *See also* Section 342.)

Note 4.

1. (1932) 1932 Lah 103 (110) : 33 Cri L Jour 97 : 1932 Cri Cas 123, *Mohinder Singh* v. *Emperor.*

Note 5.

1. [See cases in foot notes (2) and (3).]
2. (1932) 1932 Lah 243 (244) : 33 Cri L Jour 411 : 1932 Cri Cas 255, *Hayat* v. *Emperor.* Two persons seen togther and shortly afterwards one of them found to have been murdered. No *onus* rests on survivor to explain how deceased met with his death.
   (1894) Ratanlal 686 (686), *Queen* v. *Jethmel Narayan.* Prisoner on his trial is merely on his defensive and owes no duty to any one but himself; he could not be convicted because he had not tried to explain to the Court how the death in question occurred or by what means.
3. (1884) 10 Cal 140 (149), *Hurry Churn Chuker Butty* v. *Empress.*
   (1882) 8 Cal 121 (125), *Empress* v. *Dhunno Kazi.*
   (1895) Ratanlal 779 (782, 783), *Queen* v. *Narayan Mathu.*
4. (1921) 1921 Cal 531 (532) : 23 Cri L Jour 220, *Gouri Narayan Barrua* v. *Tilbikram Chetri.*
   (1868) 1868 Pun Re Cr. No. 22, page (57), *Jehangeer Khan* v. *Crown.*
   (1872) 1872 Pun Re Cr No. 5, page (6), *Crown* v. *Gulab and Mussammat Kassima.*
   (1890) 1890 Pun Re Cr No. 21, page (47), *Empress* v. *Harjas Rai.*
   (1867) 1867 Pun Re Cr No. 37, page (68), *Crown* v. *Shah Mahomed.*
   (1923) 1923 Mad 365 (367): 24 Cri L Jour 426, *Ramudu Iyer* v. *Emperor.*
   (1925) 1925 Oudh 78 (88) : 27 Oudh Cas 188 : 26 Cri L Jour 225, *Hira Lal* v. *Emperor.*
5. (1930) 1930 Oudh 460 (463): 32 Cri L Jour 94 : 1930 Cri Cas 1084, *Gendan Lal* v. *Emperor.*
6. (1931) 1931 Pat 384 (386) : 10 Pat 590 : 33 Cri L Jour 111 : 1931 Cri Cas 912, *Leda Bhagat* v. *Emperor.*
   (1928) 1928 Pat 100 (101) : 6 Pat 627 : 29 Cri L Jour 239, *Ghanshyam Singh* v. *Emperor.*
   (1919) 1919 Oudh 160 (174) : 20 Cri L Jour 465, *Sushil Chandra Lahiri* v. *Emperor.*
   (1914) 1914 Sind 111 (112) : 7 Sind L R 109 : 15 Cri L Jour 497, *Isarsing Sawansingh* v. *Crown.*
   (1925) 1925 Oudh 78 (88) : 27 Oudh Cas 188 : 26 Cri L Jour 225, *Hira Lal* v. *Emperor.*
   (1928) 1928 Cal 27 (39) : 29 Cri L Jour 49, *Hari Narayan Chandra* v. *Emperor.* If a *prima facie* case is made out against the accused, he should rebut it by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated statements from the dock.
   (1930) 1930 Lah 163 (166) : 31 Cri L Jour 131 : 1930 Cri Cas 171, *Jowaya* v. *Emperor.*
   (1916) 1916 All 63 (64) : 17 Cri L Jour 23 (23), *Abdul Aziz* v. *Emperor.*
   (1916) 1916 Cal 188 (199): 16 Cri L Jour 497 (518) : 42 Cal 957, *Amritalal Hazra* v. *Emperor.*

Note 6.

1. (1926) 1926 Pat 566 (568) : 27 Cri L Jour 1041, *Emperor* v. *Zahir Haidar Bilgrami.*
   (1916) 1916 Cal 633 (641) : 16 Cri L Jour 724 (733), *Emperor* v. *Dwijendra Chandra Mukerjee.*
   (1935) 1935 Cal 687 (688) : 1935 Cri Cas 1079, *Emperor* v. *Tarak Nath Baidya.*

291.* The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in Sections 211 and 231, be entitled of right to have any witness summoned. other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial. **Sec. 291**

Right of accused as to examination and summoning of witnesses.

Synopsis.

Other Topics.

Adjournment for summoning new witnesses. See Note 3, Pts. 1, 3.
Amount of evidence—Privilege of accused. See Note 3, F-N. (3).
Refusal to summon witnesses named—Delay. See Note 3, Pts. 7 and 8.
Summons refused by Magistrate—Issued by Sessions Court. See Note 3, Pt. 10.
Witness not previously named but present. See Note 2, Pt. 1.

1. Scope of the Section.

This Section entitles the accused to examine in his defence in the Sessions Court all witnesses who are present whether they have been named by him previously or not. It also entitles him to the assistance of the Court in compelling the attendance of all those witnesses who were included by him in the list of witnesses delivered by him to the committing Magistrate under Section 211, *ante*. As it is a frequent ground of appeal against a conviction by the Sessions Court that the Court refused or omitted to examine witnesses for the defence, the Court should be careful to note specifically in the record whether the accused elected to call any witnesses in his defence or refused to do so and whether the witnesses called by him were examined.[1]

2. Examination of witnesses present in Court.

Under this Section the accused is entitled as of right to examine as a witness in his defence any person who is present in the Court notwithstanding that he was not named by him previously as his witness.[1] *A fortiori*, if a witness

* **(Code of 1882—S. 291**—Same.)

(Code of 1872—S. 363.)

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363. The accused person shall be allowed to examine any witness not previously named by him if such witness be in attendance; but he shall not except as provided in S. 448,† be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed or held to bail for trial.

Right of accused as to examination and summoning of witness.

† [1872—S. 448; 1861—S. 246; 1898—S. 229.]

(Code of 1861—S. 375—Same as that of 1872 Code.)

Section 291—Note 1.

1. (1895) 17 All 524 (526), *Empress* v. *Pirbhu.*

Note 2.

1. (1875) 24 Suth W R Cri 18 (19), *Queen* v. *Luckhy Narain Nagory.* Accused is entitled to call as his witness any one who is in Court, whether summoned by him or not.
(1889) 16 Cal 610 (618), *Bikas Khan* v. *Empress.* (Do.)

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included in the list delivered by the accused to the committing Magistrate under Section 211, *ante* is present in Court the Court is bound to allow him to be examined.[2] In the undermentioned case[3] it was held that if the accused insists on the examination of a witness in attendance who had been *discharged* before, the Court may, if it thinks that the interests of justice would be served, allow him to be examined.

3. Right to issue of process for compelling attendance of witnesses.

This Section provides that except in certain cases, the accused is not entitled as of right to the issue of summons to any witness not included in the list delivered by him to the committing Magistrate under Section 211 *ante*. Nor can he insist on an adjournment being granted to enable him to examine any such witness.[1] But it is open to the Sessions Court in the exercise of its *discretion* to issue summons for the attendance of such witnesses[2] and ordinarily, an accused's prayer for summons ought not to be refused if there is time to secure the attendance of the witnesses before the conclusion of the trial.[3]

In the case of witnesses included in the list delivered by the accused to the committing Magistrate under Section 211 *ante*, Sections 216 and 217 *ante* provide that they should be summoned to give evidence before the Sessions Court or, if they have been examined before the committing Magistrate, should be required to execute bonds binding themselves to give evidence in the Sessions Court. If any of them fail to appear in the Sessions Court the accused is entitled as of right to the issue of process to compel their attendance[4] or to an adjournment of the case to enable him to secure their attendance.[5] This right of the accused applies not

2. (1866) 1866 Pun Re Cr No. 118, p. (119), *Ahmud Khan* v. *Empress.*
3. (1923) 1923 Oudh 142 (142) : 24 Cri L Jour 518, *Nageshwar* v. *Emperor.*

Note 3.

1. (1865) 3 Suth W R Cri 29 (29), *Queen* v. *Boidnath Singh.*
   (1871) 16 Suth W R Cri 28 (30, 34), *In re Bholanath Mookerjee.*
   (1933) 1933 Pat 559 (560) : 1933 Cri Cas 1259, *Ram Sewak* v. *Emperor.*
   (1925) 1925 Lah 557 (558) : 27 Cri L Jour 134, *Nazir Singh* v. *Emperor.*
2. (1897) 19 All 502 (503, 504), *Empress* v. *Shakir Ali.*
   (1934) 1934 All 372 (373) : 1934 Cri Cas 437 : 35 Cri L Jour 591, *Misri Lal* v. *Emperor.*
   (1934) 1934 Lah 250 (251) : 1934 Cri Cas 469 : 35 Cri L Jour 1034, *Fazal Husain* v. *Emperor.* No list put in before committing Magistrate, still, Sessions Judge can summon witnesses.
3. (1933) 1933 Pat 559 (560) : 1933 Cri Cas 1259, *Ram Sewak* v. *Emperor.*
   (1935) 1935 Sind 216 (217) : 1935 Cri Cas 1250 : 37 Cri L Jour 108, *Hote* v. *Emperor.* [See (1903) 7 Cal W N 188 (190), *Brojendra Lal* v. *Emperor.* It is for the accused and not for the Judge to say what amount of evidence is proper to be placed before the jury. (1930) 1930 Cal 362 (363) : 31 Cri L Jour 1077 : 1930 Cri Cas 538, *Muktal Hossein* v. *Emperor.* In a serious case the Judge should allow every opportunity to the accused to adduce such evidence as they choose, either oral or documentary.]
4. (1882) 2 Weir 383 (383), *In re Muriammal.*
   (1875) 23 Suth W R Cri 56 (56), *Queen* v. *Prosunnoo Coomar Moitro.*
   (1930) 1930 Cal 188 (189) : 31 Cri L Jour 695 : 1930 Cri Cas 145, *Kali Bilash* v. *Emperor.*
   (1871) 15 Suth W R Cri 34 (35), *Queen* v. *Ishan Dutt.*
   (1865) 2 Suth W R Cri 6 (6), *Queen* v. *Bhoobun Isher Gossamee.*
   (1866) 5 Suth W R Cri 65 (65), *Queen* v. *Kalee Thakoor.*
   (1865) 3 Suth W R Cri 35 (36), *Queen* v. *Abdul Satar.*
   (1920) 1920 Cal 531 (531) : 47 Cal 758 : 21 Cri L Jour 842, *Foijuddi* v. *Emperor.* Application for summons made at a late stage and rejected on that ground and not on ground of the witnesses being immaterial—*Held* that the rejection was bad. It was open to the Sessions Judge to take steps that applications were made early.
   (1931) 1931 Cal 6 (7) : 1931 Cri Cas 38 : 58 Cal 412 : 32 Cri L Jour 316, *Ram Mamud Sarkar* v. *Emperor.*
   (1871) 16 Suth W R Cri 14 (15), *Queen* v. *Rajcoomar Mookerjee.*
5. (1931) 1931 Cal 6 (7) : 1931 Cri Cas 38 : 58

only to the witnesses included in the list which the committing Magistrate is *bound* to accept under Section 211, sub-section 1, but also to those included in the list which he accepts in the exercise of his *discretion* under sub-section 2 of that Section.[6] Sec. 291 Note 3

But the right of the accused to issue of process is one that can be waived by him. Hence, if the accused has said that he does not wish to examine any witness, but requests for process at a late stage of the case, the Court may decline to comply with his request.[7] Similarly, where the Court directs the accused to make his application for summons early but the latter delays and applies for summons at the last moment, his application may be rejected.[8] But the accused is not bound to apply for summons before he is called upon to enter upon his defence.[9]

Where the committing Magistrate has, in the exercise of his discretion under Section 216, *ante*, refused to issue summons to a certain witness and the accused applies to the Sessions Court for summons to such witness, the Sessions Court *can* issue such summons.[10] The Sessions Court has power under this Section to re-call a prosecution witness for cross-examination by the accused when the accused had no opportunity of cross-examining him before.[11]

292. If the accused, or any of the accused, adduces any evidence, the prosecutor shall be entitled to reply.

Prosecutor's right of reply.

Prosecutor's right of reply.

292.* *The prosecutor shall be entitled to reply—* Sec. 292

(a) if the accused or any of the accused adduces any oral evidence ; or

(b) with the permission of the Court, on a point of law ; or

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*(Code of 1882—S. 292.)

Same as that of 1898 Code.

(Code of 1872—S. 252.)

Prosecutor's right of reply. **252.** If any evidence is adduced on behalf of the accused person, the officer conducting the prosecution shall be entitled to reply.

(Code of 1861—S. 376.)

Prosecutor's right of reply. **376.** If any evidence is adduced on behalf of the accused person, or if he answers any question put to him by the Court, the prosecutor, or the Counsel or Agent for the prosecution, shall be entitled to a reply.

Cal 412 : 32 Cri L Jour 316, *Ram Mamud Sarkar* v. *Emperor*.

(1872) 18 Suth W R Cr 20 (21), *Queen* v. *Rajendra Mytee*.

(1875) 23 Suth W R Cr 58 (59), *In re Kali Prosunno Roy*.

(1882) 2 Weir 383 (383), *In re Muriammal*.

6. (1930) 1930 Cal 188 (189) : 31 Cri L Jour 695 : 1930 Cri Cas 145, *Kali Bilash Hazara* v. *Emperor*.

7. (1925) 1925 Pat 381 (384) : 26 Cri L Jour 713, *Jamal Momim* v. *Emperor*.

8. (1920) 1920 Cal 531 (531, 532) : 47 Cal 758 : 21 Cri L Jour 842, *Foijuddi* v. *Emperor*.

9. (1869) 12 Suth W R Cr 22 (22), *Queen* v. *Mookun*.

10. (1886) 8 All 668 (671, 672), *In the matter of the petition of the Rajah of Kantit*.

11. (1882) 2 Weir 383 (383), *In re Muriammal*. Accused saying that he did not know when he had the right to cross-examine. *Held* that accused was entitled to another opportunity to cross-examine.

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(c) with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence :

Provided that, in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.

Synopsis.

Other Topics.

Joint trial of several accused—Evidence of some—Right of reply. See Note 3.

History of the Section. See Note 5.

1. Object of the Section.

The object of the Legislature in enacting this Section is to give each side an opportunity to comment upon the evidence let in by the other and not to give an additional advantage to the Prosecutor.[1]

There is no similar provision so far as the trial of warrant cases is concerned[2] ; but it has been held that even in such cases, both the Prosecutor and the accused should be allowed to address arguments to the Court after the evidence is let in. [3]

2. Prosecutor, meaning of.

Section 270 *ante* provides that in every trial before a Court of Session, the prosecution shall be conducted by a *Public Prosecutor*. The "Prosecutor" in this Section therefore means the Public Prosecutor.

Sections 492 and 493 provide for the appointment of Public Prosecutors, the latter also providing that if a private person instructs a pleader to prosecute in any Court any person, in any such case, such pleader shall act under the directions of the Public Prosecutor. *See* Notes to those Sections.

3. "If the accused or any of the accused."

Where one of several accused persons tried *jointly* calls witnesses at the trial but the other accused call no witnesses, they must all follow in their defence and the prosecutor has the right of reply on the whole case. He is not to sum up as to such of the accused as do not call evidence and reply on the evidence that may have been adduced by the others.[1] Where, however, the accused are

Section 292—Note 1.

1. (1884) 10 Cal 140 (142), *Hurry Churn Chukerbutty* v. *Empress.*
   (1917) 1917 Cal 524 (524, 525): 17 Cri L Jour 423 (424): 43 Cal 426, *Emperor* v. *Sreenath Mahapatra.*
   (1906) 4 Cri L Jour 1 (10): 30 Bom 421, *Emperor* v. *Bhaskar.*
2. (1897) Ratanlal 938 (938), *Empress* v. *W. E. Lapprey.*
3. (1928) 1928 Bom 557 (559): 53 Bom 119 : 30 Cri L Jour 185, *Vinayak Laxman Bhatkhande* v. *Emperor.*

Note 3.

1. (1894) 18 Bom 364 (365), *Empress* v. *Sadanand Narayan.*

indicted under separate counts in the same indictment, the charges are distinct and the Prosecutor has a right of reply upon that prisoner only in whose behalf evidence was called.[2]

4. Extent of right of reply.

If any of the accused lets in oral evidence the Prosecutor is entitled to reply ; such reply need not be confined to the evidence let in by such accused, but may be as against all the accused and generally on the whole case.[1] Where under Clause (c) of this Section, only documents are put in with the permission of the Court and no oral evidence is let in on behalf of the accused, the Prosecutor can only comment upon such documents, but cannot, except with the permission of the Court, address on the whole case.

5. Production of document in cross-examination of prosecution witness—Right of reply.

Section 292 of the Code of 1882 provided that the Prosecutor had a right of reply where the accused or any of the accused had stated, when asked under Section 289, *that he meant to adduce evidence.* It was however held by the Calcutta High Court[1] that where the accused *did not in fact adduce any evidence*, there was no right of reply even though he had stated when questioned under Section 289 that he meant to adduce evidence. There was also a conflict of opinion on the question whether, where the accused filed documents in *cross-examination of the prosecution witnesses* he must be taken to have adduced evidence so as to give the Prosecutor a right of reply.[2]

Under the Section as it stood before the Amendment of 1923, the Prosecutor had a right of reply where the accused or any of the accused *adduced any evidence.* This, however, did not settle the conflict on the question whether the filing of a document in cross-examination of the prosecution witness gave the Prosecutor a right of reply.[3]

The present amended Section has set the conflict at rest. The right of reply now depends upon the accused adducing *oral* evidence after the close of the prosecution case, or by the production of a document *after he enters* on his

2. 2 Hyde 247 (247), *Queen* v. *Abbas.*

Note 4.

1. (1894) 18 Bom 364 (365), *Empress* v. *Sadanand Narayan.*

Note 5.

1. (1884) 10 Cal 140 (142), *Hurry Churn Chuckerbutty* v. *Empress.*
2. (1892) 14 All 212 (219, 220), *Empress* v. *G. W. Hayfield.* (Yes.)
   (1894) 16 All 88 (101), *Empress* v. *Moss.* (Yes.)
   (1882) 11 Mad 339 (340), *Empress* v. *Venkatapathi.* (Yes.)
   (1890) 14 Bom 436 (438), *Empress* v. *Krishnaji Baburao Bulell.* (No.)
   (1884) 10 Cal 1024 (1025), *Empress* v. *Grees Chunder Banerjee.* (No.)
   (1886) 14 Cal 245 (247), *Empress* v. *Kali Prosanna Doss.* (No.)
   (1890) 17 Cal 930 (933), *Empress* v. *Soloman.* (No.)
   (1898) 2 Cal W N 201*n* (201), *Fakur* v. *Empress.* (No.)
3. (1906) 4 Cri L Jour 1 (10): 30 Bom 421, *Emperor* v. *Bhaskar.* (No.)
   (1914) 15 Cri L Jour 241 (242) : 7 Low Bur Rul 84, *Emperor* v. *J. S. Berch.* (No.)
   (1909) 9 Cri L Jour 284 (286) : 1 Ind Cas 280 (Bom), *Emperor* v. *Abdul Ali.* (No.)
   (1906) 10 Cal W N 267*n* (267), *Emperor* v. *Timol.* (No.)
   (1917) 1917 Cal 524 (524, 525): 17 Cri L Jour 423 (424) : 43 Cal 426, *Emperor* v. *Sreenath Mahapatra.* (No.)
   (1904) 1 Cri L Jour 451 (452, 453) : 31 Cal 1050, *Emperor* v. *Stewart.* (No.)
   (1908) 8 Cri L Jour 215 (220) : 1 Sind L R 91, *Emperor* v. *Bhuro valad Gul Beg.* (No.)
   (1909) 10 Cri L Jour 24 (26, 27) (Kathiawar), *Emperor* v. *Nanji Jetha.* (No.)
   (1907) 6 Cri L Jour 115 (117) : 4 Low Bur Rul 5, *Emperor* v. *H. Manuel.* (Yes.)
   (1911) 12 Cri L Jour 73 (78) : 9 Ind Cas 436 (Lah), *Emperor* v. *Mahna Singh.* (Yes.)
   (1902) 6 Cal W N 276*n* (276*n*), *Emperor* v.

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defence. The filing of a document during the cross-examination of the prosecution witness will not give the Prosecutor a right of reply.[4]

6. Reply wrongly allowed—Effect.

Where the Prosecutor is wrongly allowed to reply in a case in which there is no right of reply, the irregularity is not one which will vitiate the whole proceedings or which will call for a re-trial even from the stage at which the error arose.[1]

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293.* (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

View by jury or assessors.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

Synopsis.

* (Code of 1882—S. 293—Same.)

(Code of 1872—S. 253.)

253. Whenever, in the opinion of the Court it is proper and convenient that the jury or assessors should view the place in which the offence charged is said to have been committed, or any other place in which any other transaction material to the inquiry in the trial took place, an order shall be made to that effect, and the jury or assessors shall be conducted in a body under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

View by jury or assessors.

Such officer shall not suffer any other person to speak to, or hold any communication with, any of the jury or assessors; and they shall, when the view is finished, be immediately conducted back into Court.

(Code of 1861—S. 348—Same as that of 1872 Code.)

Moni Lal. Question not decided.

(1902) 6 Cal W N 308*n* (304), *Port Trust Railway* v. *Satkari Dhole.* Not decided.
[See also article in (1900) 10 Mad L Jour 316*n* (316*n*, 319*n*).]

4. (1931) 1931 Lah 534 (535): 1931 Cri Cas 774 : 13 Lah 172 : 32 Cri L Jour 944, *Kundan Singh* v. *Emperor.*

Note 6.

1. (1931) 1931 Lah 534 (535): 1931 Cri Cas 774 : 13 Lah 172 : 32 Cri L Jour 944, *Kundan Singh* v. *Emperor.*

Other Topics.

Local inspection and not examination of witnesses. See Note 3, Pt. 1.
Local inspection when immaterial. See Note 2, Pts. 1 and 2.
Notice to parties. Local inspection after close of the case. See S. 539-B Notes.

1. Scope of the Section.

This Section provides for the local inspection of the scene of occurrence or any other material place, by the *jury or assessors* in Sessions cases. Section 539-B provides for similar inspection by *Magistrates and Judges.*[1] *Vide* Section 539-B and Notes thereunder.

2. "Whenever the Court thinks."

It is only in cases where the Court considers that an inspection would assist the jury or the assessors, in determining whether the charge is true or false, that it should be ordered. Where the charge against a prisoner was that he made certain statements on oath knowing them to be false, (the statement being that one *M* threatened to cut the tree) it was held that a local inspection as to the condition of tree was not material to the case.[1] *See also* the undermentioned case.[2]

3. Jury or assessors not to hold communication with any other person.

It is imperative that the jury or assessors should not have any extra-judicial knowledge of the facts in the case ; they are to decide the case on the legal evidence taken by the Judge. Where a Sessions Judge directed the assessors to make an inspection of the locality and also instructed them to orally examine witnesses if they desired to do so, the High Court condemned the procedure and held that in asking the assessors to take evidence, he was "abdicating his own high functions".[1]

294.* If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

When juror or assessor may be examined.

Synopsis.

Scope and object of the Section. Note No. 1.

Other Topics.

Judge when disqualified. See Sec. 556.
Jury or assessor not disqualified under the Section. See Note 1, Pt. 3.

* **(Code of 1882—S. 294** and **Code of 1872—S. 258**—Same as that in 1898 Code.)

(Code of 1861—Nil.)

Section 293—Note 1.

1. [See (1912) 13 Cri L Jour 156 (157) : 39 Cal 476, *Alla Rai* v. *Jhingur Tewari.*]

Note 2.

1. (1865) 2 Suth W R Cri 60 (60), *Queen* v. *Seetanath Ghosal.*
2. (1910) 11 Cri L Jour 121 (126) : 37 Cal 340, *Babbon Sheikh* v. *Emperor.*

Note 3.

1. (1866) 5 Suth W R Cri 59 (60), *Queen* v. *Chutterdharee Singh.*

Sec. 294 Note 1

1. Scope and object of the Section.

The principle of this Section is that no man shall be convicted except on evidence which he has had an opportunity of testing by cross-examination and of contradicting the same by rebutting evidence.[1] A juryman or assessor is expected to form and give his opinion on the evidence given at the trial and not to act upon his personal knowledge of any relevant facts of the case without giving evidence of the same as a witness in the case.[2]

Where the juror or assessor is examined as a witness, he is not disqualified from acting as a juror or assessor in the case after giving his evidence.[3]

Sec. 295

Jury or assessors to attend at adjourned sitting.

295.* If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

Synopsis.

Adjournment of Sessions Case. Note No. 1

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1. Adjournment of Sessions Case.

A Sessions case can be adjourned like any other case for sufficient reasons (*See* Note 14 to Section 286). Where such case is so adjourned, the jury or assessors are bound, under this Section, to attend the adjourned hearing. A failure to attend will be punishable under Section 332, *infra*.

As to adjournments of criminal trials, *see* Section 344, *infra*.

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* **(Code of 1882—S. 295—Same.)**

(Code of 1872—S. 260.)

260. If a trial is adjourned, the jury or assessors shall be required to attend at the adjourned sitting and at every subsequent sitting until the conclusion of the trial.

Jury or assessors to attend at adjourned sitting.

(Code of 1861—S. 378.)

378. In the event of the adjournment of a trial by Jury or with the aid of assessors, the jury or assessors shall be required to attend at the adjourned sitting and at every subsequent sitting until the conclusion of the trial; and any juror or assessor who shall without lawful excuse fail s to attend, shall be liable to the penalty prescribed in S. 354 † of thi Act, and such penalty shall be enforced in the manner therein prescribed.

Jury or assessors to attend at adjourned sitting.

† [1861—S. 354 ; 1898—S. 332.]

Section 294—Note 1.

1. (1910) 11 Cri L Jour 121 (125): 37 Cal 340, *Babbon Sheikh* v. *Emperor*.
2. (1901) 24 Mad 523 (543), *Emperor* v. *Tirumal Reddi*.
3. (1870) 13 Suth W R Cr 60 (61, 62), *Empress* v. *Mookta Singh*.

Sec. 296

296.* The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day; and subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

Locking up jury.

Synopsis.

Scope and object of the Section. Note No. 1.

Other Topics.

Juror expressing view before-hand—*De novo* trial. See Note 1, Pt. 3.

1. Scope and object of the Section.

This Section touches on the undesirability of separation of the jury before their verdict is given;[1] and empowers the High Courts to make rules for "locking them up" during trial. The jury are not entitled to talk to persons connected with the accused during the progress of the trial.[2] Where one of the jurors during the trial of a case, expressed his opinion outside Court as to the guilt of the accused person and made a fairly distinct intimation that he had formed an opinion to that effect it was held that when this was brought to the notice of the trial Judge, a *de novo* trial should be ordered after discharging that jury.[3] The object of this Section is to see that the jury comes to a conclusion in the case on the *evidence* adduced therein, uninfluenced by anything that may be said or done outside the Court.

See also the undermentioned case.[4]

F.—Conclusion of Trial in Cases tried by Jury.

Sec. 297

297.† In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

Charge to jury.

* **(Code of 1882—S. 296—Same.)**

(Codes of 1872 and 1861—Nil.)

† **(Code of 1882—S. 297—Same.)**

(Code of 1872—S. 255, Para. 1.)

Assessors' opinion, and charge to jury.

255. When the case for the defence and the prosecutor's reply, if any, are concluded, the Court shall proceed :—

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Section 296—Note 1.

1. (1925) 1925 Pat 797 (802) : 4 Pat 626 : 27 Cri L Jour 49, *Rupan Singh* v. *Emperor.*
2. (1927) 1927 Cal 628 (629) : 55 Cal 279 : 28 Cri L Jour 783, *Bhuban Chandra Prodhan* v. *Emperor.*
3. (1921) 1921 Cal 631 (631) : 22 Cri L Jour 510, *Emperor* v. *Nazar Ali Beg.*
4. (1866) 3 Bom H C R 20 (27), *Reg.* v. *Dyal Jairaj.*

(1917) 1917 Cal 149 (151) : 44 Cal 723 : 18 Cri L Jour 311 (S B), *In the matter of Bonomally Gupta.*

Sec. 297

Synopsis.

Other Topics.

in cases tried by jury, to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

(Code of 1861—S. 379.)

Of verdict of jury.

379. In a trial by a jury, the Judge shall sum up the evidence on both sides, and the jury shall then deliver their finding upon the charge.

* * * * * *

Section 33, Indian Evidence Act. See Note 11, F-N (21).
Section 162 — Statements. See Note 11, F-N (21).
Suggestions denied — Effect. See Note 9, Pt. 44.

1. Legislative changes.

Changes introduced in the Code of 1872 :—

1. The words "when the case for the defence and the Prosecutor's reply if any, are concluded the Court shall proceed to charge," etc., were introduced, thereby showing the stage at which the Court should address the jury.
2. The words "and laying down the law by which the jury are to be guided" were also added thereby throwing on the Judge the duty of explaining the law to the jury.

Changes introduced in the Code of 1882 :—

The words "A statement of the Judge's direction to the jury shall form part of the record" which occurred in the former Code were omitted.

2. Object of charge to jury.

In a trial by jury the jurymen are the sole judges of all questions of *fact*; their verdict on fact cannot be set aside on appeal (Ss. 418, 423). It is therefore of supreme importance that they should be given all the guidance and help that may be necessary for arriving at a correct decision on questions of fact. The object of this Section is to furnish such guidance and help.[1] Jurors are ordinarily not men who are used to analyse, sift and weigh the evidence and it is quite impossible for them to retain in their memory the whole of the facts which have been detailed before them.[2] In the absence of intelligent guidance and assistance from the judge, few juries, in a contested case would be able to come to an unanimous opinion, being left in a state of great perplexity by the influence of speeches of the contending lawyers.[3] Every party to a trial by jury has therefore a legal and constitutional right, to have the case which he has made either in pursuit or in defence, fairly submitted to that tribunal.[4] The Section accordingly makes it incumbent upon the Judge to charge the jury before their verdict is taken.[5]

The duties of the judge in charging the jury are laid down by this Section and the next but they are not exhaustive; they must be read together with numerous judicial decisions on the point.[6]

Section 297—Note 2.

1. (1928) 1928 Cal 269 (270), *Abdul Razak* v. *Emperor.*
   (1926) 1926 Cal 139 (141): 53 Cal 372: 27 Cri L Jour 266, *Khijiruddin* v. *Emperor.*
   (1866) 6 Suth W R Cr 72 (72), *Empress* v. *Bolakee Koormee.*
2. (1932) 1932 Cal 395 (397): 1932 Cri Cas 342: 33 Cri L Jour 486, *Akbar Sheikh* v. *Emperor.*
   (1926) 1926 Cal 235 (239): 53 Cal 181: 26 Cri L Jour 1577, *Abdul Gani* v. *Emperor.*
3. (1866) 5 Suth W R Cr 80 (87) (F B), *In re Elahee Buksh.*
   (1919) 1919 Cal 536 (538): 19 Cri L Jour 830, *Ismail Sarkar* v. *Emperor.* Verdict of a jury who had no sufficient assistance and guidance from the Judge must be upset.
4. (1909) 10 Cri L Jour 65 (67): 2 Ind Cas 517 (Bom), *Emperor* v. *Kesari Dayal Kanji.*
   (1927) 1927 Cal 631 (632): 28 Cri L Jour 742, *Emperor* v. *Rajab Ali Fakir.*
   (1886) Ratanlal 288 (288), *Empress* v. *Abdul Karim.*
5. (1919) 1919 Cal 439 (442): 20 Cri L Jour 661, *Afiruddi Chakadar* v. *Emperor.*
   (1869) 11 Suth W R Cr 39 (39), *Empress* v. *Jaga Poly.*
   [See however (1897) 20 Mad 445 (446), *Empress* v. *Ramalingam.*]
6. (1927) 1927 Oudh 259 (259): 2 Luck 597: 28 Cri L Jour 683, *Nahru Mal* v. *Emperor.*

Sec. 297 Notes 3—6

3. Judge if should himself charge the . . . jury.

The right course for the Judge is to charge the jury *himself*; but where there are difficulties in the way of doing this, as when the Judge does not happen to be sufficiently acquainted with the vernacular language so as to be understood by the jury, his delivering the charge through another person is not improper.[1]

4. Charge as to part only of case.

The law does not recognise intermediate verdicts of jurors; the Judge should address the jury on the whole case before taking their verdict; he should not ask for their verdict on one issue reserving his address on other questions of fact.[1]

5. "When the case for the defence . . . . . is closed."

The stage at which the Judge is to address the jury is when the prosecution and the defence have let in all their evidence and after the arguments, if any, of the prosecution and defence : a charge before that will be premature.[1] It is illegal to allow the jury to pronounce their verdict, before the accused is called upon to enter on his defence.[2] After the prisoner claims to be tried *all* the evidence whether statements of witnesses or admissions of the prisoner should be placed before the jury.[3] It is not open to a Judge after hearing *some* of the witnesses to tell the jury that it would be unsafe to convict the prisoner and that there is no necessity to hear further evidence. He is bound to allow the whole evidence to be placed before the jury;[4] only in cases where under S. 289, *ante*, the Judge finds that there is no evidence to go to the jury, can the case be withdrawn from the jury: in all other cases the full facts should be placed before them and then the charge should be delivered.[5]

6. Summing up the evidence for the prosecution and defence.

A charge to the jury consists of :

1. summing up the evidence for the prosecution and defence, and
2. laying down the law by which the jury are to be guided.

The summing up of the evidence is the presentation to the jury a *summary* of the evidence as it appears on the negative and affirmative sides of the case.[1] It is not necessary to read over to the jury all the evidence *in extenso*.[2] In fact it

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Note 3.

1. (1927) 1927 All 721 (725): 50 All 365: 28 Cri L Jour 950, *Surnath Bhaduri* v. *Emperor*.
   (1928) 1928 Cal 401 (402): 29 Cri L Jour 638, *Dwijapada Haldar* v. *Emperor*.
   (1919) 1919 Cal 439 (441, 442): 20 Cri L Jour 661, *Afiruddi Chakadar* v. *Emperer*. Assistance of Public Prosecutor not desirable.

Note 4.

1929) 1929 Cal 62 (63): 30 Cri L Jour 434, *Government of Bengal* v. *Nazar Darze*.
(1896) 2 Weir 499 (500), *Badava Kunhi* v. *Empress*.

Note 5.

1. (1914) 1914 Mad 319 (321): 36 Mad 585: 15 Cri L Jour 197, *Public Prosecutor* v. *Abdul Hameed*.
   (1902) 7 Cal W N 31*n* (31*n*), *Emperor* v. *Olu*.
   (1924) 1924 Lah 17 (18): 4 Lah 382: 25 Cri L Jour 377, *Lyme* v. *Emperor*.
2. (1895) 23 Cal 252 (253), *Empress* v. *Imam Ali Khan*.
3. (1866) 2 Weir 334 (335).
   (1868) 9 Suth W R Cri Letters 10 (10).
   (1886) 2 Weir 497 (498), *Doraswami Aiya Thevan* v. *Empress*.
4. (1897) 20 Mad 445 (446), *Empress* v. *Ramalingam*.
   (1889) 2 Weir 384 (384).
5. (1889) 2 Weir 391 (391, 392).

Note 6.

1. (1926) 1926 All 752 (753) : 49 All 209 : 28 Cri L Jour 15, *Enayat Hussain* v. *Emperor*.
   (1917) 1917 Mad 335 (335, 336): 17 Cri L Jour 19 (19), *In re, Sangan*.
   (1909) 10 Cri L Jour 567 (568) : 4 Ind Cas 391 (Mad), *In re, Muthan Papayya*.
2. (1909) 9 Cri L Jour 452 (454): 36 Cal 281, *Fanindranath* v. *Emperor*.
   (1870) 13 Suth W R Cr 23 (24), *Empress* v. *Sheppard*.
   (1903) 5 Bom L R 207 (208): *Emperor* v. *Apunna Devappa*.

Sec. 297 Note 6

will be anything but helpful to the jury to take the witnesses one by one in the order of their examination and to place their disconnected statements.[3] The Judge should group the witnesses in such a way as to direct the attention of the jury to the evidence regarding each particular fact sought to be proved.[4] He should sift, analyse and marshal the facts in order to enable the jury to weigh the evidence intelligently, to estimate the value of each part of it with the rest.[5]

The charge should be characterised by clearness, coherence[6] and sequence[6a] and great care should be taken to place the evidence accurately and with precision.[7] It should be delivered in direct and simple language. Involved expressions, high flown, imaginative and fanciful language[8] and slang or colloquial

(1929) 1929 Cal 765 (766): 1929 Cri Cas 477: 57 Cal 248: 31 Cri L Jour 857, *Jati Mal* v. *Emperor.*

(1925) 1925 Nag 154 (154): 27 Cri L Jour 217, *Rahim Beg* v. *Emperor.*

The contrary view in the following cases cannot be considered good law:—

(1896) Ratanlal 850, *Empress* v. *Fakira Bin Venkappa.*

(1867) 7 Suth W R Cr 25 (26), *Empress* v. *Nawab Khan.*

(1866) 6 Suth W R Cr 92 (93), *Empress* v. *Kally Churan.*

(1868-69) 5 Bom H C R 85 (88), *Reg* v. *Futehchand Vastchand.*

(1897) Ratanlal 917 (917), *Empress* v. *Basavantappa Lingappa.*

(1865) 2 Suth W R Cr 63 (63), *Empress* v. *Sreemunt Adup.*

(1895) 19 Bom 741 (743), *Empress* v. *Rego Montepoulo.*

(1932) 1932 Cal 395 (396): 1932 Cri Cas 342: 33 Cri L Jour 486, *Emperor* v. *Akbar Sheikh.*

3. (1921) 1921 Cal 697 (698): 22 Cri L Jour 606, *Abdul Rahim* v. *Emperor.*

(1935) 1935 Sind 145 (166): 1935 Cri Cas 753: 28 Sind L R 397: 36 Cri L Jour 1161, *Emperor* v. *Hari.* Judge must analyse evidence and not simply read it to jury.

4. (1930) 1930 Cal 481 (482): 1930 Cri Cas 793: 32 Cri L Jour 33, *Hachani Khan* v. *Emperor.*

5. (1931) 1931 Cal 184 (188): 1931 Cri Cas 248: 58 Cal 1051: 32 Cri L Jour 836 (F B), *Susen Behary Roy* v. *Emperor.*

(1898) 2 Weir 500 (501), *In re, Sugaligadu.*

(1927) 1927 Cal 631 (632): 28 Cri L Jour 742, *Emperor* v. *Rajab Ali Fakir.*

(1929) 1929 Cal 742 (746): 1929 Cri Cas 390: 57 Cal 740: 31 Cri L Jour 673, *Nagendranath* v. *Emperor.*

(1933) 1933 Mad 233 (235, 236): 1933 Cri Cas 289: 56 Mad 231: 34 Cri L Jour 481, *Narayana* v. *Emperor.*

(1934) 1934 Cal 169 (171): 193' Cri Cas 291: 35 Cri L Jour 601 (S B), *Molla Khan Kabuli* v. *Emperor.*

(1934) 1934 Cal 847 (849): 1934 Cri Cas 1364: 62 Cal 337: 36 Cri L Jour 358, *Enayat Karim* v. *Emperor.*

(1934) 1934 Cal 273 (275): 1934 Cri Cas 397: 35 Cri L Jour 1313, *Ram Sumer Ahir* v. *Emperor.* No connected narrative nor any sufficient attempt to sift and marshal the evidence against each accused nor to direct jury about its relevance or value or what offence it disclosed.— *Held* there was misdirection.

(1935) 1935 Cal 534 (537): 1935 Cri Cas 910: 62 Cal 911: 36 Cri L Jour 1246, *Asanullah* v. *Emperor.*

6. (1867) 8 Suth W R Cr 87 (88, 92), *Empress* v. *Nobo Kisto Ghose.*

(1908) 8 Cri L Jour 35 (37, 40) (Bom), *In re, Shambu Lal Jivandas.*

(1870) 13 Suth W R Cr 42 (43), *Empress* v. *Shahabut.*

(1905) 2 Cri L Jour 157 (159) (Cal), *Shyama Charan Chakravarthi* v. *Emperor.*

(1920) 1920 Cal 406 (406): 21 Cri L Jour 829, *Edon Karikar* v. *Emperor.*

(1911) 12 Cri L Jour 140 (141): 9 Ind Cas 788 (Mad), *Palavesa Tevan* v. *Emperor.*

(1928) 1928 Pat 326 (334): 29 Cri L Jour 325, *Mt. Champa Pasin* v. *Emperor.*

(1933) 1933 Pat 488 (491): 1933 Cri Cas 1030: 34 Cri L Jour 892, *Sachidanand Prasad* v. *Emperor.*

(1931) 32 Cri L Jour 1138 (1140): 134 Ind Cas 317 (Cal), *Emperor* v. *Jabed Sikdar.*

6a (1934) 1934 Cal 77 (78): 1934 Cri Cas 33: 35 Cri L Jour 483, *Kamireddi Sheikh* v. *Emperor.*

(1931) 1931 Mad W N 129 (131): *Manika Ramanna* v. *Emperor.*

(1930) 1930 Mad W N 773 (775): *Soliyan* v. *Emperor.*

(1896) 2 Weir 499 (500), *In re, Badavakunhi.*

(1866) 5 Suth W R Cr 68 (69). *Empress* v *Jegan Baksh.*

7. (1893) Ratanlal 644 (651), *Empress* v. *Yesu.*

8. (1910) 11 Cri L Jour 538 (539): 7 Ind Cas 915 (Cal), *Harendra Pal* v. *Emperor.*

(1930) 1930 Cal 430 (432): 1930 Cri Cas 657. 31 Cri L Jour 1115, *Manohar Mandal* v. *Emperor.*

(1930) 1930 Cal 434 (436): 1930 Cri Cas 742:

Sec. 297 Note 6

phrases[9] should be avoided. The aim of a jury trial is not a psychological examination of the mentality of jurymen ; it is concerned with the definite proof of a distinct offence and the use of language tending to divert the attention of the jury from the main issue to a subsidiary point should be deprecated.[10] As observed in *Molla Khan* v. *Emperor*[11] "It is the manner of saying it, the arrangement and structure of his charge, which will make it either of value or valueless to the jury."

Charge should not be too elaborate or too meagre.—A charge should not be too summary or meagre.[12] As has been observed above, it should sift and analyse the evidence.[13] To say to the jury "you have heard the evidence ; do you find the accused guilty or not?" is no charge at all.[14] Nor is it a sufficient compliance with the law to say that the evidence given is "very poor evidence which standing alone amounts to nothing."[15] The evidence given by the witnesses should be individually discussed.[16] On the other hand, the charge should not be *too elaborate*.[17] It is sufficient if the main, salient and important points alone are placed before the jury.[17a] "To charge the jury at very great length may itself be an obstacle to the jury arriving at a correct decision. They are laymen and to enable them to come to a correct decision it is necessary that essentials should be clearly brought out and not overwhelmed and obscured by too great a mass of detail."[18]

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57 Cal 1162 : 32 Cri L Jour 111, *Jabanullah* v. *Emperor*.

9. (1918) 1918 Cal 88 (92) : 45 Cal 557 : 19 Cri L Jour 305, *Amiruddin Ahmed* v. *Emperor*.
10. (1933) 1933 Pat 488 (492) : 1933 Cri Cas 1030 : 34 Cri L Jour 892, *Sachidanand Prasad* v. *Emperor*.
11. (1934) 1934 Cal 169 (172) : 1934 Cri Cas 291 : 35 Cri L Jour 601 (S B), *Molla Khan Kabuli* v. *Emperor*.
12. (1930) 1930 All 28 (28) : 1930 Cri Cas 44 : 52 All 207 : 30 Cri L Jour 1146, *Jagmohan Singh* v. *Emperor*.
    (1929) 1929 Cal 170 (171) : 30 Cri L Jour 912, *Dwarika Das Bairagi* v. *Emperor*.
13. (1930) 1930 Cal 136 (138) : 1930 Cri Cas 136 : 31 Cri L Jour 572, *Natabar Haldar* v. *Emperor*.
    (1899) 1 Bom L R 784 (785), *Empress* v. *Babya*.
14. (1902) 1902 All W N 201 (201), *Emperor* v. *Badal*.
15. (1899) 23 Bom 316 (317), *Empress* v. *Gangia*.
16. (1868) 10 Suth W R Cr 7 (9), *Empress* v. *Ramgopal Dhur*.
17. (1895) Ratanlal 806 (807), *Empress* v. *Kallappa*.
    (1864) 1 Suth W R Cr 22 (23), *Empress* v. *Madhub Mal*.
    (1921) 1921 Cal 73 (74) : 23 Cri L Jour 342, *Haricharan Das* v. *Empress*.
    (1912) 13 Cri L Jour 821 (823) : 40 Cal 367, *Samaruddin* v. *Emperor*.
    (1922) 1922 Cal 107 (114) : 49 Cal 573 : 23 Cri L Jour 657, *Abdul Salim* v. *Emperor*.
    (1930) 1930 Cal 228 (230) : 1930 Cri Cas 196 : 31 Cri L Jour 916, *Tofiz Pramanik* v. *Emperor*.
    (1934) 1934 Cal 124 (127) : 1934 Cri Cas 169 : 60 Cal 1339 : 35 Cri L Jour 567, *Manar Ali* v. *Emperor*.
    (1916) 1916 Pat 236 (238) : 1 Pat L Jour 317 : 17 Cri L Jour 353, *Eknath Sahay* v. *Emperor*.
    (1931) 1931 Oudh 171 (172) : 1931 Cri Cas 443 : 6 Luck 705 : 32 Cri L Jour 858, *Mangal Singh* v. *Emperor*.
    (1929) 1929 Nag 295 (297) : 1929 Cri Cas 410 : 31 Cri L Jour 557, *Narayan Singh Chhatri* v. *Emperor*.

17a (1930) 1930 Pat 513 (519) : 1930 Cri Cas 1009 : 9 Pat 606 : 32 Cri L Jour 72, *Ram Sarup Singh* v. *Emperor*.
    (1922) 1922 Cal 192 (193) : 24 Cri L Jour 8, *Abdul Gafur Khan* v. *Emperor*.
    (1903) 27 Bom 626 (630), *Emperor* v. *Waman Shivram Damle*.
    (1916) 1916 Pat 236 (237, 238) : 17 Cri L Jour 353 (355, 356) : 1 Pat L Jour 317, *Eknath Sahay* v. *Emperor*.
    (1881) 7 Cal 42 (46), *Empress* v. *Rochia Mohato*,
    (1934) 1934 Cal 142 (143) : 1934 Cri Cas 180 : 35 Cri L Jour 536, *Fazar Ali Darji* v. *Emperor*.
    (1914) 1914 P C 116 (124) : 41 Cal 1023 : 8 Low Bur R 16 : 15 Cri L Jour 309 (P C), *Channing Arnold* v. *Emperor*.
    (1935) 1935 All 103 (105) : 1935 Cri Cas 89 : 36 Cri L Jour 612, *Azizkhan* v. *Emperor*.

18. (1933) 1933 Pat 496 (497) : 1933 Cri Cas 1061 : 35 Cri L Jour 56, *Emperor* v. *Ardali Mian*.

Charge should be impartial.—The summing up should be dispassionate and impartial[18a] and should not create prejudice against the accused.[19] The Judge should take up neither the role of the Public Prosecutor nor that of the defence counsel.[20] He should refer to important pieces of evidence both for the prosecution and against it.[21] He should not put the case of the prosecution too strongly and fail to put the defence case as strongly as it ought to be[22]. The usual way of charging the jury would be to ask them to start with the presumption of the innocence of the accused,[23] to trace the history of the case as laid before the Court by the prosecution[24] placing before the jury the evidence for the prosecution[25] and drawing their attention to the weak points, if any, in such evidence,[26] then to state the case for the defence in sufficient detail[27] and to

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18a (1934) 1934 Cal 273 (275) : 1934 Cri Cas 397 · 35 Cri L Jour 1313, *Ram Sumer Ahir* v. *Emperor.* Unjustifiable remarks meant to disparage the case for the prosecution in the eyes of the jury amount to misdirection.

19. (1884) 10 Cal 140 (145), *Hurry Churn* v. *Empress.*
(1914) 1914 Cal 549 (550) : 15 Cri L Jour 147, *Ofel Mollah* v. *Emperor.*
(1929) 1929 Cal 617 (621, 626) : 1929 Cri Cas 228 : 30 Cri L Jour 993 (S B), *Padam Prasad Upadhyaya* v. *Emperor.*
(1919) 1919 Cal 439 (446) : 20 Cri L Jour 661, *Affiruddi Chakdar* v. *Emperor.*
(1921) 1921 Cal 252 (255) : 23 Cri L Jour 244, *Emperor* v. *Taribullah Sheikh.*
(1922) 1922 Cal 106 (106) : 24 Cri L Jour 143, *Superintendent & Remembrancer of Legal Affairs* v. *Shyam Sundar Bhumij.*
(1924) 1924 Cal 47 (48) : 50 Cal 658 : 24 Cri L Jour 838, *Eran Khan* v. *Emperor.*
(1927) 1927 Cal 200 (202) : 28 Cri L Jour 201, *Isu Sheikh* v. *Emperor.*
(1928) 1928 Cal 551 (552) : 30 Cri L Jour 120, *Mahomed Segiruddi* v. *Emperor.*
(1928) 1928 Pat 31 (33, 34) : 7 Pat 50 : 28 Cri L Jour 843, *Tajali Mian* v. *Emperor.*
(1930) 32 Cri L Jour 416 (417) : 129 Ind Cas 676 (677) (Cal), *Upendranath Ta* v. *Emperor.*
(1926) 1926 All 429 (430) : 27 Cri L Jour 785, *Dhiraji* v. *Akasi.*
(1905) 2 Cri L Jour 8 (11) (Cal), *Yasin Sheikh* v. *Emperor.*
(1926) 1926 Cal 139 (141) : 53 Cal 372 : 27 Cri L Jour 266, *Khijiruddin* v. *Emperor.*

20. (1878) 1 Cal L R 436 (437), *In the matter of Chinibash Ghose.*
(1928) 1928 Cal 500 (502) : 29 Cri L Jour 497, *Samiuddin* v. *Emperor.*

21. (1911) 12 Cri L Jour 537 (539) : 12 Ind Cas 513 (Oudh), *Makbul Ahmad* v. *Emperor.*
(1911) 12 Cri L Jour 193 (196) : 10 Ind Cas 684 (Cal), *Rashidazzaman* v. *Emperor.*
(1894) Ratanlal 720 (721), *Empress* v. *Mahadu.*
(1911) 12 Cri L Jour 537 (539) : 12 Ind Cas 513 (Oudh), *Makbul Ahmad* v. *Emperor.*
(1864) 1 Suth W R Cr Letters 10 (10).
(1865) 4 Suth W R Cr 18 (18), *Empress* v. *Arjun Sheikh.*
(1911) 12 Cri L Jour 140 (141) : 9 Ind Cas 788 (Mad), · *Palavesa Tevan* v. *Emperor.*
(1872) 17 Suth W R Cr 58 (58), *Empress* v. *Kissoree Lohim Dutt.*
(1925) 1925 Cal 729 (734) : 26 Cri L Jour 1009, *Jessarat* v. *Emperor.*
(1926) 28 Cri L Jour 19 (22) : 99 Ind Cas 51 (Cal), *Mamat Ali* v. *Emperor.* Omission to direct jury upon an important point in favour of the accused amounts to a misdirection.

22. (1933) 1933 Cal 426 (428): 1933 Cri Cas 624: 34 Cri L Jour 533 (S B), *Emperor* v. *Asraf Ali.*
[See also (1870) 14 Suth W R Cri 59 (62), *Empress* v. *Hurry Prosad.*]

23. (1931) 1931 Cal 796 (798): 1931 Cri Cas 1060: 58 Cal 1095 : 33 Cri L Jour 196, *Emperor* v. *Tazan Ali.*

24. (1905) 2 Cri L Jour 311 (Cal), *Panchu Mondal* v. *Emperor.*
(1866) 6 Suth W R Cr 64 (64), *Empress* v. *Mohabur Singh.*
(1929) 1929 Pat 34 (35) : 7 Pat 153 : 30 Cri L Jour 273, *Wajid Ali* v. *Emperor.*

25. (1907) 5 Cri L Jour 427 (430) : 34 Cal 698, *Jatindra Nath Chatterji* v. *Emperor.*
(1918) 1918 Cal 314 (315, 318) : 19 Cri L Jour 81, *Ashraf Ali* v. *Emperor.*
(1929) 1929 Cal 244 (246) : 56 Cal 566 : 30 Cri L Jour 1031, *Debendra Narayan Chakravarthy* v. *Emperor.*

26. (1865) 3 Suth W R Cr 29 (31), *Empress* v. *Bodinath Singh.*
(1866) 5 Suth W R Cr 13 (13), *Empress* v. *Choonee.*
(1929) 1929 Mad W N 946 (947), *Doraiswamy Pillai* v. *Emperor.*
(1928) 1928 Cal 690 (691) : 56 Cal 145 : 30 Cri L Jour 350, *Mokbul Khan* v. *Emperor.*

27. (1888) Ratanlal 426 (427), *Empress* v. *Dattu.*

Sec. 297 Note 6

draw the attention of the jury to all the points in favour of the defence[27a] even though the accused or his pleader omitted to raise[28] or did not lay much stress on such points.[29] The Judge should not try to explain away points favourable to the accused[30] or ridicule the defence.[31] Where there are discrepancies in the evidence the Judge should not merely say that there are discrepancies but should point out *what* they are.[32] It will not be proper to advise the jury to disbelieve a man of consistent evidence merely because there are a few minor discrepancies[33] nor is it proper to put before the jury hypothetical or speculative cases, for which there is no foundation in evidence.[34]

But, having regard to Section 298, sub-section 2, it is proper and reasonable for the Judge to direct the jury as to the weight to be attached to the evidence called at the trial, provided that the Judge takes care to caution the jury that they are the sole judges of all questions of fact.[34a]

[See also (1933) 1933 P C 124 (133): 1933 Cri Cas 442 : 34 Cri L Jour 322 (332, 333) (P C), *Dwarkanath* v. *Emperor*.]

27a (1929) 1929 Mad W N 946 (946, 947), *Doraiswamy* v. *Emperor*.

(1915) 1915 Bom 249 (251, 252) : 40 Bom 220: 17 Cri L Jour 133. *Fakira Appaya* v. *Emperor*.

(1871) 15 Suth W R Cr 37 (39, 40), *Empress* v. *Mahima Chandra Das*.

(1900) 4 Cal W N 196 (200), *Rahamzat Ali* v. *Empress*.

28. (1924) 1924 Cal 257 (282) : 25 Cri L Jour 817 (F B), *Emperor* v. *Barendra Kumar Ghose*.

(1930) 1930 Cal 442 (443) : 1930 Cri Cas 750: 31 Cri L Jour 1203, *Kuti* v. *Emperor*.

(1933) 1933 Cal 656 (658) : 1933 Cri Cas 1102 : 34 Cri L Jour 1078, *Golapdi* v. *Emperor*.

(1928) 1928 Cal 700 (702) : 30 Cri L Jour 799, *Ajgar Sheikh* v. *Emperor*.

(1930) 1930 Sind 308 (309) : 1930 Cri Cas 1145 : 32 Cri L Jour 172, *Mahomad Khan* v. *Emperor*.

29. (1917) 1917 Mad 335 (335) : 17 Cri L Jour 19 (19), *Sangam, In re*.

30. (1899) 2 Weir 501 (502), *Boga Vasantugadu, In re*.

(1913) 14 Cri L Jour 623 (623) : 21 Ind Cas 671 (Mad), *In re Subbu Thevan*.

(1899) 2 Weir 386 (386), *Kizakedath Univam* v. *Empress*.

31. (1925) 1925 Sind 116 (119) : 25 Cri L Jour 761, *Topandas* v. *Emperor*.

32. (1866) 5 Suth W R Cr 70 (71), *Empress* v. *Burjo Barrick*.

(1888) 2 Weir 493 (494), *In re Anchula Nallacharla Naidu*.

(1927) 1927 Cal 200 (201) : 28 Cri L Jour 201, *Isu Sheik* v. *Emperor*.

(1876) 25 Suth W R Cr 54 (54, 56), *Empress* v. *Chunder Kumar Muzoomdar*.

(1884) 11 Cal 10 (13), *Leiu Tu* v. *Empress*.

33. (1920) 1920 Pat 575 (575) : 22 Cri L Jour 1250, *Baijnath Mahton* v. *Emperor*.

34. (1915) 1915 Cal 773 (779) : 16 Cri L Jour 561 (571) (FB), *Emperor* v. *Upendranath Das*.

(1928) 1928 Pat 139 (141) : 6 Pat 572 : 29 Cri L Jour 626, *Nathuni Nonia* v. *Emperor*.

(1932) 1932 Bom 279 (285) : 1932 Cri Cas 391 : 56 Bom 484 : 33 Cri L Jour 613, *Vasudeo Balwant Gogte* v. *Emperor*.

(1933) 1933 Pat 481 (485) : 1933 Cri Cas 1010 : 34 Cri L Jour 828, *Emperor* v. *Kameshwar Lal*.

(1916) 1916 Low Bur 114 (122, 123) : 17 Cri L Jour 49 (52, 54, 58) : 8 Low Bur Rul 306, *Nga Mya* v. *Emperor*.

34a (1934) 1934 All 1032 (1033) : 1934 Cri Cas 1339 : 36 Cri L Jour 322, *Bansi Dhar* v. *Emperor*.

(1934) 1934 All 326 (328) : 1934 Cri Cas 410 : 35 Cri L Jour 688, *Sumera* v. *Emperor*. Judge giving dogmatic and unqualified opinion on question of fact of cardinal importance amounts to misdirection.

(1934) 1934 Cal 757 (757) : 1934 Cri Cas 1165 : 35 Cri L Jour 1487, *Husain Ali* v. *Emperor*. Expression of opinion on matters of evidence is not misdirection where Judge warns that the jury is not bound to accept his opinion on questions of fact.

(1935) 1935 Rang 214 (216) : 1935 Cri Cas 847 : 13 Rang 141 : 36 Cri L Jour 1232, *Scott* v. *Emperor*. A Judge charging a jury does not fulfil his duty if he merely reiterates the evidence given by the witnesses for the prosecution and the defence, and then leaves the jury to decide the case one way or another.

(1935) 1935 Pat 263 (265, 266) : 1935 Cri Cas 749 : 14 Pat 225 : 36 Cri L Jour 1026, *Harilal* v. *Emperor*. Criticisms and exposures of arguments on behalf of defence do not amount to misdirection if jury are warned that they are not bound by his expressions of opinion.

(1935) 1935 All 928 (929), *Sri Kishan* v. *Emperor*. Judge expressing opinion

Sec. 297 Note 6

Summing up is not rendered unnecessary by reason of counsel having addressed jury.—The sufficiency of a charge to the jury must depend largely upon the special circumstances of each case such as the constitution of the jury, their intelligence and education, the elaboration with which the case has been conducted, the skill of the defence and a variety of other circumstances.[35] But the Judge will not be relieved of the duty of placing before the jury the important facts of the case simply because the counsel on opposite side have addressed long arguments to them.[36] It is necessary that the jury should learn *from the Judge* what are the important points to which their attention should be directed.[37]

Effect of omission to refer to defence case.—An omission to refer to the case of the defence or the failure to deal with it in an adequate manner will vitiate the trial.[38] Where, however, the defence was not specific but consisted in merely denying the charge coupled with destructive criticism of the prosecution evidence it was held that it was enough if the Judge drew the attention of the jury to the discrepancies in the prosecution evidence and the criticisms advanced, and that no useful purpose would be served by formally charging the jury that the defence was a denial of the prosecution case.[39]

Allowing jury to have experiment as to question of identification.—*See* the

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on question of fact under S. 298, sub-section 2—It is not necessary on every occasion when he expresses such opinion to tell jury that they are sole Judges of questions of fact, it is enough if this point is mentioned at the end of the charge to the jury.

35. (1923) 1923 Pat 238 (239) : 24 Cri L Jour 495, *Gajo Singh* v. *Emperor*.
(1931) 1931 Oudh 171 (171, 172) : 1931 Cri Cas 443 : 6 Luck 705 : 32 Cri L Jour 858, *Mangal Singh* v. *Emperor*.
(1903) 27 Bom 644 (651), *Emperor* v. *Malgowda*.
(1918) 1918 Pat 201 (208) : 19 Cri L Jour 886, *Ram Bhagwan* v. *Emperor*.
(1910) 11 Cri L Jour 13 (14) : 3 Sind L R 102, *Imperator* v. *Minhwasayo*.

36. (1928) 1928 Cal 269 (270), *Abdul Razak* v. *Emperor*.
(1882) 10 Cal L R 4 (6), *Jugut Mohinee Dassee* v. *Madhu Sudhan Dutt*.
(1934) 1934 Nag 94 (95, 96) : 1934 Cri Cas 377 : 30 Nag L R 262 : 35 Cri L Jour 957, *Abdul Aziz* v. *Emperor*.
(1927) 1927 Oudh 259 (260) : 2 Luck 597 : 28 Cri L Jour 683, *Nahrumal* v. *Emperor*.

37. (1919) 1919 Cal 142 (144) : 20 Cri L Jour 300 (FB), *Peary* v. *Emperor*.

38. (1922) 1922 Cal 124 (126) : 23 Cri L Jour 567, *Emperor* v. *Durga Charan Bepari*.
(1874) 11 Bom H C R 166 (169), *Reg* v. *Sakharam Mukundji*.
(1889) Ratanlal 484 (486), *Empress* v. *Ardeshir*.
(1891) Ratanlal 581 (582), *Empress* v. *Dhanba*.
(1903) 5 Bom L R 207 (209), *Emperor* v. *Appunna Devappa*.
(1904) 6 Bom L R 31 (33), *Emperor* v. *Miragajbar*.
(1920) 1920 Cal 527 (528) : 21 Cri L Jour 670, *Abdul Gafur* v. *Emperor*.
(1908) 18 Mad L Jour 541 (541), *Gangi Reddi Buchanna, In re*.
(1912) 13 Cri L Jour 271 (272) : 14 Ind Cas 655 (Mad), *Venkattan* v. *Emperor*.
(1924) 1924 Mad 230 (230) : 25 Cri L Jour 269, *In re Mulli Mayandi Thevan*.
(1926) 1926 Mad 370 (370) : 27 Cri L Jour 176, *Ambalam, In re*.
(1932) 1932 Oudh 23 (24) : 1932 Cri Cas 55 : 7 Luck 390 : 33 Cri L Jour 167, *Sita Ram* v. *Emperor*.
(1923) 1923 Cal 517 (519) : 50 Cal 318 : 25 Cri L Jour 467 (470), *Mahomed Yunas* v. *Emperor*.
(1890) 14 Bom 115 (144), *Empress* v. *Magan Lall*.
(1933) 1933 Cal 833 (834) : 1933 Cri Cas 1493 : 35 Cri L Jour 508, *Kali Charan* v. *Emperor*.
(1908) 8 Cri L Jour 397 (397) (Mad), *In re Gangi Reddi Buchanna*.
(1911) 12 Cri L Jour 18 (18) : 8 Ind Cas 1088 (Mad), *In re, Garuga Rammayya*.
(1933) 1933 Mad 233 (235) : 56 Mad 231 : 34 Cri L Jour 481 : 1931 Cri Cas 289, *Kalian Narayana* v. *Emperor*.

39. (1932) 1932 Cal 536 (537) : 59 Cal 1123 : 33 Cri L Jour 694 : 1932 Cri Cas 564, *Israil* v. *Emperor*.
(1935) 1935 All 928 (929), *Sri Kishen* v. *Emperor*. Where there is no evidence for the defence, a discussion of only the prosecution evidence cannot be attacked as one sided.

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undermentioned case.[40]

7. Summing up where there are several accused.

Where there are several accused the Judge should deal with the evidence relating to each of the accused.[1]

8. Direction to recommend for mercy.

The jury should not be directed by the Judge to recommend the accused to mercy.[1]

9. "Laying down the law by which the jury are to be guided."

There should be only one charge to the jury both on the facts and on the law. It is illegal to comment upon the evidence and ask the jury to consider whether the prisoner is guilty and then to explain the law and take their verdict as to what offence the prisoner is guilty of.[1] The Judge should explain to the jury his own view of the law, but should not refer it to the High Court.[2]

The discussion of legal matters should be introduced in the charge in appropriate places, as and when something occurs in the discussion of the evidence which gives rise to them and necessitates their application.[2a]

Elements of offence should be explained:—The Judge should draw the attention of the jury to the offence with which the accused is charged and explain to them clearly and fully the various ingredients which should be proved in order to find the accused guilty of that offence.[3] It should not be presumed that the jurymen were aware of the necessary elements which constitute an offence or the legal distinction between one offence and another.[4] Wherever necessary the Judge should charge the jury as to the necessity of strict proof of *mens rea*, of fraudulent

40. (1934) 1934 Cal 744 (745): 36 Cri L Jour 129: 1934 Cri Cas 1153, *Sarup Ali* v. *Emperor*. Evidence as to accused being identified in diffused light from electric torches—Judge while charging jury as to evidence of identification allowing jury to have experiment with such torches in absence of accused: *Held* that the procedure was gravely irregular.

Note 7.

1. (1907) 5 Cri L Jour 78 (80): 30 Mad 44, *Mari Valayan* v. *Emperor*.
(1908) 7 Cri L Jour 358 (358) (Mad), *In re, Acchabha Beori*.
(1901) 2 Weir 517 (518), *Dakshinamurthi* v. *Public Prosecutor*.
(1894) 2 Weir 514 (514), *Veerappan, In re*.
(1895) Ratanlal 749 *Empress* v. *Menga Budhia*.
(1910) 11 Cri L Jour 538 (539): 7 Ind Cas 915 (Cal), *Harendra Pal* v. *Emperor*.
(1920) 1920 Cal 966 (967): 47 Cal 46: 21 Cri L Jour 775, *Hemanta Kumar Pathak* v. *Emperor*.
(1935) 1935 Cal 534 (537): 62 Cal 911: 36 Cri L Jour 1246: 1935 Cri Cas 910, *Asanulla* v. *Emperor*. To hang a lot of witness numbers round the neck of each accused without any discussion of the evidence given by the witnesses is not the way of carrying out the above rule.
(1934) 1934 Cal 273 (275): 35 Cri L Jour 1313: 1934 Cri Cas 397, *Ram Sumer Ahir* v. *Emperor*.

Note 8.

1. (1870) 14 Suth W R Cr 46 (46), *Empress* v. *Dassee Musulmany*.

Note 9.

1. (1888) 2 Weir 493 (494), *In re, Anchula Nallacharla Naidu*.
2. (1865) 3 Suth W R Cr Letters 18 (18).
2a (1935) 1935 Cal 534 (536): 62 Cal 911: 36 Cri L Jour 1246: 1935 Cri Cas 910, *Asanulla* v. *Emperor*.
3. (1864) 1 Suth W R Cr Letters 10 (11).
(1907) 5 Cri L Jour 168 (170) (Bom), *Emperor* v. *Mahamad Khan Sultan Khan*.
(1930) 1930 Cal 433 (434): 31 Cri L Jour 1092: 1930 Cri Cas 741, *Mahomed Jalal-ud-din Mandal* v. *Emperor*.
(1920) 1920 Cal 564 (564): 47 Cal 795: 31 Cri L Jour 694, *Kassim-ud-din Nasya* v. *Emperor*.
(1930) 1930 All 24 (25): 31 Cri L Jour 33: 1930 Cri Cas 40, *Emperor* v. *Mohammad Ismail*.
(1927) 1927 Cal 200 (201): 28 Cri L Jour 201, *Isu Sheikh* v. *Emperor*.
(1935) 1935 Oudh 175 (176): 35 Cri L Jour 507: 1935 Cri Cas 298, *Jagan* v. *Emperor*. What is meant by term "robbery" must be explained.
4. (1935) 1935 Oudh 175 (176): 35 Cri L Jour 507 (508): 1935 Cri Cas 298, *Jagan* v. *Emperor*.

intention, etc.[5]; if the evidence discloses that the accused comes under the exceptions to a particular offence or the General Exceptions under Ch. IV of the Penal Code, he should explain those Sections also,[6] *vide* the undermentioned cases,[7] where the various High Courts have given directions as to how particular Sections should be explained.

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5. (1889) Ratanlal 484, *Empress* v. *Ardeshir Merwanji.*
6. (1926) 1926 Cal 1107 (1108): 27 Cri L Jour 1402, *Jahur Shaikh* v. *Emperor.*
7. (1873) 20 Suth W R Cri 70 (71), *Empress* v. *Nobin Chunder Banerjee.* S. 84, I.P.C.
(1871) 16 Suth W R Cr 36 (37), *Empress* v. *Zoolf Kar Khan.* S. 85, Penal Code,.
(1928) 1928 Cal 269 (270), *Abdul Razak* v. *Emperor.* S. 97, I. P. C.
(1927) 1927 Cal 257 (259): 53 Cal 980: 28 Cri L Jour 273, *Asiruddin* v. *Emperor.* S. 96, I. P. C.
(1924) 1924 Cal 776 (777): 26 Cri L Jour 48, *Baseruddi Sheikh* v. *Emperor.* S. 103, I. P. C.
(1923) 1923 Cal 517 (518, 519): 50 Cal 318: 25 Cri L Jour 467, *Muhammad Yunus* v. *Emperor.* Ss. 100 and 101, I. P. C.
(1921) 1921 Cal 697 (698): 22 Cri L Jour 606, *Abdul Rahim Mir* v. *Emperor.* Ss. 96 to 103, I. P. C.
(1921) 1921 Cal 269 (270): 23 Cri L Jour 41, *Gangadhar Goala* v. *Reginald William Lemon Reed.* S. 96, I. P. C.
(1921) 13 Cri L Jour 26 (26): 13 Ind Cas 218 (Cal), *Mehar Sardar* v. *Emperor.* S. 99, I. P. C.
(1909) 9 Cri L Jour 443 (445): 36 Cal 296, *Baijnath Dhanuk* v. *Emperor.* S. 99, I. P. C.
(1908) 7 Cri L Jour 256 (262, 265): 35 Cal 368, *Kabiruddin* v. *Emperor.* S. 99, I. P. C.
(1872) 17 Suth W R Cri 45 (45), *Empress* v. *Mookhtaram Mundle.* S. 100, I. P. C.
(1931) 1931 Cal 757 (759): 1931 Cri Cas 1021: 58 Cal 1228: 33 Cri L Jour 79 (S B), *Emperor* v. *Amode Ali Sikdar.* S. 109, I. P. C.
(1920) 1920 Cal 966 (967): 47 Cal 46: 21 Cri L Jour 775, *Hemanta Kumar* v. *Emperor.* S. 109, I. P. C.
(1912) 13 Cri L Jour 715 (715): 16 Ind Cas 523 (Cal), *Jamiruddi Biswas* v. *Emperor.* S. 114, I. P. C., abetment.
(1920) 1920 Cal 834 (834): 22 Cri L Jour 448, *Raja Khan* v. *Emperor.* S. 107, I. P. C.
(1916) 1916 Cal 355 (355): 17 Cri L Jour 92 (93), *Abdul Shaikh* v. *Emperor.* S. 141, I. P. C.
(1928) 1928 Pat 139 (142): 6 Pat 572: 29 Cri L Jour 626, *Nathuni Nonia* v. *Emperor.* S. 141, I. P. C.
(1925) 1925 Cal 494 (497): 25 Cri L Jour 1386, *Abdul Gani* v. *Emperor.* S. 141, I. P. C.
(1924) 1924 Cal 771 (772): 51 Cal 79: 25 Cri L Jour 945, *Keamuddi Karikar* v. *Emperor.* S. 141, I. P. C.
(1869) 12 Suth W R Cri 51 (51), *Empress* v. *Rasookoollqh.* S. 141, I. P. C.
(1886) 1 Weir 450 (451), *In re Thomali Viswasam.* Ss. 34 and 149, I. P. C.
(1894) Ratanlal 710 (715, 716), *Empress* v. *Abdul Razak.* S. 149, I. P. C.
(1895) 22 Cal 276 (285), *Sabir* v. *Empress.* S. 149, I. P. C.
(1925) 1925 P C 1 (4): 52 Cal 197: 26 Cri L Jour 431 (PC), *Barendra Kumar* v. *Emperor.* S. 34, I. P. C., fully discussed.
(1910) 11 Cri L Jour 15 (16): 3 Sind L R 125, *Emperor* v. *Murid.* S. 34, I. P. C.
(1927) 1927 Oudh 102 (103): 1 Luck 180: 27 Cri L Jour 846, *Gurdin* v. *Emperor.* Ss. 149 and 34, I. P. C.
(1926) 1926 Cal 410 (412): 26 Cri L Jour 1560, *Kasem Molla* v. *Emperor.* Common object. S. 147, I. P. C.
(1925) 1925 Cal 913 (914): 26 Cri L Jour 827, *Anirudda Mana* v. *Emperor.* Ss. 34 and 149, I. P. C.
(1924) 1924 Cal 257 (270): 25 Cri L Jour 817 (F B), *Emperor* v. *Barendra Kumar Ghose.* S. 34 I. P. C.
(1907) 5 Cri L Jour 427 (431): 34 Cal 698, *Jatindranath Chatterjee* v. *Emperor.* S. 149, I. P. C.
(1895) 22 Cal 276 (284, 285), *Sabir* v. *Empress.* Common object. S. 149, I. P. C.
(1885) 11 Cal 106 (109, 110) *Behari Mahton* v. *Empress.* (Do.)
(1882) 8 Cal 739 (751), *Empress* v. *Jhuboo Mahton.* S. 149, I P. C.
(1899) 1 Bom L R 784 (785), *Empress* v. *Babya.* S. 34, I. P. C.
(1900) 2 Bom L R 304 (309), *Empress* v. *Vinayak.* S. 124-A, I. P. C.
(1900) 2 Bom L R 286 (298): *Empress* v. *Luxman.* S. 124-A, I. P. C.
(1892) 19 Cal 35 (44, 45), *Empress* v. *Jogendra Chunder Bose.* S. 124-A, I. P. C.
(1867) 7 Suth W R Cr 29 (30), *Empress* v. *Lahai Mundal.* S. 176, I. P. C.
(1934) 1934 Cal 144 (145): 1934 Cri Cas 200: 35 Cri L Jour 535, *Nagendra Bhakta* v. *Emperor.* S. 201, I. P. C.
(1866) 6 Suth W R Cr 84 (84), *Empress* v. *Parbutty Churan Sirkar.* S. 191, I. P. C.
(1873) 20 Suth W R Cr 41 (44, 45), *Empress* v. *Nim Chand Mookerjee.* Ss. 194 and 115, I. P. C.
(1897) 1 Cal W N 301 (302), *Tomij Pra-*

Sec. 297 Note 9

Section not to be merely read :—It is not a sufficient compliance with the law if the Judge merely reads the relevant Section or Sections under which the

manik v. *Empress.* S. 211, I. P. C.
(1869) 12 Suth W R Cr 66 (66), *Empress* v. *Kola.* S. 211, I. P. C.
(1869) 12 Suth W R Cr 31 (32), *Empress* v. *Moti Khowa.* S. 211, I. P. C.
(1868) 9 Suth W R Cr 52 (53), *Empress* v. *Denonath.* S. 211, I. P. C.
(1866) 6 Suth W R Cr 15 (15), *Empress* v. *Pran Kissen.* S. 211, I. P. C.
(1917) 1917 Cal 123 (126, 127): 18 Cri L Jour 385 (388): 44 Cal 477, *Fateh Chand* v. *Emperor.* S. 243, I. P. C.
(1933) 1933 Cal 242 (243): 1933 Cri Cas 321: 34 Cri L Jour 668, *Saheb Ali* v. *Emperor.* Ss. 300 to 304, I. P. C.
(1930) 1930 P C 201 (204): 1930 Cri Cas 884: 31 Cri L Jour 701 (P C), *Benjamin Knowles* v. *Emperor.* S. 300, I. P. C.
(1906) 3 Cri L Jour 1 (2): 3 Low Rur Rul 75, *Hla Gyi* v. *Emperor.* S. 300, I. P. C.
(1931) 1931 Cal 345 (349): 1931 Cri Cas 409: 58 Cal 1138: 32 Cri L Jour 598, *Ifattullah* v. *Emperor.* S. 304-A, I. P. C.
(1930) 1930 Cal 136 (138): 1930 Cri Cas 136: 31 Cri L Jour 572, *Natabar Haldar* v. *Emperor.* Ss. 302 to 304, I. P. C.
(1911) 11 Cri L Jour 295 (298, 300): 6 Ind Cas 251 (Cal), *Rezauddin* v. *Emperor.* S. 300, I. P. C.
(1908) 8 Cri L Jour 6 (8): 35 Cal 531, *Natabar Ghose* v. *Emperor.* Intention. S. 304, I. P. C.
(1885) 11 Cal 410 (412), *Netai Laskar* v. *Empress.* S. 300, I. P. C.
(1885) 11 Cal 85 (90), *Empress* v. *Jacquiet.* S. 300, I. P. C.
(1871) 15 Suth W R Cr 17 (18), *Empress* v. *Kall Churan Das.* S. 304, I. P. C., which part.
(1869) 12 Suth W R Cr 35 (36), *Empress* v. *Ameer Khan.* S. 304, I. P. C.
(1868) 9 Suth W R Cr 72 (72), *Empress* v. *Gunesh Luskar.* S. 300, provocation.
(1868) 9 Suth W R Cr 51 (52), *Empress* v. *Shamshere Beg.* S. 300, I. P. C.
(1867) 8 Suth W R Cr 26 (27), *Empress* v. *Bysagoo.* Intention. S 300, I. P. C.
(1895) Ratanlal 766 (768), *Empress* v. *Dadubhai.* Ss. 302, 304, I. P. C.
(1895) Ratanlal 735 (735), *Empress* v. *Posha Hari.* S. 304, I. P. C.
(1890) Ratanlal 530 (530), *Empress* v. *Ladkya Mahaduya.* S. 304, I. P. C.
(1912) 13 Cri L Jour 750 (751): 6 Sind L R 116, *Emperor* v. *Chagan Rajaram.* S. 320, I. P. C.
(1928) 30 Cri L Jour 857 (857, 858): 117 Ind Cas 862 (Cal), *Fedu Sheikh* v. *Emperor.* Ss. 363 to 376, I. P. C.
(1932) 1932 Oudh 28 (30): 1932 Cri Cas 60: 32 Cri L Jour 275, *Emperor* v. *Zamin.* S. 368, I. P. C.
(1927) 1927 Oudh 259 (260): 2 Luck 597: 28 Cri L Jour 683, *Nahru Mal* v. *Emperor.* Age in cases of S. 366-A, I. P. C.
(1933) 1933 Cal 606 (606): 1933 Cri Cas 970: 34 Cri L Jour 1161, *Abdul Kalique* v. *Emperor.*
(1932) 1932 Cal 442 (444): 33 Cri L Jour 512, *Fulchand Tepriwalla* v. *Emperor.* S. 366, I. P. C.
(1932) 1932 Cal 417 (417): 33 Cri L Jour 553, *Bhola Sardar* v. *Emperor.* S. 373, I. P. C.
(1930) 1930 Cal 209 (210): 1930 Cri Cas 209: 57 Cal 1074: 31 Cri L Jour 903, *Prafulla Kumar Bose* v. *Emperor.* S. 363, I. P. C.
(1926) 1926 Cal 226 (227): 26 Cri L Jour 1021, *Gadadhar Sarkar* v. *Emperor.* S. 368, I. P. C.
(1910) 11 Cri L Jour 9 (10): 4 Ind Cas 543 (Cal), *Emperor* v. *Nakul Kabiraj.* S. 366, I. P. C., Guardian suit.
(1933) 1933 Cal 718 (721): 1933 Cri Cas 1268: 60 Cal 1457: 35 Cri L Jour 307, *Saheb Ali* v. *Emperor.* S. 366, I. P. C.
(1864) 1 Suth W R Cr 21 (21), *Empress* v. *Akbar Kazee.* S. 376, I. P. C.
(1914) 1914 Low Bur 216 (218): 17 Cri L Jour 154 (155): 8 Low Bur Rul 125, *Kya Nyan* v. *Emperor.* Ss. 300 to 304, I. P. C.
(1864) 1 Suth W R Cr 2 (3), *In re, Bharat Chander Christian.* Ss. 379 to 412, I. P. C.
(1898) 25 Cal 416 (418), *Nabi Baksh* alias *Ali Baksh* v. *Empress.* S. 379, I. P. C.
(1910) 11 Cri L Jour 164 (164): 4 Ind Cas 1071 (Mad), *Kamma Aswathan* v. *G. Thimmappa.* S. 379, I. P. C.
(1907) 5 Cri L Jour 78 (79, 80): 30 Mad 44, *Mari Valayan* v. *Emperor.* S. 392, I. P. C.
(1931) 1931 Mad 427 (428): 1931 Cri Cas 475: 54 Mad 588: 32 Cri L Jour 1212, *Raman Koravan* v. *Emperor,* (Do.)
(1931) 1931 Mad 481 (482): 1931 Cri Cas 545: 32 Cri L Jour 973. *Duraiswami Naick* v. *Emperor.* S. 395, I. P. C.
(1929) 31 Cri L Jour 451 (451): 122 Ind Cas 650 (Mad), *In re, Perumal Thevan.* (Do.)
(1910) 11 Cri L Jour 249 (249): 5 Ind Cas 797 (Mad), *Pidda Enumundu Garu* v. *Emperor.* (Do.)
(1909) 9 Cri L Jour 311 (311): 1 Ind Cas 546 (Mad), *Sinna Thevan* v. *Emperor.* (Do.)
(1903) 1 Weir 446 (447), *In re, Mookandi Manigaran.* (Do.)

accused stands charged.[8] Mere references to Sections unless the jurors are trained men cannot be of much assistance to them to apply the law to the facts; it is always desirable that in charges to the jury the law should be *sufficiently* explained.[9] Their attention should also be drawn to the evidence in the case and the method of applying the law to the facts found on such evidence, explained.[10] The Judge should not explain the law which does not arise on the facts of the case or the pleadings of the parties; only so much law as is necessary to find

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(1864) Suth W R Cr Sup 8 (9), *Empress* v. *Bono Maly Ghose.* (Do.)

(1931) 1931 Cal 414 (416) : 1931 Cri Cas 510 : 59 Cal 8 : 32 Cri L Jour 892, *Meher Sheikh* v. *Emperor.* (Do.)

(1933) 1933 Cal 294 (295) : 1933 Cri Cas 391 : 34 Cri L Jour 524 (S. B.), *Madhu Singh* v. *Emperor.* S. 396, I. P. C.

(1912) 13 Cri L Jour 42 (42) : 13 Ind Cas 282 (Mad), *Arunachala Thevan, In re.* S. 397, I. P. C.

(1931) 1931 Pat 49 (50) : 1931 Cri Cas 145 : 32 Cri L Jour 476, *Labedan Sain* v. *Emperor.* S. 397, I. P. C.

(1911) 12 Cri L Jour 97 (98) : 38 Cal 408, *Bonai* v. *Emperor.* S. 400, I. P. C.

(1912) 13 Cri L Jour 39 (41, 42) : 13 Ind Cas 279 (Cal), *Kadar Sundar* v. *Emperor.* S. 400, I. P. C.

(1870-1871) 6 Mad H C R 120 (121), *In re, Sri Ram Venkatswami.* S. 401, I. P. C.

(1927) 1927 Mad 243 (244) : 27 Cri L Jour 1368, *In re, Muniyan.* S. 404, I. P. C.

(1882) 6 Bom 731 (733), *Empress* v. *Mulh Ari.* S. 411, I. P. C.

(1873) 18 Suth W R Cr 25 (26), *Empress* v. *Samiruddin.* (Do.)

(1867) 8 Suth W R Cr 16 (17), *Empress* v. *Mussamut Joomnee.* (Do.)

(1867) 7 Suth W R Cr 73 (74, 75), *Empress* v. *Jogeshur.* S. 412, I. P. C.

(1891) 15 Bom 369 (370), *Empress* v. *Balya Somya.* S. 411, I. P. C.

(1930) 1930 Mad W N 249 (284), *C. K. N. Sunderasa Iyer* v. *Emperor.* S. 415, I. P. C.

(1924) 1924 Cal 502 (507) : 25 Cri L Jour 1034, *Charu Chandra Ghosh* v. *Emperor.* S. 415, I. P. C.

(1915) 1915 Cal 292 (294) : 41 Cal 662 : 15 Cri L Jour 155, *Emperor* v. *Madan Mondal.* S. 441, I. P. C.

(1898) 2 Cal W N 91*n* (91*n*), *Dinabandu Bysak* v. *Empress.* Ss. 464 and 471, I. P. C.

(1918) 1918 Cal 140 (141, 142) : 19 Cri L Jour 649, *Emperor* v. *Asimoddi.* S. 465, I. P. C.

(1891) 16 Bom 165 (168, 170), *Empress* v. *Abaji Ramachandra.* Ss. 474 and 475, I. P. C.

(1867) 8 Suth W R Cri 81 (82), *Empress* v. *Jaha Bux.* S. 471, I. P. C.

(1904) 8 Cal W N 278 (283) : 1 Cri L Jour 124, *Hurjee Mull* v. *Imam Ali Sirkar.* Intention in S. 47, I. P. C.

(1933) 1933 P C 124 (133) : 1933 Cri Cas 442 : 34 Cri L Jour 322 (P C), *Dwarakanath* v. *Emperor.* S. 477, I. P. C.

(1931) 1931 Cal 184 (186) : 1931 Cri Cas 248 : 58 Cal 1051 : 32 Cri L Jour 836 (F B), *Emperor* v. *Susen Behari Roy.* S. 477, I. P. C.

(1881) 8 Cal L R 542 (545, 546), *Khorshed Kazi* v. *Empress.* Fraudulent or dishonest intention in cases of S. 471, I. P. C.

(1915) 1915 All 134 (134) : 37 All 187 : 16 Cri L Jour 322, *King-Emperor* v. *Paras Ram Dube.* Presumption of English Law against the possibility of the offence of rape by a boy under 14, does not apply to India and the question is one of fact only.

(1935) 1935 Mad W N 1288 (1288), *Chekala Narasa* v. *Emperor.* Charge of dacoity and robbery.

8. (1900) 4 Cal W N 193 (196), *Sri Prosad Misser* v. *Empress.*
(1898) 25 Cal 711 (713), *Taju Pramanik* v. *Empress.*
(1933) 1933 Mad W N 320 (320), *Arumuga Goundan* v. *Emperor.*

9. (1898) 25 Cal 736 (738), *Abbas Peada* v. *Empress.*
(1922) 1922 Cal 124 (125) : 23 Cri L Jour 567, *Durga Charan* v. *Emperor.*
(1926) 1926 Mad 1121 (1122) : 27 Cri L Jour 1191, *Venkatigadu* v. *Emperor.*

10. (1925) 1925 Pat 797 (805) : 4 Pat 626 : 27 Cri L Jour 49, *Rupan Singh* v. *Emperor.*
(1933) 1933 Mad W N 320 (321), *Arumuga* v. *Emperor.*
(1930) 1930 All 534 (536): 1930 Cri Cas 759 : 32 Cri L Jour 158, *Suraj Prasad* v. *Emperor.*
(1933) 1933 Cal 509 (510, 511) : 1933 Cri Cas 814 : 34 Cri L Jour 841, *Chittya Ranjan Das* v. *Emperor.*
(1930) 1930 Cal 434 (435) : 1930 Cri Cas 742 : 57 Cal 1162: 32 Cri L Jour 111, *Jabanullah* v. *Emperor.*
(1930) 1930 Cal 370 (375) : 1930 Cri Cas 634: 58 Cal 96 : 32 Cri L Jour 10, *Government of Bengal* v. *Santiram Mondal.*
(1925) 1925 Cal 926 (927) : 26 Cri L Jour 1279, *Abdul Rahim* v. *Emperor.*

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whether the accused is guilty or not of the offence charged should be explained.[11] Digressions into questions of first principles[12] or about the proposed amendments of the law[13] and other extraneous arguments unnecessary to the facts of the case should be avoided.

The explanation of the law should be in the shortest and simplest terms possible without reference to the numbers of the Acts and Sections of which the jury have never heard.[14] Similarly, though there is no prohibition in law forbidding a Judge to read to the jury cases from law reports,[15] generally it is very undesirable to refer them to many cases, often conflicting, which would tend to confuse their minds.[16] It is also improper for a Judge to leave a copy of the Penal Code with the jury so that they may find out for themselves under what Section the offence against the accused falls.[17]

Explanation of the law is not rendered unnecessary by the fact that counsels have addressed the jury :—As has been stated in Note 6 *ante* the fact that the prosecuting and defence counsels have explained the law to the jury, does not relieve the Judge of his duty in that respect. The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge and it is immaterial how much or how often jury have been addressed by pleaders on both sides.[18] The reason for this may be stated in the words of a recent pronouncement of the Privy Council[19] "jurors are apt to be suspicious of the law as propounded by the defence; they look to the Judge for an authoritative statement of it."

When the jurymen state that they do not understand the law, it is the duty of the Judge to explain the same to them again.[20]

The heads of charge should also show how the law was explained to the jury. *See* the undermentioned cases[21] and Section 367, *infra*.

Besides explaining the particular Section or Sections of the Penal Code or

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11. (1915) 1915 Cal 773 (773): 16 Cri L Jour 561 (569, 570) (F B), *Emperor* v. *Upendranath Das*.
(1927) 1927 Cal 324 (326) : 28 Cri L Jour 334, *Adam Ali* v. *Emperor*.
(1934) 1934 Cal 142 (144) : 1934 Cri Cas 180 : 35 Cri L Jour 536, *Fajer Ali Darji* v. *Emperor*.
(1918) 1918 Pat 201 (205) : 19 Cri L Jour 886, *Ram Bhagwan* v. *Emperor*.
12. (1933) 1933 Cal 722 (723) : 1933 Cri Cas 1272 : 34 Cri L Jour 1231 *Garibulla Sheikh* v. *Emperor*.
(1914) 1914 Low Bur 34 (35) : 15 Cri L Jour 257, *Browne C. H.* v. *Emperor*.
13. (1922) 1922 Cal 505 (506) : 24 Cri L Jour 76, *Abdul Gohur Sikdar* v. *Emperor*.
14. (1929) 1929 Cal 742 (746) : 1929 Cri Cas 390: 57 Cal 740 : 31 Cri L Jour 673, *Nagendranath* v. *Gopal Sardar*.
15. (1927) 1927 Rang 68 (70) : 4 Rang 488 : 28 Cri L Jour 213, *Emperor* v. *Nga Tin Gyi*.
(1930) 1930 Cal 434 (435, 436) : 1930 Cri Cas 742 : 57 Cal 1162 : 32 Cri L Jour 111, *Jabanullah* v. *Emperor*.
16. (1912) 13 Cri L Jour 26 (27) : 13 Ind Cas 218 (Cal), *Mehar Sardar* v. *Emperor*.
(1905) 2 Cri L Jour 157 (159) (Cal), *Shyama Charan Chakravarthi* v. *Emperor*.
17. (1886) 14 Cal 164 (168), *Jaspath Singh* v. *Empress*.
(1895) Ratanlal 736 (737), *Empress* v. *Bharmia*.
18. (1926) 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ram Prasad* v. *Emperor*
(1902) 29 Cal 379 (381), *Mangan Das* v. *Emperor*.
(1877) 2 Bom 61 (64), *Imperatrix* v. *Pitambarjina*.
19. (1933) 1933 P C 218 (221) : 1933 Cri Cas 1302 : 34 Cri L Jour 886 (P C), *Basil Ranger Lawrance* v. *Emperor*.
20. (1911) 12 Cri L Jour 140 (141) : 9 Ind Cas 788 (Mad), *Palavesa Tevan* v. *Emperor*.
(1932) 1932 Cal 118 (119) : 1932 Cri Cas 103: 58 Cal 1335 : 33 Cri L Jour 135, *Girischandra Namadas* v. *Emperor*.
(1926) 1926 Cal 895 (897) : 27 Cri L Jour 926, *Emperor* v *G. C. Wilson*.
(1923) 1923 Cal 647 (648) : 25 Cri L Jour 343, *Bilaschandra Banerjee* v. *Emperor*.
21. (1932) 1932 Cal 786 (786) : 1932 Cri Cas 829: 34 Cri L Jour 56, *Hanif* v. *Emperor*.
(1926) 1926 Cal 139 (145) : 53 Cal 372 : 27

other Acts under which the accused is charged, it is the duty of the Judge to advise and direct the jury on other questions of law and procedure which may arise in the case.

A. Charge for major offence :—The Judge can direct that it is open to the jury to convict the accused of a minor offence though the charge is in respect of a major offence.[22]

B. Approver's evidence—Value of :—The Judge should direct the jury to consider whether a particular witness in the case is or is not an accomplice.[23] He can direct that there is no prohibition under the law to convict an accused on the uncorroborated testimony of an accomplice, but that, considering the fact that it is tainted evidence and that the accomplice is giving evidence on a tender of pardon which is liable to be revoked, it should be received with caution and may be treated as unworthy of credit. He can also inform the jury that as a doctrine of expediency and prudence, Judges in India and England, have laid down that it is always unsafe to convict an accused on the uncorroborated testimony of an approver alone.[24] *See also* the undermentioned cases.[25]

He must also tell the jury that the corroboration of the approver's evidence "must be independent testimony which affects the accused by connecting or tending to connect him with the crime; in other words that it must be evidence which implicates him, that is which confirms in material particulars, not only

Cri L Jour 266, *Khijiruddin* v. *Emperor*.
(1925) 1925 Cal 1055 (1056) : 26 Cri L Jour 1151, *Raham Ali Howladar* v. *Emperor*.
(1917) 1917 All 173 (175) : 18 Cri L Jour 491 (493) : 39 All 348, *Ikramuddin* v. *Emperor*.

22. (1880) 5 Cal 871 (873), *Government of Bengal* v. *Mahaddi*.
(1895) 20 Bom 215 (217, 225), *Empress* v. *Devji Govindji*.
(1900) 2 Bom L R 334 (334), *Empress* v. *Pandukal Patil*.
(1926) 1926 Cal 1059 (1060) : 53 Cal 599 : 27 Cri L Jour 1314, *Torap Ali* v. *Emperor*.
(1922) 1922 Pat 321 (322) : 23 Cri L Jour 47, *Emperor* v. *Bhimlal Chamar*.
(1914) 1914 Mad 425 (428) : 13 Cri L Jour 739 (741) : 37 Mad 236, *In re Adabala Muthiyalu*.
(1929) 1929 Nag 295 (296) : 1929 Cri Cas 410 : 31 Cri L Jour 557, *Narayan Singh* v. *Emperor*.

23. (1927) 1927 Cal 460 (461) : 28 Cri L Jour 278. *E. St. Moss* v. *Emperor*.
(1920) 1920 Cal 980 (986) : 21 Cri L Jour 802, *Suryakanta Bhattacharjee* v. *Emperor*.
(1925) 1925 Cal 666 (668) : 52 Cal 223 : 26 Cri L Jour 1155, *Satiya Charan* v. *Emperor*.
(1900) 27 Cal 144 (152, 154), *Empress* v. *Deodhar Singh*.
(1923) 1923 Lah 345 (346) : 24 Cri L Jour 618, *Jhana* v. *Emperor*.
(1903) 26 Mad 1 (6, 7, 13), *Emperor* v. *Edward William Smither*.

24. (1866) 5 Suth W R Cr 80 (86), *In re Elahee Buksh*.
(1878) 1 Mad 394 (395), *Reg* v. *Ramaswami*.
(1890) 14 Bom 331 (336), *Empress* v. *Chagan*.
(1928) 1928 Pat 630 (631) : 8 Pat 235 : 30 Cri L Jour 137, *Rattan Dhanuk* v. *Emperor*.
(1913) 14 Cri L Jour 625 (630) : 21 Ind Cas 673 (Bom), *Ganga Kardapa* v. *Emperor*.

25. (1926) 1926 All 377 (377) : 48 All 409 : 27 Cri L Jour 746, *Kalwa* v. *Emperor*.
(1887) 9 All 528 (555), *Empress* v. *Gobardhan*.
(1863) 2 Weir 796 (798), *Palavasami, In re*.
(1867) 3 Bom H C R Cr 57 (58), *Reg* v. *Imam*.
(1869) 6 Bom H C R Cr 57 (58, 59), *Reg* v. *Ganubin Dharoji*.
(1890) 14 Bom 115 (119, 143), *Empress* v. *Magan Lall*.
(1903) 27 Bom 626 (635), *Emperor* v. *Waman Shivram Damle*.
(1889) Ratanlal 466 (466), *Empress* v. *Rama*.
(1894) Ratanlal 720 (721), *Empress* v. *Mahadhu*.
(1895) Ratanlal 750 (751, 754), *Empress* v. *Bhagya*.
(1896) Ratanlal 848, *Empress* v. *Dhondi*.
(1902) 4 Bom L R 431 (432), *Emperor* v. *Kostal Khan*.
(1866) 6 Suth W R Cr 17 (17, 18), *Empress* v. *Khutub Sheikh*.
(1866) 6 Suth W R Cr 44 (45), *Empress* v. *Karoo*.
(1866) 6 Suth W R Cr 91 (91), *Empress* v. *Ashruff Ali*.
(1867) 8 Suth W R Cr 19 (25), *Empress* v. *Nawabjan*.
(1868) 10 Suth W R Cr 17 (17, 18), *Empress* v. *Bykuntnath Banerjee*.

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evidence that the crime has been committed but also that the prisoner committed

(1871) 15 Suth W R Cr 37 (38, 40), *Empress* v. *Mohima Chandar Dass.*
(1872) 18 Suth W R Cr 45 (45), *Empress* v. *Nidheeram.*
(1873) 19 Suth W R Cr 16 (20), *Empress* v. *Mohesh Biswas.*
(1873) 19 Suth W R Cr 43 (43), *Empress* v. *Luchmee Pershad.*
(1873) 19 Suth W R Cr 48 (48), *Empress* v. *Koa.*
(1873) 19 Suth W R Cr 68 (69), *Empress* v. *Udhan Bind.*
(1873) 20 Suth W R Cr 19 (20, 21), *Empress* v. *Ramsody.*
(1874) 21 Suth W R Cr 69 (70, 71), *Empress* v. *Sadhu Mundal.*
(1875) 24 Suth W R Cr 55 (56), *Empress* v. *Chando Chandalinee.*
(1875) 25 Suth W R Cr 43 (43), *Empress* v. *Baijoo Chowdhury.*
(1890) 17 Cal 642 (667), *Empress* v. *O' Hara.*
(1894) 21 Cal 328 (336), *Ishan Chandra* v. *Empress.*
(1896) 23 Cal 361 (366), *Alimuddin* v. *Empress.*
(1902) 29 Cal 782 (787), *Jamiruddi Masalli* v. *Emperor.*
(1898) 2 Cal W N 55 (56), *Jogendranath Bhawmik* v. *Sangapgaro.*
(1898) 2 Cal W N 672 (674), *Rajoni Kant Bose* v. *Asan Mullick.*
(1915) 1915 Cal 73 (74): 15 Cri L Jour 438, *Munessar Ahir* v. *Emperor.*
(1924) 1924 Cal 701 (702, 703): 51 Cal 160: 25 Cri L Jour 1000, *Emperor* v. *Jamaidi Fakir.*
(1925) 1925 Cal 161 (162): 26 Cri L Jour 307, *Harendra Nath* v. *Emperor.*
(1929) 1929 Cal 57 (60): 56 Cal 150: 30 Cri L Jour 435, *Rebati Mohan Chakrabarthi* v. *Emperor.*
(1929) 1929 Cal 822 (824): 1929 Cri Cas 669: 31 Cri L Jour 809, *Emperor* v. *C. A. Mathews.*
(1932) 1932 Cal 295 (296): 1932 Cri Cas 264: 33 Cri L Jour 477, *Golam Asphia* v. *Emperor.*
(1934) 1934 Cal 114 (116): 1934 Cri Cas 165: 35 Cri L Jour 551, *Shibadas Daw* v. *Emperor.*
(1902) 1902 Pun Re Cr No. 5, page 16, *Wazir Khan* v. *Emperor.*
(1911) 12 Cri L Jour 5 (5): 9 Ind Cas 39 (Lah), *Hira* v. *Emperor.*
(1912) 13 Cri L Jour 182 (182): 13 Ind Cas 998 (Lah), *Lad Khan* v. *Emperor.*
(1915) 1915 Lah 16 (21): 1915 Pun Re Cr No. 17: 16 Cri L Jour 354, *Balmokand* v. *Emperor.*
(1922) 1922 Lah 1 (23, 25): 3 Lah 144: 23 Cri L Jour 513, *Mohant Narain Das* v. *Emperor.*
(1924) 1924 Lah 357 (358): 23 Cri L Jour 734, *Tota Singh* v. *Emperor.*
(1924) 1924 Lah 481 (481): 25 Cri L Jour 979, *Khushi Muhammad* v. *Emperor.*
(1925) 1925 Lah 432 (434): 6 Lah 183: 26 Cri L Jour 1238, *Bhawala* v. *Emperor.*
(1889) 12 Mad 196 (197), *Empress* v. *Arumuga.*
(1902) 25 Mad 143 (147), *Emperor* v. *Mohiuddin.*
(1903) 2 Weir 803 (806, 813, 814): 27 Mad 271, *In re Ramaswamy Goundan.*
(1863) 2 Weir 796 (797, 798), *In re Palavasam.*
(1891) 1 Mad L Jour 397 (403, 404) (F B), *Empress* v. *Kunjan Menon.*
(1911) 12 Cri L Jour 150 (158): 9 Ind Cas 897 (Mad), *In re Vyasa Rao.*
(1911) 12 Cri L Jour 170 (174): 9 Ind Cas 978 (Mad), *In re Talari Rarainaswamy.*
(1911) 12 Cri L Jour 240 (240): 10 Ind Cas 284, (Mad) *Nanjigadu* v. *Emperor.*
(1912) 13 Cri L Jour 305 (314, 315): 35 Mad 247, *Emperor* v. *Nilakanta.*
(1912) 13 Cri L Jour 352 (357, 361, 364, 372, 381, 397, 404): 35 Mad 397, *Muthukumaraswami* v. *Emperor.*
(1891) 4 C P L R 1 (7, 8), *Empress* v. *Tantia Bhil.*
(1921) 1921 Nag 39 (41): 17 Nag L R 113: 23 Cri L Jour 673, *Govinda* v. *Emperor.*
(1910) 11 Cri L Jour 71 (74): 12 Oudh Cas 418, *Hubba* v. *Emperor.*
(1911) 12 Cri L Jour 537 (538): 12 Ind Cas 513 (Oudh), *Makbul Ahmad* v. *Emperor.*
(1928) 1928 Oudh 207 (208): 29 Cri L Jour 311, *Mani Ram* v. *Emperor.*
(1929) 1929 Oudh 321 (326): 1929 Cri Cas 143: 30 Cri L Jour 922, *Lale* v. *Emperor.*
(1926) 1926 Pat 232 (235): 5 Pat 63: 27 Cri L Jour 484, *Jagwa Dhanak* v. *Emperor.*
(1930) 1930 Pat 513 (515): 1930 Cri Cas 1009: 9 Pat 606: 32 Cri L Jour 72, *Ram Sarup Singh* v. *Emperor.*
(1931) 1931 Pat 105 (109): 1931 Cri Cas 233: 32 Cri L Jour 383, *Kailash Misser* v. *Emperor.*
(1933) 1933 Pat 96 (100): 1933 Cri Cas 249: 34 Cri L Jour 421, *Raghunath Pande* v. *Emperor.*
(1933) 1933 Pat 500 (502, 503), *Emperor* v. *Wajid Sheikh.*
(1912) 13 Cri L Jour 424 (426): 1 Upp Bur Rul 96, *Ah Jat* v. *Emperor.*
(1911) 12 Cri L Jour 132 (137, 139): 6 Low Bur Rul 4, *Nga Po Chit* v. *Emperor.*
(1924) 1924 Rang 173 (174): 1 Rang 609: 25 Cri L Jour 381, *Maung Lay* v. *Emperor.*

it."[26] *See also* the undermentioned cases.[27]

C. Confessions of prisoner:—The question as to the admissibility of a confession with reference to its being voluntary or otherwise is one for the Judge to decide and he cannot leave it to the jury.[27a]

The Judge should instruct the jury that a confession of an accused is legally sufficient to convict him, without any other corroborative evidence.[28] In cases where the confession has been retracted, the jury should be advised as to the weight to be given to the same (some decisions[29] lay down that without independent corroboration, retracted confessions should not be acted upon; others hold that there is no such absolute rule of law and that a conviction can be based upon it if the reasons for its retraction appear on the face to be false.[30]) *See also* the undermentioned case.[30a]

(1925) 1925 Sind 105 (108) : 19 Sind L R 183: 25 Cri L Jour 1057, *Faizullah* v. *Emperor*.
(1926) 27 Cri L Jour 1011 (1012): 96 Ind Cas 867 (Cal), *Umed Sheikh* v. *Emperor*.
(1876) 1 Bom 475 (476), *Reg* v. *Budhu*.
(1911) 12 Cri L Jour 286 (289) : 38 Cal 559 (F B), *Emperor* v. *Noni Gopal*.
(1931) 1931 Oudh 172 (176) : 1931 Cri Cas 444 : 6 Luck 668 : 32 Cri L Jour 860, *Bhuneshwari Pershad* v. *Emperor*.
(1911) 12 Cri L Jour 537 (539) : 12 Ind Cas 513 (All), *Makbul Ahmad* v. *Emperor*.
(1934) 1934 Cal 651 (653) : 1934 Cri Cas 933: 36 Cri L Jour 70, *Kashim Ali* v. *Emperor*. Saying that statements of two accomplices might be used to corroborate each other if independent was held to be misdirection.

26. (1934) 1934 Cal 7 (9) : 1934 Cri Cas 23 : 62 Cal 527 : 36 Cri L Jour 796, *Nur Ahmad* v. *Emperor*.
[See observations in *R.* v. *Baskervelli*, (1916) 12 Cr App Rep 81 : (1916) 2 K B 658 : 86 L J (K B) 28.]

27. (1886) 8 All 509 (513), *Queen* v. *Baldeo*.
(1896) Ratanlal 840 (841), *Queen* v. *Genu Gopal*.
(1867) 8 Suth W R Cr 19 (25), *Queen v. Nawab Jan*.
(1873) 19 Suth W R Cr 57 (58, 61), *Queen* v. *Jaffar Ali*.
(1884) 10 Cal 970 (973), *Queen* v. *Bepin Biswas*.
(1901) 28 Cal 339 (343), *Kamala Prasad* v. *Sital Prasad*.
(1925) 1925 Cal 872 (874) : 52 Cal 595 : 26 Cri L Jour 1037, *Ledu Molla* v. *Emperor*.
(1930) 1930 Cal 481 (485) : 1930 Cri Cas 793: 32 Cri L Jour 33, *Hachuni Khan* v. *Emperor*.
(1923) 1923 Lah 666 (667) : 25 Cri L Jour 520, *Emperor* v. *Darya Singh*.
(1924) 1924 Lah 727 (728) : 25 Cri L Jour 1347, *Hazara Singh* v. *Emperor*.
(1868) 4 Mad H C R App 7 (7, 8).
(1922) 1922 Nag 172 (173) : 23 Cri L Jour 391, *Kasim Baghuji* v. *Emperor*.
(1921) 1921 Lah 215 (216) : 23 Cri L Jour 158, *Lala* v. *Emperor*.

27a (1934) 1934 Cal 717 (718) : 1934 Cri Cas 1102 : 36 Cri L Jour 135, *Ramlal Ghose* v. *Emperor*. Not to state whether confession was voluntary or not is to commit error of law.
(1934) 1934 Cal 651 (652) : 1934 Cri Cas 933: 36 Cri L Jour 70, *Kashim Ali* v. *Emperor*.

28. (1930) 1930 Cal 633 (635) : 1930 Cri Cas 969: 57 Cal 488, *Emperor* v. *Kutub Bux*.
(1876) 25 Suth W R Cr 25 (26), *Queen* v. *Wuzir Mundal*.
(1873) 20 Suth W R Cr 33 (35), *Queen* v. *Ramachandra Ghose*.
(1867) 7 Suth W R Cr 41 (41), *Queen* v. *Jhuree*.
(1877) 2 Bom 61 (64), *Imperatrix* v. *Pitambar Jina*.

29. (1886) 2 Weir 507 (508), *In re Cholakel*.
(1893) 2 Weir 510 (511, 513), *In re Chinna Chegadu*.
(1891) 2 Weir 509 (509), *In Re Sokkan*.
(1930) 1930 Lah 257 (258) : 1930 Cri Cas 289 : 11 Lah 106 : 30 Cri L Jour 1046, *Arjun Singh* v. *Emperor*.
(1929) 1929 Lah 597 (598) : 1929 Cri Cas 167 : 30 Cri L Jour 640, *Mt. Miran* v. *Emperor*.
(1921) 1921 Pat 337 (338) : 22 Cri L Jour 200, *Maksud Ali* v. *Emperor*.
(1929) 1929 Pat 212 (213) : 8 Pat 262 : 30 Cri L Jour 716, *Sheo Narain Singh* v. *Emperor*.
(1934) 1934 Cal 651 (653) : 36 Cri L Jour 70: 1934 Cri Cas 933, *Kashim Ali* v. *Emperor*.

30. (1929) 1929 Mad 837 (839) : 1929 Cri Cas 485 : 53 Mad 160 : 31 Cri L Jour 768, *Kesava Pillai* v. *Emperor*.
(1929) 1929 Oudh 381 (382) : 1929 Cri Cas 220 : 30 Cri L Jour 967, *Nawab* v. *Emperor*.
(1898) 23 Bom 316 (317, 318), *Queen* v. *Gangia*.
(1929) 1929 Sind 253 (254) : 1929 Cri Cas 682 : 31 Cri L Jour 753, *Sanwal Das* v. *Emperor*.
(1898) 21 Mad 83 (88), *Public Prosecutor* v. *Raman*.

30a (1934) 1934 Cal 853 (857): 1934 Cri Cas 1368;

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D. Confessions of co-accused :—The Judge should tell the jury that a statement of an accused person which does not amount to a confession cannot be considered at all as evidence against a co-accused;[31] that a confession of a co-accused may, under Section 30 of the Indian Evidence Act, be considered against a co-accused, but such confession, without corroboration will be insufficient to sustain a conviction of the co-accused[32] and a retracted confession of a co-accused is practically useless and that without the fullest corroboration by untainted evidence, there can be no conviction.[33] He should also point out that the evidence given by a prisoner jointly charged with others, after he is convicted and sentenced, as a witness in a subsequent trial of his co-prisoners stands on a different footing and can be good corroborative evidence of an accomplice.[34]

E. Presumption arising out of recent possession of stolen property :—It is a misdirection to ask the jury to make a positive presumption of guilt from *mere* possession of stolen property after theft. Such a presumption *may* be made, but it is a matter for the jury if they will make it or not.[35] *See* the following cases[36]

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62 Cal 312: 36 Cri L Jour 485, *Kasimuddin* v. *Emperor*. Even after a confessionis once admitted in evidence, the Judge can withdraw it from the jury where he finds on the subsequent evidence that it is inadmissible.

31. (1925) 1925 Sind 116 (119) : 25 Cri L Jour 761, *Topan Das* v. *Emperor*.
(1930) 1930 Cal 139 (141) : 1930 Cri Cas 139 : 57 Cal 801 : 31 Cri L Jour 610, *Bikram Ali Pramanik* v. *Emperor*.
(1928) 1928 Cal 416 (417) : 29 Cri L Jour 527, *Bhadreswar Sardar* v. *Emperor*.
(1925) 1925 Cal 926 (927) : 26 Cri L Jour 1279, *Abdul Rahim* v. *Emperor*.
(1923) 1923 Cal 517 (519) : 50 Cal 318 : 25 Cri L Jour 467, *Mahomed Yunus* v. *Emperor*.
(1920) 1920 Cal 980 (986) : 21 Cri L Jour 802, *Surya Kanta* v. *Emperor*.
(1918) 1918 Cal 88 (90) : 45 Cal 557 : 19 Cri L Jour 305, *Amiruddin* v. *Emperor*.
(1881) 6 Cal 279 (282, 283), *Noor Bux Kazi* v. *Empress*.
(1867) 7 Suth W R Cr 72 (72), *Queen* v. *Bhekoo Singh*.
(1906) 3 Cri L Jour 144 (147) (Cal), *Surendranath Mitra* v. *Emperor*.
(1869) 6 Bom H C R 10 (11, 12), *Reg* v. *Miya*.
32. (1934) 1934 Pesh 11 (12) : 1934 Cri Cas 381 : 35 Cri L Jour 719, *Nizam Din* v. *Emperor*.
(1929) 1929 Pat 275 (279) : 1929 Cri Cas 62 : 8 Pat 289 : 30 Cri L Jour 675, *Kunja Subudhi* v. *Emperor*.
(1909) 9 Cri L Jour 308 (309) : 1 Ind Cas 547, (Mad), *Kuppan* v. *Emperor*.
(1896) 2 Weir 745 (745) : 19 Mad 482, *Queen Empress* v. *Raru Nayar*.
(1886) 2 Weir 742 (744), *In re Alagappan Bali*.
(1883) 2 Weir 741 (742), *Kaliyappa Goundan, In re*.
(1876) 1 Mad 163 (164), *Reg* v. *Ambigara Hulagu*.
(1871-74) 7 Mad H C R App 15 (15).
(1884) 10 Cal 970 (975), *Empress* v. *Bapin Biswas*.
(1889) Ratanlal 436 (439), *Empress* v. *Jhina Ali*.
(1898) 2 Cal W N 749 (750), *Manki Tewari* v. *Amir Hossein*.
(1879) 4 Cal 483 (490) (F B), *Empress* v. *Ashootosh Chuckerbertty*.
(1875) 23 Suth W R Cr 24 (24, 25), *Queen* v. *Naga*.
(1874) 21 Suth W R Cr 69 (71), *Queen* v. *Sadhu Mundul*.
(1895-1900) 1895-1900 Low Bur Rul 363 (368, 369), *Empress* v. *Nga Tha Nyan*.
(1909) 9 Cri L Jour 404 (405) : 33 Mad 46, *In re, Giddigadu*.
(1873) 19 Suth W R Cr 67 (67), *Queen* v. *Belat Ali*.
(1901) 28 Cal 689 (690,691), *Yasin* v. *Emperor*.
33. (1925) 1925 Cal 406 (407) : 26 Cri L Jour 360, *Moyez Sardar* v. *Emperor*.
(1926) 1926 Cal 374 (375) : 26 Cri L Jour 1146, *Ibrahim, In re*.
(1933) 1933 Cal 6 (7) : 1933 Cri Cas 26 : 34 Cri L Jour 23, *Kashem Ali* v. *Emperor*.
(1910) 11 Cri L Jour 538 (539) : 7 Ind Cas 915 (Cal), *Harendra Pal* v. *Emperor*.
(1920) 1920 Cal 966 (967) : 47 Cal 46 : 21 Cri L Jour 775, *Hemanta Kumar Pathak* v. *Emperor*.
34. (1892) 2 Weir 520 (521), *In re, Maruddamuthu Kavirayan*.
35. (1933) 1933 Mad W N 320 (321), *Arumuga Goundan* v. *Emperor*.
(1925) 1925 Cal 666 (667) : 52 Cal 223 : 26 Cri L Jour 1155, *Satya Charan Mauna* v. *Emperor*.
36. (1931) 1931 Cal 617 (617, 618) : 1931 Cri Cas 801 : 33 Cri L Jour 40, *Bhutanath Mondal* v. *Emperor*.
(1925) 1925 Cal 1241 (1242) : 53 Cal 157 : 26 Cri L Jour 1582, *Kabatullah* v. *Emperor*.

where the proper mode of charging in such a case is laid down. They should be told that the question whether the possession of the article was *recent* enough to attract the presumption of law under Section 114, Ill. (a) of the Indian Evidence Act, is a matter to be decided by them from all the circumstances of the case.[37]

F. Circumstantial evidence :—In cases where there is only circumstantial evidence against the accused, the Judge should direct the jury to find (i) whether the circumstances from which an adverse inference is sought to be drawn against the accused have been proved beyond all reasonable doubt and those circumstances should be clearly connected with the fact sought to be inferred therefrom and (ii) whether the circumstances are incompatible with the innocence of the accused and incapable of an explanation upon any other reasonable hypothesis than that of his guilt.[38] The Judge should tell the jury that testimony of eye-witnesses is not necessary to the establishment of a charge of murder and if from the circumstances of the case they had no doubt as to the guilt of the accused they must give effect to that decision.[39]

G. Inferences to be drawn from non-examination of witnesses :—The jury ought to be told that no adverse inference can be drawn against the accused from his non-examination of witnesses.[40] But where it is proved that the prosecution had material witnesses who could have given relevant evidence and that they had been deliberately kept back, the Judge should direct the jury to draw an adverse inference against the prosecution.[41]

(1920) 1920 Cal 342 (343): 21 Cri L Jour 545, *Hathim Mondal* v. *Emperor.*
(1884) 2 Weir 489 (492), *In re, Puthanvittil* alias *Karuman Kuzhi Krishna Nayar.*
(1899) 2 Weir 515 (516), *In re, Mammadi.*
(1929) 1929 Mad W N 577 (578), *Mayandi Thevan* v. *Emperor.*
(1882) Ratanlal 184 (184, 185), *Empress* v. *Mulhari.*
(1866) 5 Suth W R Cr 3 (3), *Queen* v. *Narain Bagdee.*
(1875) 23 Suth W R Cr 16 (17), *Queen* v. *Jetoo.*
(1895) 2 Weir 493 (493), *In re, Muppidi Krishnamoorthy.*

37. (1929) 30 Cri L Jour 542 (543) : 115 Ind Cas 831 (Mad), *Muthu Vira Velan* v. *Emperor.*
(1903) 26 Mad 467 (468), *Guzzala Hanuman* v. *Emperor.*
(1912) 13 Cri L Jour 140 (140): 13 Ind Cas 828 (Mad), *In re, Gorle Kandungadu.*
(1910) 11 Cri L Jour 187 (188): 4 Ind Cas 1103 (Mad), *In re, Manjunnath.*
(1932) 1932 Mad W N 862 (863), *Aziz Khan Sahib* v. *Emperor.*

38. (1931) 1931 Cal 11 (13) : 1931 Cri Cas 43 : 32 Cri L Jour 418, *Jahura Bibi* v. *Emperor.*
(1928) 1928 Cal 551 (552): 30 Cri L Jour 120, *Mahammad Sagiruddin* v. *Emperor.*
(1926) 30 Cal W N 376 (379): 98 Ind Cas 102, *Aragali* v. *Emperor.*
(1918) 1918 Cal 314 (318): 19 Cri L Jour 81, *Ashraf Ali* v. *Emperor.*
(1934) 1934 Cal 124 (126): 1934 Cri Cas 169: 60 Cal 1339: 35 Cri L Jour 567, *Manar Ali* v. *Emperor.*
(1930) 1930 Cal 370 (374): 1930 Cri Cas 634: 58 Cal 96 : 32 Cri L Jour 10, *Government of Bengal* v. *Santi Ram Mondal.*
(1933) 1933 Pesh 94 (96) : 1934 Cri Cas 47 : 35 Cri L Jour 476, *Nawab Khan* v. *Emperor.*

39. (1876) 25 Suth W R Cr 36 (36), *Queen* v. *Gokool Kahar.*

40. (1882) 8 Cal 121 (125), *Empress* v. *Dhunno Kazi.*
(1884) 10 Cal 140 (149), *Hurry Churan* v. *Empress.*

41. (1916) 1916 Mad 582 (583): 16 Cri L Jour 615 (616), *In re Kotaigadu.*
(1932) 1932 Cal 474 (477) : 1932 Cri Cas 464: 59 Cal 1361 : 33 Cri L Jour 854, *Saroj Kumar Chakravarthy* v. *Emperor.*
(1932) 1932 Cal 118 (119, 120) : 1932 Cri Cas 103 : 58 Cal 1335 : 33 Cri L J 135, *Girishchandra Namadas* v. *Emperor.*
(1931) 1931 Cal 752 (755): 1931 Cri Cas 1016: 33 Cri L Jour 85, *Sali Sheikh* v. *Emperor.*
(1930) 1930 Cal 708 (709): 1930 Cri Cas 1108: 58 Cal 580 : 32 Cri L Jour 228, *Nababali* v. *Emperor.*
(1930) 1930 Cal 481 (484) : 1930 Cri Cas 793 : 32 Cri L Jour 33, *Hachani Khan* v. *Emperor.*
(1930) 1930 Cal 134 (136, 137) : 1930 Cri Cas 134: 31 Cri L Jour 918, *Nayan Mandal* v. *Emperor.*
(1926) 1926 Cal 728 (730) : 27 Cri L Jour 398, *Hari Charan Das* v. *Emperor.*

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H. Other cases of warning :—The Judge should also warn the jury that in charges made by a woman in cases arising out of sexual matters, it is unsafe to rely solely upon the testimony of the woman,[42] that the evidence of an expert should be approached with caution,[43] that suggestions of pleaders do not amount to evidence unless they are partly or wholly accepted by the prosecution witnesses[44] and that evidence of witnesses taken under S. 164 must be accepted with a great deal of caution.[45]

10. Effect of non-observance of this provision—Laying down the law.

It has been held in the undernoted cases[1] that the failure of the Judge to properly explain the law to the jury is not a mere misdirection, but that it is a failure to comply with an express provision of law which vitiates the whole trial; it is a defect which cannot be cured by Section 537. In other cases, however, it has been held that such an omission is not a material misdirection[2] and where the offence charged is a simple one (like theft) and where the jury has understood fully the constituent factors of the offence an omission to explain the law may not of itself justify a reversal of the verdict,[3] though where such an omission to explain the law occasions a failure of justice the verdict will be set aside.[4]

11. Misdirection.

The word "misdirection" mentioned in sub-section 2 of Section 423, *infra*,

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(1925) 1925 Cal 872 (873): 52 Cal 595: 26 Cri L Jour 1037, *Ledu Molla* v. *Emperor.*

(1923) 1923 Cal 517 (520): 50 Cal 318: 25 Cri L Jour 467, *Mahommed Yunus* v. *Emperor.*

(1918) 1918 Cal 314 (317): 19 Cri L Jour 81, *Ashraf Ali* v. *Emperor.*

(1916) 1916 Cal 355 (355): 17 Cri L Jour 92, *Abdul Sheik* v. *Emperor.*

(1933) 1933 Pat 481 (484): 1933 Cri Cas 1010: 34 Cri L Jour 828, *Emperor* v. *Kameshwar Lal.*

(1929) 1929 Pat 651 (654): 1929 Cri Cas 379: 9 Pat 647: 31 Cri L Jour 306, *Krishna Maharana* v. *Emperor.*

(1928) 1928 Pat 31 (32): 7 Pat 50: 28 Cri L Jour 843, *Tajali Mian* v. *Emperor.*

(1924) 1924 Cal 771 (772, 773): 51 Cal 79: 25 Cri L Jour 945, *Kiamuddi Karikar* v. *Emperor.*

(1922) 1922 Cal 192 (192): 24 Cri L Jour 8, *Abdul Gafur Khan* v. *Emperor.*

(1921) 1921 Cal 257 (257): 22 Cri L Jour 475, *Tenaram Mondal* v. *Emperor.*

(1927) 1927 Mad 475 (476, 477): 28 Cri L Jour 307, *Muthaya Thevan, In re.*

42. (1922) 23 Cri L Jour 475 (475): 67 Ind Cas 827 (827) (Lah), *Kanshi Ram* v. *Emperor.*

(1934) 1934 Cal 7 (9): 1934 Cri Cas 23: 62 Cal 527: 36 Cri L Jour 796, *Emperor* v. *Nur Ahmed.*

(1933) 1933 Cal 833 (834): 1933 Cri Cas 1493: 35 Cri L Jour 508, *Surendra Nath Das* v. *Emperor.*

43. (1905) 2 Cri L Jour 311 (313) (Cal), *Panchu Mandal* v. *Emperor.*

44. (1932) 1932 Cal 375 (377): 1932 Cri Cas 318: 33 Cri L Jour 725, *Emperor* v. *Karimuddi Sheikh.*

45. (1908) 7 Cri L Jour 315 (316) (Cal), *Kali Singh* v. *Emperor.*

(1912) 13 Cri L Jour 283 (284): 14 Ind Cas 667 (Cal), *Tufani Sheikh* v. *Emperor.*

Note 10.

1. (1907) 5 Cri L Jour 78 (80): 30 Mad 44, *Mari Valayan* v. *Emperor.*

(1910) 11 Cri L Jour 482 (483): 7 Ind Cas 401 (Mad), *In re Suruttai.*

(1931) 1931 Mad 427 (428): 1931 Cri Cas 475: 54 Mad 588: 32 Cri L Jour 1212, *Raman Koravan* v. *Emperor.*

(1925) 1925 Cal 1235 (1236): 26 Cri L Jour 946, *Ahmed Fakir* v. *Emperor.*

(1924) 1924 Oudh 411 (412): 25 Cri L Jour 1129, *Nawab Ali* v. *Emperor.*

(1914) 1914 Low Bur 216 (218): 17 Cri L Jour 154: 8 Low Bur R 125, *Kya Nyien* v. *Emperor.*

(1910) 11 Cri L Jour 340 (341): 5 Low Bur R 149, *J. S. Briscoe Birch* v. *Emperor.*

(1935) 1935 Oudh 175 (176): 1935 Cri Cas 298: 35 Cri L Jour 507, *Jagan* v. *Emperor.*

2. (1916) 1916 Low Bur 114 (115): 17 Cri L Jour 49 (50, 51, 52): 8 Low Bur R 306 (F B), *Nga Mya* v. *Emperor.*

3. (1923) 1923 Mad 329 (330): *Rangare Ramudu In re.*

(1925) 1925 Oudh 69 (69): 25 Cri L Jour 1032, *Jindar Singh* v. *Emperor.*

4. (1897) 25 Cal 561 (564), *Biru Mandal* v. *Queen-Empress.*

provides that the verdict of a jury cannot be altered or reversed "unless . . . . . such verdict is erroneous owing to a *misdirection* by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him." There is no definition of the word "misdirection" in the Code. Technically a "misdirection" is an error of law made by a Judge in charging a jury.[1] But the expression as used in the Code includes not only an error in laying down the law by which the jury are to be guided, but also a defect in summing up the evidence.[2] In *Sundaresa Iyer* v. *Emperor*[3] it was observed that a "misdirection" "includes also a defect in summing up the evidence or in not summing it up, or summing it up erroneously which may often prejudice the accused more than *not* summing it up at all. Such error and defect are in all cases an infringement of the law as laid down in S. 297." A mere *non-direction* is not necessarily a misdirection; those who allege misdirection must show that something wrong was said or something was said which would make wrong that which was left to be understood.[4]

The proper way of viewing a charge by a Judge to the jury has been laid down by their Lordships of the Privy Council in *Channing Arnold* v. *Emperor*.[5] "A charge to a jury must be read as a whole. If there are salient propositions of law in it, these will of course be the subject of separate analysis. But in a protracted narrative of facts, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look up on the whole proceedings in black type. It would, however, not be in accordance either with the usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province."[5a] It is not enough for the purpose of establishing a misdirection to show that the Judge might have laid much *more stress* than he has laid on the defects in the prosecution case.[6]

The following may be given as instances of misdirection :

(a) Instead of asking the jury to find if the case has been legally proved, to tell them that if they are morally convinced, they may find the accused guilty.[6a]

(b) Misreading or misquoting the evidence.[7] It is of the greatest importance that whatever the Judge says to the jury must be true;

(1926) 1926 Mad 1121 (1122) : 27 Cri L Jour 1191, *Venkatigadu* v. *Emperor*.

Note 11.

1. Wharton's Law Lexicon.
2. (1910) 11 Cri L Jour 13 (13, 15) : 3 Sind L R 102, *Imperator* v. *Minhwasayo*.
3. (1930) 1930 Mad W N 249 (280), *C. K. N. Sunderesa Iyer* v. *Emperor*.
4. (1916) 1916 Pat 236 (237) : 1 Pat L Jour 317 : 17 Cri L Jour 353 (360), *Eknath Sahay* v. *Emperor*.
   (1915) 1915 Cal 773 (783) : 16 Cri L Jour 561 (571), *Emperor* v. *Upendra Nath Das*.
5. (1914) 1914 P C 116 (124) : 41 Cal 1023 : 8 Low Bur R 16 : 15 Cri L Jour 309 (P C), *Channing Arnold* v. *Emperor*.

5a [See also (1934) 1934 Cal 757 (758) : 1934 Cri Cas 1165 : 35 Cri L Jour 1487, *Hossein Ali Mir* v. *Emperor*. The charge must be taken as a whole, and not selected passages on which criticisms might be levelled to decide whether in the light of the evidence there has been any misdirection or non-direction.]

6. (1926) 1926 Mad 370 (370) : 27 Cri L Jour 176, *In re Ambalam*.
   [See also (1884) 10 Cal 1079 (1085, 1086), *Queen-Empress* v. *Shib Chunder Mitter*.
   (1925) 1925 Cal 980 (981) : 26 Cri L Jour 572, *Sham Lal* v. *Emperor*.]

6a (1926) 1926 All 752 (753) ; 28 Cri L Jour 15 : 49 All 209, *Enayat Husain* v. *Emperor*.

7. (1930) 1930 All 28 (28) : 1930 Cri Cas 44 : 52 All 207 : 30 Cri L Jour 1146, *Jagmohan Singh* v. *Emperor*.
   (1927) 1927 Cal 200 (202) : 28 Cri L Jour 201, *Isu Sheikh* v. *Emperor*.
   (1930) 1930 Cal 756 (756) : 1930 Cri Cas

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and must be a correct representation of facts appearing from the evidence[8]. The Judge should not make suggestions which are absolutely without foundation on the record.[9]

(c) Grave omissions and vague over-statements.[10]

(d) Stressing too much on unimportant points.[11]

(e) Asking the jury to neglect any portion of the evidence[12] or telling them that "if juries were to throw up a case on account of contradictions and falsehoods, there would be an end to the criminal law of the land.[13]

(f) Suggesting that the *onus* of proof lies on the accused to show that he is innocent[14] or that the *onus* changes or shifts on the accused.[15]

(g) Telling the jury that in capital cases stronger evidence or higher degree of certainty is required than in other cases.[16]

(h) Saying that there is a presumption of veracity in favour of a witness as there is the presumption of innocence in favour of the accused.[17]

(i) Improper admission of evidence.[18] If inadmissible evidence has crept into the case it is the duty of the Judge to warn the jury to exclude

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1156 : 32 Cri L Jour 233, *Mokshed Sheikh v. Emperor.*
(1910) 11 Cri L Jour 187 (188) : 4 Ind Cas 1103 (Mad), *In re Manjunatha.*
(1912) 13 Cri L Jour 271 (271) : 14 Ind Cas 655 (Mad), *Venkatan* v. *Emperor.*
(1915) 1915 Mad 1036 (1038) : 16 Cri L Jour 717 (718), *In re Sennimalai Goundan.*
(1923) 1923 Pat 158 (159) : 23 Cri L Jour 406, *Dasrath Singh* v. *Emperor.*
(1929) 1929 Mad W N 946 (947, 948), *Doraiswamy Pillay* v. *Emperor.*
(1908) 8 Cri L Jour 361 (374) : 1 Sind L R 104, *Imperator* v. *Kilaitali Shah.*

8. (1927) 1927 Oudh 259 (259): 2 Luck 597: 28 Cri Jour 683, *Nahrumal* v. *Emperor.*
(1920) 1920 Cal 527 (528): 21 Cri L Jour 670, *Abdul Gafur* v. *Emperor.*

9. (1934) 1934 Cal 77 (80): 1934 Cri Cas 33 : 35 Cri L Jour 483, *Kamireddi Sheikh* v. *Emperor.*
(1871) 16 Suth W R Cr 36 (37), *Queen* v. *Zoolfkar Khan.*
(1883) 9 Cal 455 (459), *Raghuni Singh* v. *Empress.*

10. (1895) Ratanlal 806 (816), *Queen-Empress* v. *Kellappa.*

11. (1875) 23 Suth W R Cr 21 (21), *Queen* v. *Ganga Govind.*

12. (1903) 6 Bom L R 31 (33), *Emperor* v. *Mira Gajabar.*

13. (1908) 12 Cal W N 111*n* (112*n*) (P C), *Laku Nana* v. *King.* Appeal to Privy Council from Supreme Court of Ceylon.

14. (1881) 8 Cal L R 542 (546, 547), *Khorshed* v. *Empress.*
(1900) 4 Cal W N 576 (581), *Sadhu Sheikh* v. *Empress.*
(1910) 11 Cri L Jour 557 (558): 8 Ind Cas 52 (Cal), *Akbar Sheikh* v. *Emperor.*
(1922) 1922 Cal 505 (505) : 24 Cri L Jour 76, *Abdul Gohur Sirkar* v. *Emperor.*
(1916) 1916 Mad 582 (583) : 16 Cri L Jour 615 (616), *In re, Kotaigadu.*
(1906) 3 Cri L Jour 1 (3) : 3 Low Bur Rul 75, *Hla Gyi* v. *Emperor.*

15. (1925) 1925 Cal 666 (667) : 52 Cal 223 : 26 Cri L Jour 1155, *Satya Charan Manna* v. *Emperor.*
(1929) 1929 Cal 726 (728) : 1929 Cri Cas 362: 31 Cri L Jour 909 : 57 Cal 649, *Khiro Mondol* v. *Emperor.*

16. (1921) 1921 Cal 111 (113): 22 Cri L Jour 562, *Emperor* v. *Lalit Mohan Singh Roy.*
(1922) 1922 Cal 342 (345) : 49 Cal 167 : 22 Cri L Jour 562, *Legal Remembrancer, Bengal* v. *Lalit Mohan Singh Roy.*

17. (1928) 1928 Cal 551 (553) : 30 Cri L Jour 120, *Muhammad Sagiruddin* v. *Emperor.*
(1932) 1932 Cal 474 (477, 478): 1932 Cri Cas 464 : 59 Cal 1361 : 33 Cri L Jour 854, *Saroj Kumar Chakravarthy* v. *Emperor.*
(1931) 1931 Cal 796 (799) : 1931 Cri Cas 1060: 33 Cri L Jour 196 : 58 Cal 1095, *Emperor* v. *Tazenu Ali.*
(1928) 1928 Cal 769 (770) : 30 Cri L Jour 825, *Ambar Ali* v. *Emperor.*

18. (1869) 6 Bom H C R 47 (49), *Reg* v. *Ramaswami Mudaliar.*
(1873) 10 Bom H C R 497 (501), *Reg* v. *Amrita Govinda.*
(1914) 1914 P C 155 (164) : 15 Cri L Jour 326 (P C), *Ibrahim* v. *King Emperor.*
(1931) 1931 Cal 65 (66) : 1931 Cri Cas 63 : 32 Cri L Jour 421, *Ohedali Sheikh* v. *Emperor.*
(1925) 1925 Cal 161 (163): 26 Cri L Jour 307, *Harendra Nath* v. *Emperor.*
(1919) 1919 Cal 514 (518) : 46 Cal 895 : 20 Cri L Jour 324, *Ramesh Chandra Deo* v. *Emperor.*

that evidence and caution them against being influenced by such evidence.[19] In the undermentioned cases[20] the Courts have held that a subsequent exhortation not to rely upon the inadmissible evidence is useless, since the mischief of introducing inadmissible evidence has been already done and that on the mere ground of such admission of inadmissible evidence, the verdict should be set aside. *See* also the following cases[21] where the effect of admitting various kinds of inadmissible evidence has been considered.

(1881) 6 Bom 34 (37), *Imperatrix* v. *Pandarinath.*
(1890) 15 Bom 189 (193), *Queen-Empress* v. *Abaji Ramchandra.*
(1867) 7 Suth W R Cr 7 (7), *Queen* v. *Beharee Dosadh.*
(1868) 10 Suth W R Cr 57 (58), *Queen* v. *Ramgopal Dhur.*
(1869) 3 Ben L R 43 (43), *Queen* v. *Gairaj.*
(1882) 10 Cal L R 4 (6), *Jugut Mohinee* v. *Madhu Sudhan.*
(1926) 1926 Mad 370 (370) : 27 Cri L Jour 176, *Ambalam, In re.*
(1918) 1918 Pat 201 (209) : 19 Cri L Jour 886, *Ram Bhagwan* v. *Emperor.*
(1872) 9 Bom H C R 358 (376, 397), *Reg* v. *Navroji Dadabhoi.*

19. (1919) 1919 Mad 222 (222) : 20 Cri L Jour 790, *Puli Subba Reddi, In re.*
(1929) 30 Cri L Jour 57 (58) : 113 Ind Cas 73 (Cal), *Kailash Chandra Rishi* v. *Emperor.*
(1926) 1926 Bom 238 (240, 241) : 27 Cri L Jour 481, *Kutubuddin Khan* v. *Emperor.*
(1916) 1916 Mad 851 (854) : 16 Cri L Jour 294 (295, 297) : 39 Mad 449, *Annavi Muthiriyan* v. *Emperor.*

20. (1926) 1926 Cal 320 (322) : 27 Cri L Jour 263, *Karamat Mandal* v. *Emperor.*
(1867) 7 Suth W R Cri 25 (25), *Queen* v. *Pitambar Sirdar.*
(1903) 27 Bom 626 (631, 633), *Emperor* v. *Waman Shivaram Damle.*
(1919) 1919 Cal 514 (518) : 46 Cal 895 : 20 Cri L Jour 324, *Ramesh Chandra Deo* v. *Emperor.*
(1923) 1923 Pat 142 (142) : 23 Cri L Jour 141, *Madodar Bam* v. *Emperor.*

21. (1906) 4 Cri L Jour 412 (414) (Cal), *Sheikh Fakir* v. *Emperor.* Hearsay.
(1921) 1921 Cal 111 (113) : 22 Cri L Jour 562, *Emperor* v. *Lalit Mohan Singh.* (Do.)
(1922) 1922 Cal 106 (106) : 24 Cri L Jour 143, *Superintendent and Remembrancer Legal Affairs* v. *Shyam Sardar Bhumiji.* (Do.)
(1925) 1925 Cal 887 (889) : 26 Cri L Jour 606, *Sheikh Abdul* v. *Emperor.* (Do.)
(1881) 2 Weir 762 (762), *In re Vaithilinga Pillai.* (Do.)
(1908) 7 Cri L Jour 358 (358) (Mad), *In re Acchappa Beori.*
(1875) 24 Suth W R Cri 77 (78), *Queen* v. *Chander Kumar.* Hearsay and anonymous letter.
(1883) 9 Cal 455 (458), *Roghuni Singh* v. *Empress.* Section 162 statement.
(1909) 9 Cri L Jour 452 (454, 455) : 36 Cal 281, *Fanindranath Banerji* v. *Emperor.* (Do.)
(1929) 1929 Pat 268 (270, 271) : 1929 Cri Cas 21 : 8 Pat 279 : 30 Cri L Jour 858, *Jhari Gopa* v. *Emperor.*
(1923) 1923 Pat 158 (159) : 23 Cri L Jour 406, *Dasrath Singh* v. *Emperor.* Section 162 statement.
(1912) 13 Cri L Jour 244 (245) : 14 Ind Cas 596 (Mad), *Vallaya Rowther* v. *Emperor.* (Do.)
(1931) 1931 Cal 622 (624) : 1931 Cri Cas 806 : 32 Cri L Jour 1245, *Jasimuddin Sarkar* v. *Emperor.* (Do.)
(1931) 1931 Cal 189 (190) : 1931 Cri Cas 253 : 32 Cri L Jour 841 : 58 Cal 1009, *Rahijaddi* v. *Emperor.* (Do.)
(1929) 1929 Cal 448 (448) : 1929 Cri Cas 71 : 31 Cri L Jour 127, *Fulbash Sheikh* v. *Emperor.* (Do.)
(1928) 1928 Cal 771 (772) : 30 Cri L Jour 803, *Momin Talukdar* v. *Emperor.*
(1927) 1927 Cal 257 (259) : 53 Cal 980 : 28 Cri L Jour 273, *Aseruddin* v. *Emperor.* Section 162 statement.
(1926) 1926 Cal 550 (551) : 27 Cri L Jour 222, *Bhagirathi Chowdhury* v. *Emperor.* (Do.)
(1925) 1925 Cal 959 (961) : 26 Cri L Jour 579, *Kalia* v. *Emperor.*
(1924) 1924 Cal 1029 (1030) : 52 Cal 172 : 26 Cri L Jour 350, *Emperor* v. *Abinash Chandra Bose.*
(1867) 8 Suth W R Cr 68 (69), *Queen* v. *Hurdut Surma.*
(1924) 1924 Cal 435 (435) : 24 Cri L Jour 305, *Mofezuddi* v. *Emperor.* Records in preliminary trials.
(1866) 6 Suth W R Cr 2 (3), *Queen* v *Shobrathee.*
(1880) 5 Cal 768 (769), *Roshun Dosadh* v. *Empress.*
(1909) 10 Cri L Jour 498 (499) : 4 Ind Cas 120 (Cal), *Keshab Pal* v. *Emperor.*
(1921) 1921 Bom 70 (71) : 45 Bom 1086 : 22 Cri L Jour 318, *Dinanath Sunderaji Ravte* v. *Emperor.*
(1910) 11 Cri L Jour 96 (96) : 5 Ind Cas 315 (Cal), *Sheikh Hazir* v. *King-Emperor.*
(1874) 11 Bom H C R Cri 146 (148), *Reg* v. *Kalu Patil.*

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(j) Referring to prior conviction of the accused contrary to the provisions contained in S. 310, *infra*.[22]
(k) Improper rejection of evidence.[23]
(l) Putting forward new explanation on behalf of the prosecution.[24]
(m) Saying that admissions by accused's pleader are binding on the accused.[25]
(n) Directing the jury to accept the statement in the F. I. R. in preference to the evidence given before the Court.[26]
(o) Erroneous explanation of the law (*vide* Note 6).
(p) Dogmatic expression of opinion by the Judge so as to take the case out of the hands of the jury, *vide* S. 298.
(q) Omission to put before the jury important facts (*see* Notes below.)
(r) Telling jury that they are bound by his (the Judge's) decision as to the voluntary character of the accused's confession arrived at when

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(1916) 1916 Cal 352 (352, 353) : 17 Cri L Jour 188 (189), *Emperor* v. *Anshi Bibi*.
(1903) 26 Mad 38 (40), *Thandraya Mudali* v. *Emperor*.
(1908) 7 Cri L Jour 325 (327, 328) : 31 Mad 127, *In re, Sankappa Rai*.
(1923) 1923 Pat 103 (104) : 23 Cri L Jour 91, *Someshwar Jha* v. *Emperor*.
(1881) 6 Cal 247 (248), *Gogun Chunder Ghose* v. *Empress*.
(1869) 12 Suth W R Cr 3 (5), *Queen* v. *Bishonath*.
(1868) 9 Suth W R Cr 58 (61), *Queen* v. *Kartick Chunder*.
(1932) 1932 Cal 293 (294, 295) : 1932 Cri Cas 262 : 59 Cal 136 : 32 Cri L Jour 441, *Trilokyanath Das* v. *Emperor*.
(1932) 1932 Mad W N 862 (863), *Aziz Khan Sahib* v. *Emperor*.
(1926) 1926 Cal 139 (146) : 53 Cal 372 : 27 Cri L Jour 266, *Khijiruddin* v. *Emperor*. Admission of documents without legal proof.
(1899) 26 Cal 49 (50), *Basanta Kumar Ghattak* v. *Queen-Empress*.
(1890) 17 Cal 642 (667), *Queen-Empress* v. *O'hara*.
(1930) 1930 Cal 132 (133) : 1930 Cri Cas 132 : 31 Cri L Jour 656, *Sreehari Swarnakar* v. *Emperor*.
(1930) 1930 Cal 706 (707) : 1930 Cri Cas 1106 : 57 Cal 940 : 32 Cri L Jour 180, *Khedem* v. *Emperor*.
(1910) 11 Cri L Jour 538 (539) : 7 Ind Cas 915 (Cal), *In re Harendra Pal*.
(1920) 1920 Cal 90 (91) : 21 Cri L Jour 183, *Emperor* v. *Abdul Sheikh*. Dying declaration.
(1930) 1930 Cal 754 (754) : 1930 Cri Cas 1154 : 32 Cri L Jour 324, *Sashi Kanta De* v. *Emperor*. (Do.)
(1930) 1930 Cal 756 (757) : 1930 Cri Cas 1156 : 32 Cri L Jour 233, *Mokshed Sheikh* v. *Emperor*. Evidence in contravention of S. 33, Indian Evidence Act.
(1899) 26 Cal 49 (51), *Basanta Kumar Ghattack* v. *Queen-Empress*. Statement under S. 342.
(1871) 15 Suth W R Cri 37 (39, 40), *Queen* v. *Mahima Chandra Das*. Evidence of character contrary to S. 54, Indian Evidence Act.
(1868) 10 Suth W R Cr 39 (39), *Queen* v. *Kulum Sheikh*. (Do.)
(1868) 10 Suth W R Cr 17 (19), *Queen* v. *Bykunt Natha Banerjee*. (Do.)
(1867) 8 Suth W R Cr 11 (11), *Queen* v. *Phoolchand* alias *Pholeel*.
(1866) 6 Suth W R Cr 72 (73), *Queen* v. *Gopal Thakoor*.
(1932) 1932 Cal 474 (476): 1932 Cri Cas 464: 59 Cal 1361: 33 Cri L Jour 854, *Saroj Kumar Chakravarthy* v. *Emperor*.
(1928) 30 Cri L Jour 57 (58): 113 Ind Cas 73 (Cal), *Kailash Chandra Rishi* v. *Emperor*.
(1927) 1927 Cal 17 (20): 54 Cal 237: 28 Cri L Jour 99, *Azimaddy* v. *Emperor*.
(1906) 3 Cri L Jour 41 (42), *Emperor* v. *Moti Dongarshet Gujar*. *Panchnama* does not prove itself and must be legally proved if it is to be put in evidence.

22. (1925) 1925 Cal 872 (873): 52 Cal 595: 26 Cri L Jour 1037, *Ledu Molla* v. *Emperor*.
(1920) 1920 Cal 698 (701): 22 Cri L Jour 60, *Asimuddin Sardar* v. *Emperor*.
(1901) 2 Weir 393 (393), *In re Chundi Perugadu*.
(1900) 27 Cal 139 (143), *Mankara Pasi* v. *Queen-Empress*.

23. (1930) 1930 Cal 370 (375): 1930 Cri Cas 634: 58 Cal 96: 32 Cri L Jour 10, *Government of Bengal* v. *Santiram Mondal*.

24. (1932) 1932 Mad W N 862 (864), *Aziz Khan Sahib* v. *Emperor*.

25. (1900) 2 Bom L R 751 (752), *Queen* v. *Sangaya*.

26. (1910) 11 Cri L Jour 557 (557): 8 Ind Cas 52 (Cal), *Asfar Sheikh* v. *Emperor*.

admitting in evidence such confession and that they are only to find out the truth or otherwise of the confession on the basis of its being voluntary.[26a]

See also the undermentioned cases[26b] for further illustrations of what is and what is not misdirection.

The above instances are only illustrative and not exhaustive. The question in each case will depend upon its own facts and circumstances. The test will be whether the jury were misled and whether they were put on the "wrong track and made to arrive at a wrong conclusion" by reason of what the Judge said.[27]

12. Non-direction.

As has been seen in the previous Note, non-direction is not necessarily misdirection in every case so as to vitiate the trial.[1] Where, however, the non-

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26a (1935) 1935 Cal 308 (309): 1935 Cri Cas 459: 36 Cri L Jour 921, *Kishori Mishra* v. *Emperor*. Judge can decide question of voluntariness of confession in its bearing on *admissibility* — Jury are also entitled to decide independently of the Judge whether confession was voluntary when considering truth of confession.

(1934) 1934 Cal 853 (855, 856): 1934 Cri Cas 1368: 62 Cal 312: 36 Cri L Jour 485, *Kasimuddin* v. *Emperor*.

26b (1933) 1933 P C 124 (133): 1933 Cri Cas 442: 34 Cri L Jour 322 (P C), *Dwarka Nath Varma* v. *Emperor*. Several offences of making false entries in diaries charged separately — Judge directing jury that if any one item was established against accused, they could give a general verdict of guilty — Charge amounts to misdirection.

(1934) 1934 Bom 200 (201): 1934 Cri Cas 651: 58 Bom 498: 35 Cri L Jour 1437, *Bhagchand Jasraj Marwadi* v. *Emperor*. What amounts to possession under S. 273, I. P. C. is question of fact, but Judge giving jury guidance as to what constitutes possession is not misdirection.

(1934) 1934 Cal 766 (768): 36 Cri L Jour 364, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Forhad*. Comment on importance of entries as to age in vaccination and school registers, *held* in the circumstances, not to amount to misdirection.

(1334) 1934 Cal 651 (653): 1934 Cri Cas 933: 36 Cri L Jour 70, *Kashim Ali* v. *Emperor*. Corroborating confessional statements of accused with reference to statements made by them to the police is misdirection as it is a contravention of S. 162 *ante*.

(1934) 1934 Cal 717 (718): 1934 Cri Cas 1102: 36 Cri L Jour 135, *Ram Lal Ghose* v. *Emperor*. Saying that evidence of witnesses was corroborated by statements made before police amounts to misdirection as it contravenes S. 162 *ante*.

(1934) 1934 Cal 610 (614): 1934 Cri Cas 908: 61 Cal 991: 35 Cri L Jour 1367, *Emperor* v. *Bhagirath Mahato*. Judge entirely misconceiving the legal position—There is misdirection.

(1934) 1934 Cal 557 (558, 559): 1934 Cri Cas 789: 36 Cri L Jour 619, *Inayet Ali* v. *Emperor*. Bringing to notice of jury statement of person not examined as witness but warning jury that failure to examine him may give rise to presumption that, if examined, his evidence would be against the party failing to examine him—No misdirection.

(1935) 1935 All 103 (105): 1935 Cri Cas 89: 36 Cri L Jour 612, *Aziz Khan* v. *Emperor*. Judge should emphasize that the burden of proving the guilt of the accused is on the prosecution. But where the whole trend of the charge shows that the Judge warned the jury on this point, the mere fact that the warning was not mentioned in express terms does not amount to misdirection.

(1935) 1935 All 928 (929), *Sri Kishen* v. *Emperor*. Telling jury that there was no reason to disbelieve certain prosecution witnesses was held not to be misdirection.

(1935) 1935 All 665 (665): 1935 Cri Cas 664: 36 Cri L Jour 826, *Narain* v. *Emperor*. Jury likely to be misled as to the point on which they should come to a finding—There is misdirection.

(1888) Ratanlal 428, *In re Shankar Shobag*. High Court interfered with acquittals when the lower Court erroneously treated a witness as an accomplice requiring corroboration.

27. (1928) 1928 Pat 120 (122): 6 Pat 817: 29 Cri L Jour 81, *Bajit Mian* v. *Emperor*.

Note 12.

1. (1916) 1916 Pat 236 (243): 17 Cri L Jour 353: 1 Pat L Jour 317, *Eknath Sahay*

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direction is with regard to a point of *vital* importance[2] especially when it is favourable to the accused[3] and when such non-direction has misled the jury,[4] the trial will be held to be illegal. A mere failure on the part of the Judge to point out to the jury all the matters which may be considered by them in evidence does not necessarily amount to misdirection.[5] If a case is substantially put to the jury, a mere omission to refer to this or that circumstance or suggestion will not make such omission a misdirection.[6] The test as to whether an omission in the summing up of the Judge to the jury amounts to a misdirection or not is whether the omission, in the opinion of the appellate or revisional Court, is of such importance as to have led to an erroneous verdict by the jury.[7] A grave omission by the Judge to direct the jury on a vital point cannot be made good by the accused's counsel calling attention to it at the termination of the summing up.[8]

The following are some of the instances of non-direction which may amount to misdirection :—

(a) Failure to explain the law arising in the case.[9]

(b) Omission of the Judge to direct the jury in cases where several accused are tried together, to consider the case of each accused individually.[10] "It is desirable and indeed obligatory that a Judge in

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v. *Emperor*.
(1919) 1919 Cal 142 (144): 20 Cri L Jour 300 (F B), *Peary* v. *Emperor*.
(1915) 1915 Cal 773 (783): 16 Cri L Jour 561 (571) (F B), *Emperor* v. *Upendranath Das*.
(1893) Ratanlal 644 (652), *Queen-Empress* v. *Yesu*.
(1917) 1917 Cal 123 (129): 18 Cri L Jour 385 (391): 44 Cal 477, *Fatteh Chand* v. *Emperor*.

2. (1925) 1925 Cal 887 (889): 26 Cri L Jour 606, *Sheikh Abdul* v. *Emperor*.
(1926) 1926 Cal 439 (441): 26 Cri L Jour 567, *Chhakari* v. *Emperor*.
(1910) 11 Cri L Jour 13 (14, 15): 3 Sind L R 102, *Imperator v. Minhwasayo*.

3. (1903) 27 Bom 627 (635), *Emperor* v. *Waman Shivaram Damle*.
(1926) 28 Cri L Jour 19 (22): 99 Ind Cas 51 (Cal), *Mamat Ali* v. *Emperor*.
(1929) 1929 Mad W N 946 (950), *Doraiswamy Pillay* v. *Emperor*. Motive for prosecution.

4. (1928) 1928 Pat 326 (334): 29 Cri L Jour 325, *Mt. Champa Pasin* v. *Emperor*.
(1926) 1926 Bom 238 (240): 27 Cri L Jour 481, *Kutubuddin Khan* v. *Emperor*.

5. (1922) 1922 Pat 321 (321): 23 Cri L Jour 47, *Emperor* v. *Bhim Lal Chamar*.

6. (1924) 1924 Cal 257 (301): 25 Cri L Jour 817 (F B), *Emperor* v. *Barendra Kumar Ghose*.

7. (1932) 1932 Oudh 23 (25): 1932 Cri Cas 55: 7 Luck 390: 33 Cri L Jour 167, *Sita Ram* v. *Emperor*.

8. (1929) 1929 Cal 617 (626) : 1929 Cri Cas 228: 30 Cri L Jour 993 (SB), *Padam Prashad Upadhyaya* v. *Emperor*.

9. (1927) 1927 Cal 257 (258) : 53 Cal 980 : 28 Cri L Jour 273, *Emperor* v. *Asiruddin*.
(1930) 1930 All 24 (25) : 1930 Cri Cas 40 : 31 Cri L Jour 33, *Emperor* v. *Mohammad Israil*.
(1913) 14 Cri L Jour 556 (558) : 21 Ind Cas 156 (Cal), *Emperor* v. *Sheikh Neamatullah*. Recent possession of stolen goods.
(1931) 1931 Cal 184 (188) : 1931 Cri Cas 248 : 58 Cal 1051 : 32 Cri L Jour 836, *Emperor* v. *Susen Behari Roy*.
(1924) 1924 Cal 1031 (1033) : 52 Cal 112 : 26 Cri L Jour 11, *Umadasi Dasi* v. *Emperor*.
(1869) 6 Bom H C R 47 (52), *Reg* v. *Ramaswami Mudaliar*.
(1929) 1929 Mad W N 577 (578), *Mayandi Thevan* v. *Emperor*.
(1921) 1921 Cal 64 (65) : 23 Cri L Jour 344, *Ainuddi Chowkider* v. *Emperor*.

10. (1926) 1926 Cal 139 (147) : 53 Cal 372 : 27 Cri L Jour 266, *Khijiruddin* v. *Emperor*.
(1933) 1933 Cal 5 (6) : 1933 Cri Cas 25 : 34 Cri L Jour 622, *Miajan Biswas* v. *Emperor*.
(1933) 1933 Cal 718 (720) : 1933 Cri Cas 1268 : 60 Cal 1457 : 35 Cri L Jour 307, *Sahebali* v. *Emperor*.
(1917) 1917 Mad 335 (335) : 17 Cri L Jour 19 (20), *Sangan, In re*.
(1927) 1927 Mad 56 (58) : 27 Cri L Jour 1164, *Thangaya Nadar* v. *Emperor*.
(1934) 1934 Nag 94 (95) : 1934 Cri Cas 377 : 35 Cri L Jour 957, *Abdul Aziz* v. *Emperor*.
(1928) 1928 Pat 326 (333) : 29 Cri L Jour 325, *Mt. Champa Pasin* v. *Emperor*.
(1910) 11 Cri L Jour 15 (16) : 3 Sind L R 125, *Emperor* v. *Murid*.
(1912) 13 Cri L Jour 750 (751) : 6 Sind L R 116, *Emperor* v. *Chagan Rajaram*.
(1899) 1 Bom L R 784 (785), *Queen Empress* v. *Babya bin Bhimappa*.

summing up to the jury should divide up the evidence as it affects each individual accused."[11]

(c) Failure to tell the jury that the accused should be acquitted if they had any reasonable doubt about his guilt.[12] But *see* the undermentioned cases.[13]

(d) Omission to state that even if the plea of *alibi* set up by the accused is not established, there is no presumption that the accused is guilty.[14]

(e) The failure to inform the jury that the mere fact that the accused had absconded for some time will not give rise to a presumption of his being guilty.[15]

(f) Omission to direct that the jury should reject irrelevant evidence,[16] that they should not allow the result of prior proceedings to affect their minds[17] or that they should not consider the conduct of one accused in judging the case of the other.[18]

(g) Omission to point out the absence of evidence material to the case for the prosecution.[19]

(h) Omission to point out the discrepancies between the evidence and the first information report[20] or the discrepancies and contradictions in the evidence.[21]

(i) Failure to state that the evidence of a hostile witness should be viewed with caution or should be rejected[22].

(1933) 1933 All 128 (130) : 1933 Cri Cas 283 : 34 Cri L Jour 441 : 55 All 68, *Dakhani* v. *Emperor.*

(1926) 1926 Cal 728 (730) : 27 Cri L Jour 398, *Hari Charan Das* v. *Emperor.*

11. (1934) 1934 Cal 105 (109) : 1934 Cri Cas 156 : 35 Cri L Jour 554 : 61 Cal 6, *Khoda Bux* v. *Emperor.*

12. (1906) 4 Cri L Jour 502 (502, 503) (Mad), *Para Thandan* v. *Para Senna Moonji.*

(1898) 2 Weir 500 (500, 501), *In re Sugaligadu.*

(1907) 5 Cri L Jour 427 (429) : 34 Cal 698, *Jatindra Nath Chatterjee* v. *Emperor.*

(1880) 5 Cal 768 (769), *Roshan Doosadh* v. *Empress.*

(1881) Ratanlal 172 (172), *Queen-Empress* v. *Balu.*

13. (1925) 1925 Nag 154 (155) : 27 Cri L Jour 217, *Rahim Beg* v. *Emperor.*

(1927) 1927 Nag 117 (119) : 28 Cri L Jour 177, *Sonia Koshti* v. *Emperor.*

(1930) 1930 All 28 (29) : 1930 Cri Cas 44 : 52 All 207 : 30 Cri L Jour 1146, *Jagmohan Singh* v. *Emperor.*

14. (1921) 1921 Cal 252 (254) : 23 Cri L Jour 244, *Emperor* v. *Taribullah Sheikh.*

15. (1910) 11 Cri L Jour 557 (558) : 8 Ind Cas 52 (Cal), *Asfar Sheikh* v. *Emperor.*

16. (1929) 1929 Cal 617 (625) : 1929 Cri Cas 228: 30 Cri L Jour 993 (SB), *Padam Prasad Upadhyaya* v. *Emperor.*

17. (1920) 1920 Cal 617 (619) : 21 Cri L Jour 554, *Mir Mouze Ali* v. *Emperor.*

18. (1903) 27 Bom 626 (634), *Emperor* v. *Vaman Shivram Damle.*

19. (1875) 25 Suth W R Cri 21 (21), *Queen* v. *Gunga Govind Palit.*

(1920) 1920 Cal 834 (834): 22 Cri L Jour 448, *Raja Khan* v. *Emperor.*

20. (1926) 1926 All 429 (431) : 27 Cri L Jour 785, *Dhiraji* v. *Akasi.*

(1907) 5 Cri L Jour 424 (426) : 34 Cal 325, *Dasarath Mandal* v. *Emperor.*

(1885) 11 Cal 10 (12), *Lein Tu* v. *Queen-Empress.*

(1925) 1925 Cal 729 (733) : 26 Cri L Jour 1009, *Jessarat* v. *Emperor.*

21. (1926) 1926 Cal 139 (144) : 53 Cal 372 : 27 Cri L Jour 266, *Khijiruddin* v. *Emperor.*

(1929) 1929 Cal 170 (171) : 30 Cri L Jour 912, *Dwarka Das* v. *Emperor.*

(1899) 2 Weir 501 (502), *In re Boga Vasanthugadu Adikari Buyanna.*

(1921) 1921 Cal 257 (258) : 22 Cri L Jour 475, *Teneram Mondal* v. *Emperor.*

22. (1932) 1932 Cal 293 (294) : 1932 Cri Cas 262: 59 Cal 136 : 33 Cri L Jour 441, *Trailokyanath* v. *Emperor.*

(1930) 1930 Cal 276 (278) : 1930 Cri Cas 356: 57 Cal 1266 : 31 Cri L Jour 1207, *Panchanan Gogai* v. *Emperor.*

(1932) 1932 Cal 523 (523) : 1932 Cri Cas 498: 33 Cri L Jour 604, *Wahid Ali* v. *Emperor.*

(1931) 1931 Cal 401 (407, 408) : 1931 Cri Cas 497 : 58 Cal 1404 : 32 Cri L Jour 768, *Profulla Kumar Sarkar* v. *Emperor.*

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(j) Omission to state that the evidence of a witness who deposes without taking the oath should be relied upon with caution.[23]

(k) Omission to place before the jury the inordinate delay in preferring the complaint.[24]

(l) *See also* the undermentioned cases.[25]

13. Effect of misdirection.

Under S. 423, sub-s. 2, *infra*, a verdict of the jury can be altered or reversed only on proof of misdirection by the Judge or misunderstanding of the law by the jury. But it is not every misdirection and non-direction that will be a ground for reversing the verdict of the jury. By S. 537, Cl. (d), when the misdirection does not occasion a failure of justice, the verdict cannot be altered. So in appeals against the verdict of a jury it must be shown (a) that there was misdirection and (b) that such misdirection resulted in a miscarriage or a failure of justice.[1] The

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23. (1914) 1914 Cal 276 (279) : 41 Cal 406 : 14 Cri L Jour 485 (FB), *Nafar Sheikh* v. *Emperor*.

24. (1931) 1931 Cal 10 (11) : 1931 Cri Cas 42: 32 Cri L Jour 186, *Ram Charitar Dubay* v. *Emperor*.

25. (1934) 1934 Oudh 354 (359) : 1934 Cri Cas 1049 : 35 Cri L Jour 1066, *Lal Behari Singh* v. *Emperor*. Omission to explain important point of law, *viz.*, point as to applicability of S. 149, I. P. C., *held* to amount to misdirection.
(1934) 1934 Pat 537 (538) : 1934 Cri Cas 1192 : 36 Cri L Jour 28, *Kuldip Singh* v. *Emperor*. Defective nature of test identification — Failure to charge jury with reference to defect is misdirection.
(1934) 1934 Cal 610 (614) : 1934 Cri Cas 908 : 61 Cal 991 : 35 Cri L Jour 1367, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Emperor*. Omission to consider if the right of private defence existed at the particular moment of the alleged attack.
(1934) 1934 Cal 622 (623) : 1934 Cri Cas 907: 35 Cri L Jour 1216, *Muhammad Samiruddin* v. *Emperor*. Failure to comment upon important aspect of case.

Note 13.

1. (1927) 1927 Nag 117 (118) : 28 Cri L Jour 177, *Sonia Koshti* v. *Emperor*.
(1928) 1928 Pat 326 (333) : 7 Pat 845 : 29 Cri L Jour 325, *Mt. Champa Pasin* v. *Emperor*.
(1933) 1933 P C 218 (221) : 1933 Cri Cas 1302 : 34 Cri L Jour 886 (PC), *Basil Ranger Lawrence* v. *Emperor*.
(1929) 1929 Mad W N 946 (952), *Doraiswamy Pillay* v. *Emperor*.
(1918) 1918 Cal 140 (141) : 19 Cri L Jour 649, *Emperor* v. *Asimoddi*.
(1866) 5 Suth W R Cri 80 (92), *Queen* v. *Elahi Bux*.
(1913) 14 Cri L Jour 638 (638) : 21 Ind Cas 686 (All), *Hooper* v. *Emperor*.
(1891) 15 Bom 452 (486), *Queen-Empress* v. *Dada Ana*.
(1932) 1932 Cal 295 (296) : 1932 Cri Cas 264: 33 Cri L Jour 477, *Golam Asphia* v. *Emperor*.
(1933) 1933 Mad W N 320 (323), *Arumuga Goundan* v. *Emperor*.
(1867) 7 Suth W R Cri 69 (70), *Queen* v. *Rammoin Sein*.
(1901) 5 Cri L Jour 168 (170) (Bom), *Emperor* v. *Mahamed Khan Sultan Khan*.
(1895) 19 Bom 749 (763), *Queen-Empress* v. *Ramachandra Govind*.
(1868) 5 Bom H C R Cri 85 (91, 92, 94), *Reg* v. *Fattechand Vastachand*.
(1873) 20 Suth W R Cri 33 (33), *Queen* v. *Ramchurn Ghose*.
(1908) 8 Cri L Jour 361 (372) : 1 Sind L R 104, *Imperator* v. *Kilaitdali Shah*.
(1927) 1927 Pat 370 (375) : 7 Pat 15 : 28 Cri L Jour 692, *Ramchariter Singh* v. *Emperor*.
(1923) 1923 Pat 103 (103) : 23 Cri L Jour 91, *Someshwar Jha* v. *Emperor*.
(1927) 1927 Oudh 549 (549) : 28 Cri L Jour 937, *Babban* v. *Emperor*.
(1910) 8 Ind Cas 719 (719) : 11 Cri L Jour 701 (Mad), *Sivasami Pillai* v. *Emperor*.
(1917) 1917 Mad 770 (770) : 18 Cri L Jour 15 (16), *Anipe Palladu, In re*.
(1916) 1916 Mad 1224 (1225) : 16 Cri L Jour 618 (618), *In re Chinnu*.
(1909) 10 Cri L Jour 11 (12) : 2 Ind Cas 434 (Mad), *Thoolipatti Rama Gowndan* v. *Emperor*.
(1884) 2 Weir 488 (489), *In re Government Pleader*.
(1903) 26 Mad 1 (9, 15), *Emperor* v. *Edward William Smither*.
(1870-71) 6 Mad H C R 120 (121), *In re Shriram Venkatasami*.
(1928) 1928 Cal 769 (771) : 30 Cri L Jour 825, *Ambar Ali* v. *Emperor*.
(1927) 1927 Cal 680 (682) : 54 Cal 539 : 28 Cri L Jour 689, *Haji Ayab Mandal* v. *Emperor*.

same principle will apply with regard to a non-direction.[2] What is miscarriage of justice should be judged from the facts and circumstances of each case. In a recent Allahabad case[3] the Court remarked that a "miscarriage of justice through misdirection means that there must be a reasonable ground for apprehending that the misdirection may have affected the jury's verdict." It has not been interpreted to mean that the appellate Court must find before setting aside a verdict that the accused was entitled to an acquittal on the evidence. If this were so, there is no object in ordering a new trial. It means that there must be a reasonable ground for apprehending that, but for the misdirection, the jury may have arrived at a different verdict,[4] or putting it in another way, "whether in spite of the misdirection the conviction and verdict are not justified in law, as they stand," and if they are justified there is no failure of justice.[5] Where the appellate Court finds that there is misdirection, it can under S. 423 either acquit the accused setting aside the verdict, or reduce the sentence or order a new trial with a fresh jury.[6] In trials by the High Court Sessions, by virtue of the provisions in Letters Patent of the High Courts, the verdict may be reviewed.[7]

(1927) 1927 Cal 398 (401) : 28 Cri L Jour 485, *Azimuddey* v. *Emperor.*
(1922) 1922 Cal 106 (107) : 24 Cri L Jour 143, *Superintendent and Remembrancer of Legal Affairs* v. *Shyam Sunder Bhumiji.*
(1909) 10 Cri L Jour 498 (499) : 4 Ind Cas 120 (Cal) *Keshab Pal* v. *Emperor.*
(1895) 22 Cal 377 (383), *Krishna Dhan Mandal* v. *Queen-Empress.*
(1894) 21 Cal 955 (978), *Wafadar Khan* v. *Empress.*
(1875) 24 Suth W R Cr 77 (79), *Queen* v. *Chunder Koomar Muzoomdar.*
(1873) 19 Suth W R Cr 71 (72), *Queen* v. *Rajcoomar Bose.*
(1872) 18 Suth W R Cr 66 (67). *Queen* v. *Muthoora Singh.*
(1866) 5 Suth W R Cr 13 (14), *Queen* v. *Choonee.*
(1929) 1929 Bom 296 (301, 305) : 1929 Cri Cas 114 : 53 Bom 479 : 31 Cri L Jour 65, *Emperor* v. *C. E. Ring.*
(1900) 2 Bom L R 1129 (1130), *Queen-Empress* v. *Shettya.*
(1900) 2 Bom L R 751 (752), *Queen-Empress* v. *Sangaya.*
(1866) 5 Suth W R Cr 1 (1), *Queen* v. *Sheikh Magon.*

2. (1873) 10 Bom H C R 75 (88), *Reg* v. *Pestanji Dinsha.*
(1915) 1915 Bom 249 (251) : 40 Bom 220 : 17 Cri L Jour 133, *Fakira Appaya* v. *Emperor.*
(1868) 10 Suth W R Cr 7 (8), *Queen* v. *Ramgopal Dhur.*
(1870) 13 Suth W R Cr 23 (24), *Queen* v. *Sheppard.*

3. (1930) 1930 All 28 (29) : 1930 Cri Cas 44 : 52 All 207 : 30 Cri L Jour 1146, *Jagmohan Singh* v. *Emperor.*

4. (1926) 1926 All 429 (431) : 27 Cri L Jour 785, *Dhiraji* v. *Akasi.*
(1934) 1934 Cal 847 (849) : 1934 Cri Cas 1364 : 62 Cal 337 : 36 Cri L Jour 358, *Ilu* v. *Emperor.*
[See (1933) 1933 P C 124 (133) : 1933 Cri Cas 442 : 34 Cri L Jour 322 (P C), *Dwarkanath Varma* v. *Emperor.*]

5. (1917) 1917 All 173 (175) : 18 Cri L Jour 491 (493) : 39 All 348, *Ikramuddin* v. *Emperor.*

6. (1930) 1930 Cal 370 (378) : 1930 Cri Cas 634 : 58 Cal 96 : 32 Cri L Jour 10, *Govt. of Bengal* v. *Santiram Mondal.*
(1922) 1922 Cal 505 (506) : 24 Cri L Jour 76, *Abdul Gohur Sikdar* v. *Emperor.*
(1924) 1924 Cal 625 (628) : 26 Cri L ~~Jour 5~~, *Hassenulla Sheikh* v. *Emperor.*
(1898) 25 Cal 711 (716), *Taju* v. *Empress.*
(1933) 1933 Bom 153 (155, 156) : 35 Cri L Jour 747 : 1933 Cri Cas 465, *Ramachandra* v. *Emperor.*
(1925) 1925 Sind 116 (123, 125) : 25 Cri L Jour 761, *Tapandas* v. *Emperor.*
(1918) 1918 Low Bur 104 (105, 107, 108) : 18 Cri L Jour 929 (930, 933) : 9 Low Bur Rul 60, *Thein Myin* v. *Emperor.*
(1909) 9 Cri L Jour 567 (567) : 32 Mad 179, *The Public Prosecutor* v. *Bomgiri Pottigadu.*
(1929) 1929 Cal 617 (622) : 1929 Cri Cas 228 : 30 Cri L Jour 993 (S B), *Padam Prashad Upadhyaya* v. *Emperor.*
(1900) 4 Cal W N 576 (581), *Sadhu Sheikh* v. *Empress.*
(1902) 29 Cal 782 (791), *Jamiruddi Massali* v. *Emperor.*
(1932) 1932 Oudh 23 (25) : 1932 Cri Cas 55 : 7 Luck 390 : 33 Cri L Jour 167, *Sita Ram* v. *Emperor.*
(1926) 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ramprasad* v. *Emperor.*
(1933) 1933 Bom 153 (156) : 1933 Cri Cas 465 : 35 Cri L Jour 747, *Ramachandra* v. *Emperor.*

7. (1890) 17 Cal 642 (667, 668), *Queen Empress* v. *O'Hara.*

Sec. 297 Notes 13—18

An appeal would not lie to the Privy Council merely on the ground of misdirection.[8] *See also* the undermentioned cases[9] where the principles on which the Privy Council would exercise their jurisdiction in criminal cases have been laid down.

14. Duty of appellate Court in reviewing a charge.

The appellate Court in reviewing the charge to a jury should Judge it *as a whole.* It is sufficient to see whether the tendency of a charge taken as a whole has given a correct or incorrect direction to the mind of the jury.[1]

15. Record of charge to jury.—*See* Notes to Section 367, *infra.*

16. Effect of a juror not understanding the charge.

Where one of the jurymen is unacquainted with the language in which the charge is made and so is unable to follow it, it has been held by the Privy Council that the whole trial is vitiated.[1] *See also* S. 278.

17. Effect of a bad charge.

Where a charge is inadequate and insufficient and it does not assist the jury to exercise their function as jurymen or place before them clearly the issues to be decided, the whole trial will be bad.[1] But the question in each case would be whether there was a failure of justice consequent on such bad charge.[2] *See also* Note 13, *ante.*

18. When Judge can re-charge the jury.

In cases where the jury returns an unintelligible verdict, the Judge instead of asking questions under S. 303 may *again sum up the case to them* and direct them to give a fresh verdict.[1]

But the Judge cannot re-charge the jury and ask them to return a fresh verdict merely because he disagrees with their first verdict.[2]

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8. (1893) 15 All 310 (315) (P C), *In the matter of Maccrea.*
   (1914) 1914 P C 116 (126, 127): 15 Cri L Jour 309 (P C), *Channing Arnold* v. *Emperor.*
9. (1925) 1925 P C 305 (306) (P C), *Shafi Ahmad* v. *Emperor.*
   (1913) 15 Cri L Jour 144 (144): 41 Cal 568, *Clifford* v. *Emperor.*

Note 14.

1. (1921) 1921 Cal 73 (74): 23 Cri L Jour 342, *Hari Charan Das* v. *Emperor.*
   (1869) 12 Suth W R Cr 80 (80), *Queen* v. *Goyalo.*
   (1873) 20 Suth W R Cr 41 (44), *Queen* v. *Nimchand Mookerjee.*
   (1898) 2 Cal W N 702 (706), *Queen Empress* v. *Bhairab Chunder.*
   (1918) 1918 Cal 72 (72): 19 Cri L Jour 959, *Emperor* v. *Kabili Katoni.*
   (1914) 1914 Low Bur 65 (119): 7 Low Bur Rul 143: 15 Cri L Jour 80, *G. S. Clifford* v. *Emperor.*

Note 16.

1. (1933) 1933 P C 208 (209): 1933 Cri Cas 1306: 34 Cri L Jour 843: 12 Pat 811 (P C), *Ras Behari Lal* v. *Emperor.*
   [See also (1904) 1 Cri L Jour 598 (598) (Bom), *Emperor* v. *Bhavanrao Vithalrao.*]

Note 17.

1. (1926) 1926 Nag 53 (54): 26 Cri L Jour 1090, *Ramprasad* v. *Emperor.*
   (1866) 5 Suth W R Cr 68 (69), *Queen* v. *Jehen Bakush.*
   (1903) 30 Cal 822 (830), *Birendra Lal Bhaduri* v. *Emperor.*
   (1929) 1929 Cal 182 (185): 56 Cal 840: 30 Cri L Jour 580, *Babarali Sardar* v. *Emperor.*
   (1868) 9 Suth W R Cr 52 (53), *Queen* v. *Deonath Bajjur.*
   (1864) Suth W R (Gap) Cr 15 (15), *Queen* v. *Mahadeo.*
   (1921) 1921 Cal 269 (270): 23 Cri L Jour 41, *Gangadhar Goala* v. *Reginald William Lemon Reed.*
2. (1924) 25 Cri L Jour 294 (296): 76 Ind Cas 966 (Cal), *Emperor* v. *Charu Chunder Mukerjee.*
   (1870) 14 Suth W R Cr 66 (66), *Queen* v. *Sitwa* alias *Sitaram Putwah.*

Note 18.

1. (1930) 1930 Cal 320 (320): 1930 Cri Cas 401: 57 Cal 61: 31 Cri L Jour 761, *Hamid Ali* v. *Emperor.*
2. (1935) 1935 All 1020 (1022): 1935 Cri Cas 1254: 36 Cri L Jour 1377, *Dori* v. *Emperor.*

Duty of Judge.

298.* (1) In such cases it is the duty of the Judge— Sec. 298

(*a*) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

(*b*) to decide upon the meaning and construction of all documents given in evidence at the trial;

(*c*) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

(*d*) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations.

(*a*) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.

*** (Code of 1882—S. 298—Same.)**

(Code of 1872—S. 256.)

256. It is the duty of the Judge to decide all questions of law, and especially all questions as to the relevancy of facts which it is proposed to prove, the admissibility of evidence, or the propriety of questions asked by parties or their agents, which may arise in the course of the trial; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

Duty of Judge.

to decide upon the meaning and construction of all documents given in evidence at the trial;

to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

to decide whether any question which arises is for himself or for the jury; and upon this point his decision shall be final.

The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations.

(a) It is proposed to prove a statement made by a person not called as a witness, under circumstances which render evidence of his statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(b) It is proposed to give secondary evidence of a document, the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

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It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(*b*) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

Synopsis.

Other Topics.

Competency of witnesses. See Note 2, Pts. 11 to 14.
Evidence to be heard and not prior depositions. See Note 3, Pt. 14.
Functions of Judge and jury distinct. See Note 1, Pt. 2.
Inadmissible evidence. See Note 3, Pt. 5; Note 5, Pts. 4 to 6; Note 6.
Judge's opinion and jury's liberty to form their own. See Note 9.
Misdirection. See Note 9, Pt. 19.
Objections to evidence to be heard in absence of jury. See Note 3, Pt. 5.
Sufficiency of evidence for jury. See Note 1, Pt. 2.
Value of confessions. See Note 3, Pts. 9 and 10.
Voluntary nature of confessions for Judge. See Note 3, Pts. 6, 7, 8 and 12.

1. Scope and object of the Section.

This Section and the next specify the duties of the Judge and the jury respectively[1] and embody the general principle that the question what the jury are to *receive* is for the Judge and what they are to *believe* is for the jury; in other words the question whether there is *any* evidence is for the Judge; whether there is *sufficient* evidence is for the jury.[2]

The provisions of this Section show that the Judge should evince an interest in the case even from its beginning.[3]

2. Judge to decide all questions of law arising in the course of the trial.

The decision on all questions of law arising in the course of the trial is solely for the Judge[1] whose direction thereon is absolute and binding on the jury.[2] In other words the jury is to take the law from the Judge.[3]

The following questions are for the Judge :—

1. Whether, when an adult woman had consented to sexual intercourse it would be an offence of rape within the meaning of the Indian Penal Code.[4]

Section 298—Note 1.

1 (1895) 19 Bom 741 (742, 743), *Queen-Empress* v. *Rego Montopovlo.*
2. (1889) Ratanlal 452 (453), *Queen-Empress* v. *Lal Sing.*
3. (1930) 1930 All 534 (536) : 1930 Cri Cas 759 : 32 Cri L Jour 158, *Suraj Prasad* v. *Emperor.*

Note 2.

1. (1867) 8 Suth W R Cr 87 (88), *Queen* v. *Nobo Kisto Ghose.*
(1916) 1916 Pat 236 (238) : 1 Pat L Jour 317 : 17 Cri L Jour 353 (355), *Eknath Sahay* v. *Emperor.*
(1927) 1927 Cal 200 (202): 28 Cri L Jour 201, *Isu Sheikh* v. *Emperor.*
2. (1873) 20 Suth W R Cr 41 (42), *Queen* v. *Nim Chand.*
(1929) 1929 Cal 57 (60) : 56 Cal 150: 30 Cri L Jour 435, *Revati Mohan* v. *Emperor.*
3. (1895) Ratanlal 736 (737), *Queen-Empress* v. *Bhavmia.*
4. (1895) 19 Bom 735 (736), *Queen-Empress* v. *Madhv Rao.*

2. In a case of defamation whether the imputation found to have been made and the harm found to have been the probable or expected result were such as to satisfy the offence of defamation.[5]
3. Whether a particular communication is a privileged one or not.[6]
4. Whether any evidence had been given on which the jury could properly find the question for the party on whom the *onus* of proof lies.[7]
5. Whether a person is an accomplice.[8] The High Court of Calcutta has however taken the view that it is the duty of the Judge only to put all the facts before the jury and it is for them to decide whether he is an accomplice whose testimony has to be received with caution.[9]
6. Whether there is corroboration.[10]
7. Whether a witness is capable of testifying as a witness, though after the Judge has decided in favour of his competency it is for the jury to decide on the amount of credit to be given to such a witness.[11] So the question whether a child[12] or a deaf and dumb person[13] or one who is unable to take the oath[14] can be examined as a witness should be decided by the Judge as provided by Section 118 of the Evidence Act.
8. Whether a charge under Section 498 of the Penal Code is proper in the absence of a complaint under Section 199, *ante*.[15]

3. Relevancy and admissibility to be decided by the Judge.

It is the duty of the Judge to decide whether a certain piece of evidence is admissible or relevant.[1] In introducing evidence in a trial with the aid of a jury the Judge should be very careful to see that there is no miscarriage of justice.[2] He should decide about the admissibility as and when it arises and should, if the evidence is inadmissible, shut it out from the jury.[3] The moment to decide the

5. (1879) Ratanlal 140 (140), *In re, Pitamber.*
6. (1868) 10 Suth W R Cr 14 (15), *Queen* v. *Chunder Kant.*
   (1898) 25 Cal 736 (741), *Abbasheade* v. *Queen-Empress.*
7. (1915) 1915 Cal 773 (777) : 16 Cri L Jour 561 (565) (F B), *Emperor* v. *Upendra Nath Das.*
8. (1903) 26 Mad 1 (6, 7), *Emperor* v. *Smither.*
9. (1927) 1927 Cal 460 (461) : 28 Cri L Jour 278, *E. St. C. Moss* v. *Emperor.*
10. (1932) 1932 Cal 295 (296, 297) : 1932 Cri Cas 264 : 33 Cri L Jour 477, *Golam Asphia* v. *Emperor.*
    [See also (1929) 1929 Cal 57 (59) : 56 Cal 150: 30 Cri L Jour 435, *Rebati Mohan* v. *Emperor.*]
11. (1913) 14 Cri L Jour 485 (489) : 41 Cal 406, *Nafar Sheikh* v. *Emperor.*
12. (1867) 8 Suth W R Cr 60 (60). *Queen* v. *Hosseinee.*
    (1906) 4 Cri L Jour 412 (413, 414) (Cal), *Sheikh Fakir* v. *Emperor.*
    (1923) 1923 Lah 332 (333) : 25 Cri L Jour 317, *Hussain Khan* v. *Emperor.*
13. (1912) 13 Cri L Jour 271 : 14 Ind Cas 655 (Mad), *Venkattan* v. *Emperor.*
14. (1918) 1918 Bom 212 (213) : 19 Cri L Jour 593, *Emperor* v. *Hari Ramji Ravar.*
15. (1935) 1935 Pat 357 (357) : 1935 Cri Cas 987: 36 Cri L Jour 856, *Ramjanam Tiwari* v. *Emperor.*

Note 3.

1. (1889) Ratanlal 452 (453, 456), *Queen-Empress* v. *Lal Sing.*
   (1889) Ratanlal 491 (492), *Queen-Empress* v. *Tulsaji.*
   (1935) 1935 Sind 115 (126) : 1935 Cri Cas 494 : 29 Sind L R 121 : 36 Cri L Jour 1310, *Bhurasingh* v. *Emperor.* Evidence of previous conviction.
2. (1926) 1926 Cal 147 (149) : 27 Cri L Jour 277, *Kerawat Mandal* v. *Emperor.*
3. (1906) 4 Cri L Jour 332 (333) (Bom), *Emperor* v. *Bhagivedu.*
   (1919) 1919 Lah 184 (186) : 20 Cri L Jour 305, *Kapur Singh* v. *Emperor.*
   (1898) 25 Cal 401 (403), *Ramjibun Scrowgy* v. *Oghore Nath Chatterjee.* Civil case.
   (1929) 1929 Cal 617 (620) : 1929 Cri Cas 228: 30 Cri L Jour 993 (S B), *Padam Prashad Upadhyaya* v. *Emperor.*
   (1894) Ratanlal 730 (731), *Queen-Empress* v. *Balappa.*

Sec. 298 Note 3

question of admissibility is when the evidence is sought to be admitted.[4] If inadmissible evidence is once let in, any later exhortation to the jury to ignore that will be insufficient (*see* Note 11 to S. 297) and it is always desirable that the jury should be asked to retire from the Court when the question as to the admissibility of a particular piece of evidence is being discussed.[5] The Judge should decide that a confession is voluntary before admitting it and placing it before the jury[6] although such a question is one of fact. The reason is that all facts *preliminary to the admissibility* of evidence are for the Court.[7] The Judge is not concerned with the truth of the confession, even if he is satisfied that it is true, but if its voluntary nature is doubted then the Judge should exclude it under the law.[8] When the Judge has decided on its admissibility it is for the jury to see whether it is true and can be relied upon and one test which they will apply is whether it appears to them to have been freely and voluntarily made.[9] *See also* the undermentioned case[10] and Note 4 to Section 299. Similarly the Judge has to see if the confession is vitiated by any other circumstance mentioned in Secions 24, 25, etc. of the Evidence Act.[11] He should never leave it to the jury to decide about the admissibility of the confession.[12] The documents, if any, should not be admitted without strict proof.[13]

The Judge should see that witnesses depose before the jury the facts known to them ; it is irregular to read their deposition in the prior trial and ask them if

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4. (1932) 1932 Sind 201 (205): 1932 Cri Cas 810: 26 Sind L R 302: 34 Cri L Jour 147, *Pharho Shehwali* v. *Emperor.*
5. (1933) 1933 Cal 835 (837): 1933 Cri Cas 1495: 34 Cri L Jour 1087 (S B), *Kali Charan* v. *Emperor.*
6. (1901) 25 Bom 168 (171), *Queen-Empress* v. *Basvanta.*
7. (1907) 6 Cri L Jour 164 (174): 32 Bom 111, *Emperor* v. *Narayan Raghunath Patki.*
8. (1925) 1925 Cal 587 (588, 598): 52 Cal 67 : 26 Cri L Jour 782, *Emperor* v. *Panchkari Dutt.*
9. (1918) 1918 Cal 72 (72): 19 Cri L Jour 959, *Emperor* v. *Kabili Katoni.*
   (1898) Ratanlal 952 (952), *Queen-Empress* v. *Balya Dagdu.*
   (1934) 1934 Cal 853 (855): 1934 Cri Cas 1368: 62 Cal 312 : 36 Cri L Jour 485, *Kasimuddeen* v. *Emperor.* Judge saying that voluntary nature of confession should be treated by them as concluded by his decision to admit it in evidence commits a misdirection in his charge.
   [Compare (1934) 1934 Cal 636 (640) : 1934 Cri Cas 929 : 61 Cal 399: 35 Cri L Jour 1479, *Nayabshana* v. *Emperor.* Judge saying that the jury would have to form an independent judgment as to whether the confession had been obtained by undue influence—*Held* in the circumstances of case that the charge was vitiated by misdirection.]
10. (1929) 1929 Cal 726 (727, 728): 1929 Cri Cas 362: 57 Cal 649 : 31 Cri L Jour 909, *Khiro Mondol* v. *Emperor.*
   (1925) 1925 Cal 887 (888): 26 Cri L Jour 606, *Sheikh Abdul* v. *Emperor.*
   (1909) 10 Cri L Jour 65 (66, 68): 2 Ind Cas 517 (Bom), *Emperor* v. *Kesari Dayal Kanji.*
11. (1900) 27 Cal 295 (302), *Queen-Empress* v. *Jadab Das.*
   (1917) 1917 Low Bur 93 (93): 18 Cri L Jour 383 (384), *Nga Ba* v. *Emperor.*
   (1921) 1921 Bom 70 (71): 45 Bom 1086 : 22 Cri L Jour 318, *Dinanath Sundaraji Ravte* v. *Emperor.*
   (1865) 4 Suth W R Cr 1 (2), *Queen* v. *Gunesh Koormee.*
   (1919) 1919 Cal 11 (13): 20 Cri L Jour 833, *Mobarak Ali* v. *Emperor.*
   (1915) 1915 Bom 249 (252): 40 Bom 220: 17 Cri L Jour 133, *Fakira Appaya* v. *Emperor.*
   (1916) 1916 Cal 352 (352, 353): 17 Cri L Jour 188 (189), *Emperor* v. *Anshi Bibi.*
12. (1895) Ratanlal 748 (749), *Queen-Empress* v. *Menga Budhia.*
   (1933) 1933 Cal 187 (188): 1933 Cri Cas 233: 34 Cri L Jour 369, *Baldeo* v. *Emperor.*
   (1918) 1918 Cal 88 (91) : 19 Cri L Jour 305 : 45 Cal 557, *Amiruddin Ahmed* v. *Emperor.*
   (1896) Ratanlal 842 (842), *Queen-Empress* v. *Ganu Bin Mathaji.*
   (1913) 14 Cri L Jour 625 (631): 21 Ind Cas 673 (Bom), *Gangapa Kardepa* v. *Emperor.*
13. (1880) 6 Cal L R 390 (390), *Empress* v. *Haran Chunder Mitter.*
   (1908) 8 Cri L Jour 6 : 35 Cal 531, *Natabar Ghose* v. *Emperor.*

it is true. *See also* the following case,[14] where the advantage of the jury hearing the evidence as it is deposed to by the witnesses before them is pointed out.

See also the undermentioned decision as to whether a Judge's admission of evidence amounts to a "decision" within the meaning of Letters Patent Clause 26.[15]

4. Propriety of questions asked by or on behalf of the parties.

Vide also Sections 148 to 152 of the Indian Evidence Act. The Judge should control the examination-in-chief by the prosecution and require only legal questions to be put in a legal way.[1] Similarly it is his duty to control the cross-examination in such a way as to disallow any question which is improper or misleading.[2]

5. "To prevent the production of inadmissible evidence whether it is or is not objected to by the parties."

An erroneous omission on the part of the parties to object to the admissibility of a piece of evidence will not render it admissible if otherwise it is not.[1] This Section, therefore, provides that the Judge may prevent the production of inadmissible evidence, *whether it is or is not objected to* by the parties.[1a] In *Abbas Peada* v. *Queen-Empress*,[2] their Lordships of the Calcutta High Court observed :

"This is a wise provision of the law, because in many of these cases tried in the Sessions Court by a jury sometimes the prisoners are not defended at all, and sometimes defended by persons not fully qualified for their work. It is therefore the duty of the Judge to see that evidence which is not admissible in itself should not be allowed to go in to the prejudice of the accused."

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14. (1924) 1924 Lah 17 (19) : 4 Lah 382 : 25 Cri L Jour 377, *John Thomas Lyme* v. *Emperor*.

15. (1935) 1935 Mad 486 (495) : 1935 Cri Cas 686 : 58 Mad 523 : 36 Cri L Jour 1398 (1418, 1425) (F B), *Emperor* v. *Ramanuja Ayyangar*.

Note 4.

1. (1918) 1918 Pat 146 (152) : 19 Cri L Jour 789, *Ritbaran Singh* v. *Emperor*.

2. (1933) 1933 Lah 667 (668) : 1933 Cri Cas 889 : 34 Cri L Jour 606, *Abbas Ali* v. *Emperor*.

Note 5.

1. (1897) 19 All 76 (92) (P C), *A. B. Miller* v. *Babu Madho Das*.
(1874) 11 Bom H C R 44 (45), *Reg* v. *Dayanand*.
(1909) 10 Cri L Jour 65 (67, 68) : 2 Ind Cas 517 (Bom), *Emperor* v. *Kesari Dayal Kanji*.
(1920) 1920 Bom 244 (245) : 44 Bom 192, *Narhari Hari Vaidya* v. *Ambabai Balkrishna Sansari Kar*.
(1925) 1925 Cal 587 (588) : 52 Cal 67 : 26 Cri L Jour 782, *Emperor* v. *Panch Kari Dutt*.
(1925) 1925 Cal 887 (888) : 26 Cri L Jour 606, *Sheikh Abdul* v. *Emperor*.
(1903) 26 Mad 38 (40), *Thandavaraya Mudali* v. *Emperor*.
(1918) 1918 Pat 201 (202) : 19 Cri L Jour 886, *Ram Bhagwan* v. *Emperor*. Omission to object to mode of proof.
(1931) 1931 Pat 345 (345) : 1931 Cri Cas 793 : 32 Cri L Jour 1025, *Phekan Singh* v. *Emperor*.
(1932) 1932 Sind 201 (204, 205) : 1932 Cri Cas 810 : 26 Sind L R 302 : 34 Cri L Jour 147, *Phorho Shahwali* v. *Emperor*.

1a (1867) 7 Suth W R Cr 2 (2), *Queen* v. *Kali Charn Gangooly*.
[See (1864-1866) 2 Bom H C R 125 (126), *Reg* v. *Timmi*. Evidence of character and previous conduct of a prisoner, ought not to be allowed to go to the jury.
(1867) 8 Suth W R Cr 11 (12), *Queen* v. *Phool Chand*.
(1868) 10 Suth W R Cr 57 (58), *Queen* v. *Ram Gopal Dhur*.
(1871) 15 Suth W R Cr 37 (39), *Queen* v. *Mahima Chunder Dass*.
(1868) 10 Suth W R Cr 39 (39), *Queen* v. *Kalum Sheikh*.
(1926) 1926 Cal 793 (794) : 27 Cri L Jour 641, *Gahur Howldar* v. *Emperor*.
(1897) Ratanlal 924 (925), *Queen-Empress* v. *Soma Dalji*. Judge should not refer to evidence before the committing Magistrate without making the depositions exhibits in his own proceedings.
(1867) 7 Suth W R Cr 72 (72), *Queen* v. *Bhekoo Singh*.
(1880) 5 Cal 768 (769), *Roshan Doosadh* v. *Empress*.]

2. (1898) 25 Cal 736 (740), *Abbas Peada* v. *Queen-Empress*.

Sec. 298 Notes 5—8

The fact that the accused puts forward some *particular ground* for holding that certain evidence is not admissible does not relieve the Judge of his duty to look into *all* the circumstances in order to Judge whether the evidence is admissible or not.[3] If by accident such inadmissible evidence is let in, the Judge must distinctly tell the jury to guard themselves from being influenced by it.[4] It is impossible however, to say, even in such cases, that the minds of the jury were not affected in any way by the admission of inadmissible evidence.[5] Where such admission has been prejudicial to the accused the trial will be vitiated.[6]

6. "In his discretion."

It is difficult to understand the object of these words in this Section. Granted that a piece of evidence which is about to be let in, is inadmissible under law, it is impossible to say that the Judge can have a *discretion* to allow its admission or not. The judicial decisions under this Section have in fact held that it is the *duty* of the Judge to prevent inadmissible evidence going in.

7. Construction of documents—Clause (b).

It is the duty of the Judge to decide upon the meaning and construction of all the documents given in evidence.[1] He will be in error if he leaves the legal construction of a letter or other document to the jury.[2] *See also* the undermentioned case.[3]

8. "To decide upon all matters . . . . . to enable evidence of particular matters to be given"—Clause (c).

This Clause refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible.[1] Thus the question whether an accused person was in Police custody while making a confession is to be decided by the Judge.[2] Similarly the Court has to find the preliminary facts before admitting secondary evidence or statements under Section 32, sub-section 1 or S. 33 of the Evidence Act.[3] But where an approver whose pardon has been revoked is tried for the offence as provided for under Section 339, *infra*, and where under that Section he pleads that he has complied with the conditions of the pardon, the question whether he has forfeited the pardon is one for the jury and not for the Judge[4] and that question must be tried first.

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3. (1925) 1925 Cal 587 (588) : 52 Cal 67 : 26 Cri L Jour 782, *Emperor* v. *Panch Kari Dutt.*
4. (1868) 10 Suth W R Cr 17 (19), *Queen* v. *Bykant Nath Banerjee.*
5. (1923) 1923 Pat 142 (142) : 23 Cri L Jour 141, *Damodar Ram* v. *Emperor.* [See also (1903) 27 Bom 626 (632, 633), *Emperor* v. *Waman Shivram Dambe.*]
6. (1907) 5 Cri L Jour 427 (429) : 34 Cal 698, *Jatindra Nath Chatterji* v. *Emperor.*
(1876) 1 Cal 207 (218), *Reg* v. *Hurribole Chunder Ghose.*
(1894) 21 Cal 955 (979), *Wafadar Khan* v. *Empress.*
(1918) 1918 Cal 971 (975) : 45 Cal 159, *Ambar Latiff* v. *Lufti Ali.*
(1884) 10 Cal 775 (777), *Queen-Empress* v. *Uzeer.*

Note 7.

1. (1933) 1933 P C 7 (10) : 1933 Cri Cas 130 : 34 Cri L Jour 550 (552) (P C), *Albert Godamune* v. *The King.*
2. (1865) 3 Suth W R Cr 69 (69), *Queen-Empress* v. *Setul Chunder Bagchee.*
3. (1904) 28 Bom 533 (545) : 1 Cri L Jour 390, *Emperor* v. *Bankatram Lachiman.*

Note 8.

1. (1915) 1915 Cal 667 (674) : 16 Cri L Jour 65 (70) : 42 Cal 856, *Sashi Rajbanshi* v. *Emperor.*
2. (1908) 7 Cri L Jour 325 (327) : 31 Mad 127, *In re Sankappa Rai.*
3. (1871) 15 Suth W R Cr 11 (13, 14), *In the case of Sheikh Tenoo.*
4. (1910) 11 Cri L Jour 254 (255) : 33 Mad 514, *In re Aligiriswami Naicken.*
(1915) 1915 Cal 667 (674) : 16 Cri L Jour 65 (67) : 42 Cal 856, *Sashi Rajbanshi* v. *Emperor.*

The Judge should always first decide the preliminary point on which the admissibility of other evidence depends. It is always dangerous to give in advance evidence the admissibility of which depends on what other witnesses may say.[5]

The Judge has ample powers under Section 165 of the Evidence Act to put any question to the witness or to examine any witness.[6]

9. When and how far a Judge may give his opinion on question of fact—Clause (2).

It is within the competence of a Judge in charging the jury to express his own opinion on facts and make his own suggestions on any points raised. It is for the jury to accept or reject the view of the Judge.[1] In many cases it is not merely permissible but also desirable that the Judge should tell the jury what view he has taken of the facts in order to enable them to consider the facts properly and arrive at their own decision on them.[2] The jurors have no experience in the matter of sifting evidence and weighing probabilities and consequently stand in need of intelligent guidance from the Judge.[3] It is therefore necessary that all help should be given to them.[4] It has been held that a charge which succeeds in avoiding any expression of opinion by Judge is the most colourless and unhelpful one[5] and in a recent case it was observed that if a Judge with all his advantages forms a definite and strong opinion that the evidence is not sufficient for a conviction, it is dangerous to leave the matter to the jury without a strong indication of such opinion.[6]

In so expressing his opinion the Judge should remember that the jury are the final Judges of fact. The Judge should in cases where he expresses his opinion tell the jury in the clearest terms that the responsibility for the decision is

5. (1919) 1919 Cal 514 (517): 46 Cal 895: 20 Cri L Jour 324, *Romesh Chandra Das* v. *Emperor.*

6. (1898) 21 Mad 83 (90), *Queen-Empress* v. *Raman.*
(1886) Ratanlal 245 (248), *Queen-Empress* v. *Rupya.*
(1883) 9 Cal 455 (462), *Roghuni Singh* v. *Empress.*

Note 9.

1. (1903) 5 Bom L R 207 (209), *Emperor* v. *Appunna Devappa.*
(1896) Ratanlal 842 (843), *Queen-Empress* v. *Ganu Bin Mathaji.*
(1928) 1928 All 622 (623): 50 All 540: 29 Cri L Jour 342, *Emperor* v. *Sheo Din.*
(1870) 13 Suth W R Cr 34 (34), *In re Dwarakanath Sen.*
(1868-69) 5 Bom H C R 85 (97), *Reg.* v. *Fattechand.*
(1928) 1928 All 622 (623): 50 All 540: 29 Cri L Jour 342, *Emperor* v. *Sheo Din.*
(1864) 1 Suth W R Cr 17 (17), *Queen* v. *Bustee Khan.*
(1900) 4 Cal W N 576 (581), *Sadhu Sheikh* v. *Empress.*
(1912) 13 Cri L Jour 821 (822): 40 Cal 367, *Samaruddin* v. *Empress.*
(1931) 1931 Cal 601 (603): 1931 Cri Cas 753: 33 Cri L Jour 11, *Bhondar* v. *Emperor.*
(1920) 1920 Pat 575 (575): 22 Cri L Jour 1250, *Baijnath Mahtor* v. *Emperor.*

2. (1928) 1928 Cal 269 (270), *Abdul Razak* v. *Emperor.*
(1935) 1935 Rang 214 (216): 1935 Cri Cas 847: 13 Rang 141: 36 Cri L Jour 1232, *Scott* v. *Emperor.*
[See (1934) 1934 Cal 622(623): 1934 Cri Cas 907: 35 Cri L Jour 1216, *Mahomed Samiruddin* v. *Emperor.* Definite case by prosecution—Failure to prove same— Failure of Judge to point out this to jury—Charge is defective.
(1935) 1935 Cal 31 (32): 1935 Cri Cas 196: 36 Cri L Jour 480, *Kasimuddin* v. *Emperor.* Judge thinking that evidence is so weak that there are grave doubts as to guilt of accused—Omission to direct jury to give accused benefit of doubt may amount to misdirection.]

3. (1866) 5 Suth W R Cr 80 (94), *Queen* v. *Elahi Bux.*
(1864) Suth W R Sup 5 (5), *Queen* v. *Abdul Juleel.*

4. (1926) 1926 Cal 235 (239): 53 Cal 181: 26 Cri L Jour 1577, *Abdul Gani* v. *Emperor.*

5. (1929) 1929 Cal 742 (746); 1929 Cri Cas 390: 31 Cri L Jour 673: 57 Cal 740, *Nagendra Nath* v. *Emperor.*

6. (1931) 1931 Cal 752 (755): 1931 Cri Cas 1016: 33 Cri L Jour 85, *Sali Sheikh* v. *Emperor.*

Sec. 298 Note 9

theirs and that they have to make up their minds themselves and that they need not rely on any opinion of his on the facts. He must warn them that his opinion is not binding on them.[7] This warning should not be given in a formal way either at the beginning or at the end of the charge, but should be given at the moment when the Judge has forcibly or otherwise expressed his opinion to the jury,[8] though it must be remembered that in the course of a lengthy charge the Judge cannot be expected to pause always to assure the jury that the matters of fact are matters for them.[9] In a recent decision of the Chief Court of Oudh,[10] Stuart, C. J., observed :

"If the Judge attempts to take the case out of the jury's province by something in the nature of imposing his own view upon the jury, it is a case of misdirection, but if a Judge simply states the opinion which the law allows him to state, in such a manner that intelligent jurymen should see for themselves that it is only his opinion and nothing else, it is not necessary for him to add as a safeguard a remark that it is only his opinion and that the jury are perfectly at liberty to form their own."

The Judge should not usurp the functions of the jury but should allow them to give a finding and for that purpose should present the case to the jury in a dispassionate and impartial manner.[11] He should not sum up in too strong and

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7. (1933) 1933 Cal 190 (192) : 1933 Cri Cas 236: 34 Cri L Jour 430, *Eusuff Ali* v. *Emperor.*
(1914) 1914 Low Bur 34 (35) : 15 Cri L Jour 257, *C. H. Browne* v. *Emperor.*
(1929) 1929 Bom 296 (300) : 1929 Cri Cas 114 ; 53 Bom 479 : 31 Cri L Jour 65, *Emperor* v. *C. E. Ring.*
(1907) 5 Cri L Jour 427 (429) : 34 Cal 698, *Jotindra Nath Chatterjee* v. *Emperor.*
(1926) 1926 Cal 105 (105) : 26 Cri L Jour 1553, *Fazuddin* v. *Emperor.*
(1931) 1931 Cal 752 (755) : 1931 Cri Cas 1016 : 33 Cri L Jour 85, *Sali Sheikh* v. *Emperor.*
(1933) 1933 Mad W N 320 (323), *Arumuga Goundan* v. *Emperor.*
(1933) 1933 Pat 96 (100) : 1933 Cri Cas 249 : 34 Cri L Jour 421, *Raghunath* v. *Emperor.*
(1929) 1929 Pat 313 (316) : 1929 Cri Cas 99 : 8 Pat 344 : 30 Cri L Jour 721, *Ramdas Rai* v. *Emperor.*
(1923) 1923 Pat 238 (239) : 24 Cri L Jour 495, *Gajo Singh* v. *Emperor.*
(1934) 1934 Oudh 122 (123) : 1934 Cri Cas 427 : 35 Cri L Jour 502, *Hadi Hussain* v. *Emperor.*
(1929) 1929 Cal 742 (746) : 1929 Cri Cas 390: 31 Cri L Jour 673 : 57 Cal 740, *Nagendra Nath* v. *Emperor.*
(1928) 1928 Cal 269 (270), *Abdul Razak* v. *Emperor.*
(1908) 8 Cri L Jour 6 (8) : 35 Cal 531, *Natabar Ghose* v. *Emperor.*
(1906) 3 Cri L Jour 144 (148) (Cal), *Sourendra Nath Mitra* v. *Emperor.*
(1898) 25 Cal 230 (231, 232), *Ali Fakir* v. *Queen-Empress.*
(1884) 10 Cal 970 (972), *Queen-Empress* v. *Bepin Biswas.*
(1925) 1925 Cal 872 (874) : 52 Cal 595 : 26 Cri L Jour 1037, *Ledu Molla* v. *Emperor.*
(1864) Suth W R Sup 5 (5), *Queen* v. *Abdool Juleel.*
(1899) 23 Bom 316 (318), *Queen-Empress* v. *Gangia.*
(1891) 1891 All W N 170 (171) : 14 All 25, *Queen-Empress* v. *Hughes.* Way in which question of fact is put to jury leaving no option to them but to adopt the view taken by the judge—Charge is vitiated by misdirection.
(1934) 1934 Pat 309 (311) : 1934 Cri Cas 730: 13 Pat 529 : 35 Cri L Jour 1104, *Nanhak Ahir* v. *Emperor.*
(1935) 1935 Rang 214 (216) : 1935 Cri Cas 847 : 13 Rang 141 : 36 Cri L Jour 1232, *Scott* v. *Emperor.*
8. (1934) 1934 Cal 77 (79) : 1934 Cri Cas 33 : 35 Cri L Jour 483, *Kamiraddi Sheikh* v. *Emperor.*
9. (1931) 1931 Cal 178 (182) : 1931 Cri Cas 242 : 32 Cri L Jour 190 (F B), *Emperor* v. *Panchu Sheikh.*
[See (1935) 1935 All 928 (929), *Srikishen* v. *Emperor.* It is not necessary for Judge on every occasion on which he expresses his opinion on a question of fact to tell the jury that they are sole Judges of questions of fact—It is sufficient if he makes that statement quite clearly to the jury at the end of his charge.]
[See also (1900) 4 Cal W N 196 (200), *Rihamat Ali* v. *Empress.*]
10. (1928) 1928 Oudh 326 (327, 328) : 29 Cri L Jour 721, *Des Raj Singh* v. *Emperor.*
11. (1921) 1921 Cal 252 (255) : 23 Cri L Jour 244, *Emperor* v. *Taribulla.*
(1864) 1 Suth W R Cr 25 (26), *Queen* v. *Ganga Bishun.*

unqualified terms or give a decided opinion on the case;[12] he should not thrust his own opinion on them so as to dictate to them their verdicts[13] nor should he be dogmatic in his expression of the opinion[14] or persuade the jury to accept his opinion.[15] He should charge in such a way as not to create any impression in the mind of the jury that it was a direction from the Judge which they should follow[16] or that the opinion was the only opinion that could be arrived at from the evidence in the case.[17] **Sec. 298 Note 9**

If the Judge by his strong expression of opinion takes away the case from the province of the jury, then the charge will be irregular and the trial will be vitiated.[18] But if on a whole review of the charge it appears that the case is left to the jury to decide, it will not amount to a misdirection.[19] *See also* Notes to Section 297.

Duty of jury.

299.* It is the duty of the jury— **Sec. 299**

*** (Code of 1882—S. 299—Same.)**

(Code of 1872—S. 257.)

Duty of jury.

257. It is the duty of the jury :—

(1) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned ;

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12. (1927) 1927 Oudh 259 (259) : 2 Luck 597 : 28 Cri L Jour 683, *Nahra Mal* v. *Emperor.*
(1895) 19 Bom 741 (743) : *Queen-Empress* v. *Rego Montoponlo.*
(1914) 1914 Cal 549 (550) : 15 Cri L Jour 147, *Ofel Molla* v. *Emperor.*
(1931) 1931 Cal 11 (11, 13) : 1931 Cri Cas 43: 32 Cri L Jour 418, *Jahura Bibi* v. *Emperor.*
(1864) 1 Suth W R Cr 25 (26), *Queen* v. *Gunga Bishen.*

13. (1865) 3 Suth W R Cr Letters 4 (4).
(1906) 10 Cal W N 59*n* (60*n*), *Dera Shuttollah* v. *Emperor.*
(1908) 7 Cri L Jour 315 (317) (Cal), *Kali Singh* v. *Emperor.*
(1930) 1930 Cal 430 (432) : 1930 Cri Cas 657: 31 Cri L Jour 1115 : 57 Cal 1115, *Monohar Mandal* v. *Emperor.*
(1931) 1931 Cal 533 (535) : 1931 Cri Cas 685 : 32 Cri L Jour 1101 (S B), *Superintendent and Remembrancer of Legal Affairs* v. *Purna Chandra Das.*
(1871) 16 Suth W R Cr 20 (21), *In re, Huroo Saha.*
(1926) 1926 Cal 439 (442) : 26 Cri L Jour 567, *Chekkari Shaik* v. *Emperor.*
(1898) 2 Weir 385 (386), *In re, Laxumana.*
(1924) 1924 Cal 960 (961) : 25 Cri L Jour 1217, *Emperor* v. *Sagarmal Agarwalla.*
(1910) 11 Cri L Jour 683 (684) : 8 Ind Cas 573 (Mad), *Public Prosecutor* v. *Papakka.*

14. (1929) 1929 Cal 170 (172) : 30 Cri L Jour 912, *Dwarika Das Bairagi* v. *Emperor.*
(1925) 1925 Sind 116 (122, 124) : 25 Cri L Jour 761, *Topandas* v. *Emperor.*

15. (1873) 19 Suth W R Cr 71 (73) : *Queen* v. *Rajcoomar Bose.*
(1922) 1922 Cal 107 (114) : 49 Cal 573 : 23 Cri L J 657, *Abdul Salim* v. *Emperor.*
(1890) 17 Cal 642 (666) : 6 Cri L Jour 164, *Queen-Empress* v. *O'Hara.*

16. (1926) 1926 Cal 996 (997) : 27 Cri L Jour 1038, *Naibulla Shaikh* v. *Emperor.*

17. (1892) 14 All 25 (27), *Empress* v. *Hughes.*
(1895) Ratanlal 748 (748), *Queen-Empress* v. *Menga Budhia.*
(1868) 9 Suth W R Cr 51 (51), *Queen* v. *Shum Shere Beg.*

18. (1868) 10 Suth W R Cr 7 (8), *Queen* v. *Ramgopal Dhur.*
(1931) 1931 Cal 757 (759) : 1931 Cri Cas 1021 : 58 Cal 1228 : 33 Cri L Jour 79 (S B), *Amode Ali* v. *Emperor.*
(1931) 1931 Oudh 171 (172) : 1931 Cri Cas 443 : 32 Cri L Jour 858 : 6 Luck 705, *Mangal Singh* v. *Emperor.*
(1927) 1927 Cal 631 (632) : 28 Cri L Jour 742, *Emperor* v. *Rajab Ali Fakir.*
(1910) 11 Cri L Jour 334 (334) : 5 Ind Cas 935 (Mad), *In re, Shivappa Higade.*
(1925) 1925 Oudh 311 (313) : 28 Oudh Cas 69 : 26 Cri L Jour 310, *Emperor* v. *Ali Raza.*
(1864) 1 Suth W R Cr 2 (3), *Queen* v. *Bharut Chunder.*

19. (1914) 1914 P C 116 (125) : 15 Cri L Jour 309 : 41 Cal 1023 : 8 Low Bur Rul 16 (P C), *Channing Arnold* v. *Emperor.*
(1933) 1933 All 941 (943, 944) : 1933 Cri Cas 1561 : 35 Cri L Jour 668 : 56 All 210, *Lala* v. *Emperor.*
(1865) 2 Suth W R Cr 60 (60), *Queen* v. *Seethanath Ghosal.*
(1928) 1928 Oudh 326 (327) : 29 Cri L Jour 721, *Des Raj Singh* v. *Emperor.*

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(*a*) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned ;

(*b*) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not ;

(*c*) to decide all questions which according to law are to be deemed questions of fact ;

(*d*) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

(*a*) *A* is tried for the murder of *B*.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what view of the facts *A* ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(*b*) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

Synopsis.

	Note No.		Note No.
Legislative changes.	1	**Voluntariness of confession.**	4
Duties of the Judge and jury respectively.	2	**Charge for graver offence—Verdict for smaller offence.**	5
Meaning of words.	3	**Illustration (a) to the Section.**	6

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(2) to determine the meaning of all technical terms and words used in an unusual sense, which it may be necessary to determine, whether such words occur in documents or not ;

(3) to decide all questions *declared by the Indian Penal Code, or any other law*, to be questions of fact ;

(4) to decide whether general, indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

(a) *A* is tried for the murder of *B*.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts *A* ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b) The question is whether, a person entertained a reasonable belief on a particular point, whether work was done with reasonable skill or due deligence.

Each of these is a question for the jury.

(Code of 1861—Nil.)

Other Topics.

Benefit of doubt. See Note 2, Pts. 22 and 23.
Credibility. See Note 2, Pt. 11.
Expert evidence. See Note 2, F-N (11).
Facts for application of Section. See S. 297, Note 9, Pt. 10.
F. I. R. statement and depositions. See Note 2, F-N (11); S. 297, Note 11, Pt. 26 and Note 12, Pt. 20.
Forfeiture of pardon. See Note 2, F-N (23); S. 299, Note 8, Pt. 4.
Identity of thumb-impressions. See Note 2, F.-N. (23).
Provocation. See Note 2, Pt. 19 and F-N (19).
Questions of fact. See Note 2, Pts. 11 to 21.
Questions of law. See Note 2, Pts. 3 to 10; Note 2, F-N (2).
Records in preliminary trials. See S. 297, Note 11, F-N (21).
Several accused. See S. 297, Note 7.
Sufficiency of evidence. See Note 2, Pts. 14 and 21.

1. Legislative changes.

Changes introduced in 1882 :—

1. The words "(other than terms of law)" were newly added.
2. The words "declared by the Indian Penal Code or by any other law to be questions of fact" were substituted by the words "which according to law are to be deemed questions of fact."

2. Duties of the Judge and jury respectively.

The different duties of the Judge and the jury are made clear in Ss. 297, 298 and this Section. Shortly stated, it is the duty of the Judge to lay down the law, and it is the duty of the jury to decide which view of the facts is true, in accordance with the directions of the Judge on the questions of law.[1] It is not the province of the Judge to decide upon the facts except in cases coming under Cl. (c), S. 298. Nor is it the province of the jury to decide questions of law.[2]

It is for the Judge to give direction to the jury on the following questions :—

1. The admissibility of evidence,[3] or the capacity of a witness to depose,[4]

Section 299—Note 2.

1. (1895) Ratanlal 748 (749), *Empress* v. *Menga Budhia.*
(1864) 1 Suth W R Cri 50 (51), *Queen* v. *Uckoor Ghose.*
(1873) 20 Suth W R Cri 41 (42), *Queen* v. *Nimchand Mookerjee.* What a Judge says to a jury upon the law is an absolute and binding direction upon them.
(1874) 21 Suth W R Cri 69 (70), *Queen* v. *Sadhu Mundal.*
2. (1924) 1924 Cal 321 (323) : 51 Cal 347 : 25 Cri L Jour 758, *Emperor* v. *Dhananjay Rai.*
(1924) 1924 Cal 701 (702) : 51 Cal 160 : 25 Cri L Jour 1000, *Emperor* v *Jamaldi Fakir.*
(1929) 1929 Cal 57 (60) : 56 Cal 150 : 30 Cri L Jour 435, *Rebati Mohan Chakrabarti* v. *Emperor.*
(1933) 1933 Pat 273 (273) : 1933 Cri Cas 755 : 34 Cri L Jour 731, *Sitalu* v. *Emperor.*
(1895) Ratanlal 736 (737), *Empress* v. *Bharmia.*
(1904) 1 Cri L Jour 265 (267) (Bom), *Empress* v. *Bharmia.*
(1865) 3 Suth W R Cri Letters 4 (4), *Queen* v. *Madaree Chowkeedar.*
(1867) 7 Suth W R Cri 2 (2), *Queen* v. *Kali Charan.* Cause of death is to be left to jury.
(1868) 9 Suth W R Cri 51 (52), *Queen* v. *Shumshere Beg.*
(1873) 19 Suth W R Cri 15 (15), *Queen* v. *Bheekoo Kalwar* alias *Bheksha.* Question of accused's unsoundness of mind should be tried by jury and not by Judge himself personally.
(1873) 19 Suth W R Cri 26 (26), *Queen* v. *Doorjodhum Shamonto* alias *Dajobor.*
(1868) 10 Suth W R Cri 14 (14). *Queen* v. *Chundrakant Chackerbutty.* Whether a communication is privileged or not is a point of law.
(1870) 13 Suth W R Cri 26 (26), *Queen* v. *Shurffuddin.*
3. (1932) 1932 Bom 406 (409) : 1932 Cri Cas 572 : 56 Bom 304 : 33 Cri L Jour 666, *Emperor* v. *Ramrao Mangesh Burde.*
(1867) 8 Suth W R Cri 60 (60), *Queen* v. *Hosseinee.*
(1914) 1914 Cal 276 (279) : 41 Cal 406 : 14 Cri L Jour 485, *Nafar Sheikh* v. *Emperor.*
(1933) 1933 Cal 187 (188) : 1933 Cri Cas 233 : 34 Cri L Jour 369, *Baldeo Bim* v. *Emperor.*
4. (1914) 1914 Cal 276 (279) : 41 Cal 406 : 14 Cri L Jour 485, *Nafar Sheikh* v. *Emperor.*

Sec. 299 Note 2

or the legal sufficiency of the evidence, *e. g.*, whether eye-witnesses are necessary in any particular case.[5]

2. Whether a person was in Police custody while making a confession.[6]
3. Whether a confession under S. 25 of the Evidence Act should or should not be used in favour of a co-accused.[7]

See also Notes to Sections 297 and 298, *ante*.

The Judge should not, however, allow the jury to resort to legal treatises during their consultation about the verdict,[8] or to cite cases or rulings to them[9] or ask them to differentiate or form an opinion on those authorities.[10]

The following are all questions of fact which it is for the jury alone to determine :—

1. The weight to be attached to the evidence[11] or to a confession[12] or the

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5. (1876) 25 Suth W R Cri 36 (36) : 1 Cal 207, *Queen* v. *Gokool Kahar*.
6. (1908) 7 Cri L Jour 325 (326) : 31 Mad 127, *In re Sankappa Rai*.
7. (1877) 2 Bom 61 (64), *Imperatrix* v. *Pitambar Jina*.
8. (1895) Ratanlal 736 (737), *Empress* v. *Bharmia*. Reference to Mayne's Penal Code.
   (1904) 1 Cri L Jour 265 (267) (Bom), *Empress* v. *Bharmia*.
   (1897) 14 Cal 164 (166), *Jaspath Singh* v. *Empress*.
   (1926) 1926 Cal 895 (897) : 27 Cri L Jour 926, *Emperor* v. *G. C. Wilson*.
9. (1905) 2 Cri L Jour 157 (158) (Cal), *Shyama Charan Chakravarthi* v. *Emperor*.
10. (1912) 13 Cri L Jour 26 (27) : 13 Ind Cas 218 (Cal), *Mehr Sardar* v. *Emperor*. [But see (1927) 1927 Rang 68 (70) : 4 Rang 488 : 28 Cri L Jour 213 (F B), *Emperor* v. *Nga Tin Gyi*. It was held that the Judge may read out some *passages* from the judgments for the guidance of the jury.]
11. (1891) 15 Bom 452 (461), *Empress* v. *Dada Ana*.
    (1917) 1917 All 173 (175) : 18 Cri L Jour 491 (493) : 39 All 348, *Ikramuddin* v. *Emperor*.
    (1896) 20 Bom 215 (221), *Empress* v. *Devji Govindji*.
    (1895) Ratanlal 748 (749), *Empress* v. *Menga Budhia*.
    (1865) 3 Suth W R Cr 58 (58), *Queen* v. *Rookni Kant*.
    (1871) 16 Suth W R Cr 20 (21), *In re Huroo Shaha*.
    (1876) 25 Suth W R Cr 25 (26), *Queen* v. *Wazir Mundul*.
    (1897) 1 Cal W N 465 (479), *Empress* v. *Kali Parsanna Dabyabisharad*. Weight to be attached to expert opinion.
    (1905) 10 Cal W N 59*n*, *Derashutollah* v. *Emperor*. Whether the whole prosecution story, is discreditable for part being false.
    (1905) 2 Cri L Jour 259 (264) : 32 Cal 759, *Emperor* v. *Abdul Hamid*. Weight to be attached to expert evidence.
    (1925) 1925 Cal 394 : 26 Cri L Jour 677. *Emperor* v. *Faratulla*. Effect should be given to their verdict on such point.
    (1925) 1925 Cal 876 (883) : 52 Cal 987 : 26 Cri L Jour 1256, *Emperor* v. *Premananda Dutt*. Weight and value of dying declarations.
    (1930) 1930 Cal 228 (230) : 1930 Cri Cas 196 : 31 Cri L Jour 916, *Tafiz Pramanik* v. *Emperor*.
    (1931) 1931 Cal 401 (407) : 1931 Cri Cas 497 : 58 Cal 1404 : 32 Cri L Jour 768 (F B), *Profulla Kumar Sarkar* v. *Emperor*. Appreciation of evidence —Believing testimony of witness in part is not improper.
    (1929) 1929 Pat 34 (35) : 7 Pat 153 : 30 Cri L Jour 273, *Wazid Ali* v. *Emperor*. Whether first information report is true or false.
    (1932) 1932 Bom 406 (409) : 1932 Cri Cas 572 : 56 Bom 304 : 33 Cri L Jour 666, *Emperor* v. *Ramrao Mangesh Burde*.
    (1867) 8 Suth W R Cr 60 (60), *Queen* v. *Hosseinee*.
    (1914) 1914 Cal 276 (279) : 41 Cal 406 : 14 Cri L Jour 485, *Nafar Sheikh* v. *Emperor*.
    (1933) 1933 Cal 187 (188) : 1933 Cri Cas 233 : 34 Cri L Jour 369, *Baldeo Bin* v. *Emperor*.
    (1935) 1935 Pat 433 (434, 435) : 1935 Cri Cas 1104, *Emperor* v. *Bhagwat Sahu*. Verdict depending upon credibility of witnesses—Considerable weight to be given to verdict.
    [See also (1904) 1 Cri L Jour 772 (773) (Bom), *Emperor* v. *Mahomad Ismail*. Verdict of the jury should be taken upon the evidence actually adduced at the trial, and not upon the Judge's view of the strength of the evidence.]
12. (1886) Ratanlal 311 (312), *Empress* v. *Bayaji*.
    (1877) 1 Cal L R 275 (277), *Empress* v. *Mukhun Kumar*. The voluntariness of a confession is for the jury.
    (1918) 1918 Cal 72 (72) : 19 Cri L Jour 959,

evidence of an accomplice.[13]

2. The question whether fraud or negligence is established by the evidence in the case,[14] or whether a thing was done with a particular intention[15] or knowledge.[16] In forming an opinion as to this the jury may draw such presumption about facts as S. 114 of the Evidence Act allows a Court to do.[17]
3. The question whether the accused has sufficient maturity of understanding to judge of the nature and consequences of his conduct.[18]
4. The question whether a provocation was so grave and sudden as to be sufficient to bring the case within the exceptions recognised by law.[19]
5. The question as to whether the accused intended to convey any imputation by his words and whether he believed or had reason to believe that the imputation would produce a particular effect.[20]
6. Whether particular fact or facts have been proved.[21]

In cases of circumstantial evidence, the jury must first decide whether the facts proved exclude the possibility that the deed was done by some other person and if they have doubts they must let the prisoner have the benefit of it.[22]

See also the undermentioned cases.[23]

Emperor v. *Kabili Katori.*
(1918) 1918 Cal 88 (91) : 45 Cal 557 : 19 Cri L Jour 315, *Amiruddin Ahmed* v. *Emperor.*
(1925) 1925 Cal 587 (589): 52 Cal 67: 26 Cri L Jour 782, *Emperor* v. *Panchkari Dutt.* Truth or falsity of confession is for the jury.
(1927) 1927 Cal 398 (400): 28 Cri L Jour 485, *Agimuddy* v. *Emperor.*
(1878) 1 Mad 394 (395), *Reg* v. *Ramasami Padayachi.*

13. (1933) 1933 Cal 509 (511) : 1933 Cri Cas 814: 34 Cri L Jour 841, *Chittya Ranjan Das* v. *Emperor.*
(1930) 1930 Pat 513 (515): 1930 Cri Cas 1009: 9 Pat 606 : 32 Cri L Jour 72, *Ramsarup Singh* v. *Emperor.* Approver.

14. (1895) 19 Bom 749 (756), *Empress* v. *Ramachandra Govind Harshe.*

15. (1898) 22 Bom 112 (132), *Empress* v. *Bal Gangadhar Tilak.*
(1900) 2 Bom L R 286 (296), *Empress* v. *Luxmi Narayan Joshi.*
(1865) 3 Suth W R Cr 58 (58), *Queen* v. *Chukkun.*
(1918) 1918 Cal 140 (141): 19 Cri L Jour 649, *Emperor* v. *Asimoddi.*

16. (1931) 1931 Cal 261 (262) : 1931 Cri Cas 293: 32 Cri L Jour 187 (S B), *Emperor* v. *Damullya Molla.*
(1925) 1925 Oudh 311 (313): 28 Oudh Cas 69 : 26 Cri L Jour 310, *Emperor* v. *Ali Raza.*

17. (1895) 19 Bom 749 (756), *Empress* v. *Ramachandra Govind Harshe.*
(1878) 1 Mad 394 (395), *Reg* v. *Ramasami Padayachi.*

18. (1869) Ratanlal 27 (27), *Reg* v. *Imam.*

19. (1896) 20 Bom 215 (226), *Empress* v. *Devji Govindji.*
(1895) Ratanlal 766 (768), *Empress* v. *Dadubhai.* Sufficiency of provocation.
(1868) 9 Suth W R Cr 72 (72), *Queen* v. *Gunesh Luskur.*
(1870) 13 Suth W R Cr 33 (33), *Queen* v. *Sohraie.*
(1885) 11 Cal 410 (412), *Netai Liskar* v. *Empress.*
[See also (1899) 1 Bom L R 784 (785), *Empress* v. *Babya.*]

20. (1879) Ratanlal 140 (140), *In re Pitambar.*

21. (1900) 4 Cal W N 576 (581), *Sadhu Sheikh* v. *Empress.*

22. (1917) 1917 Lah 3 (4, 8) : 18 Cri L Jour 482 (483, 484) : 1917 Pun Re Cr No. 7, *Emperor* v. *Browning.*

23. (1929) 1929 Cal 57 (61) : 56 Cal 150 : 30 Cri L Jour 435, *Rebati Mohan Chakrabarti* v. *Emperor.* Whether one witness corroborates another.
(1910) 11 Cri L Jour 254 (255): 33 Mad 514, *In re Aligiriswami Naicken.* It is the duty of the jury and not of the Judge to decide whether the approver has forfeited his pardon or not.
(1908) 6 Cri L Jour 359 (360) (Cal), *Emperor* v. *Kamar Ali.* The verdict of the jury after seeing the physical condition of the accused is to be preferred to the testimony of witnesses. The jury was competent to decide whether a person in physical condition was capable of taking part in a riot and could have had the courage to be at a place where a riot took place.
(1929) 1929 Cal 1 (7) : 30 Cri L Jour 494, *Kazi Bazlur Rahman* v. *Emperor.* It is for the jury to decide whether prisoner when he committed offence was incapable of distinguishing right from wrong.

Sec. 299 Notes 3—6

3. Meaning of words.

It is for the jury to decide the meaning and effect of words except the meaning of terms of law. Thus the effect of certain articles in a newspaper alleged to be seditious is for the jury. But the meaning of the word "disaffection" as used in S. 124-A, Penal Code, which is a term of law[1] as well as the legal effect and bearing of a document[2] is for the Judge to decide.

4. Voluntariness of confession.

It has been seen in the Notes to S. 298, *ante*, that it is for the Judge to decide all facts which it is necessary to prove in order to make other evidence admissible. A confession is inadmissible unless it has been made *voluntarily*. Consequently to the extent of coming to a conclusion as to the *admissibility* of a confession, it is for the Judge to decide whether it was made voluntarily. To the extent it bears on the *truth* or otherwise of the confession, the jury are however entitled to consider whether it was made voluntarily. The Judge cannot simply say "I have decided that the confession was voluntarily made. You must take this as settled and must decide only on the question of the *truth* of the confession."[1]

5. Charge for graver offence—Verdict for smaller offence.

A jury may find the accused guilty of a smaller offence than that with which he is charged.[1]

See also Section 301, *ante*.

6. Illustration (a) to the Section.

It is not in every case of murder that the Judge should point out to the jury the difference between murder and culpable homicide; where in a trial for murder, a verdict of culpable homicide not amounting to murder could not properly be come to, under any aspect of the case before the Court, the Judge is not called upon to explain the distinction between murder and culpable homicide not amounting to murder.[1]

(1905) 2 Cri L Jour 311 (313) (Cal), *Panchu Mondal* v. *Emperor*. Questions as to the identity of thumb impressions on two or more documents being of the same person.

(1915) 1915 Cal 667 (673) : 16 Cri L Jour 65 (67) : 42 Cal 856, *Sashi Rajbanshi* v. *Emperor*. Whether the pardon was forfeited.

(1903) 26 Mad 467 (468), *Guzzala Hanuman* v. *Emperor*. Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the jury.

Note 3.

1. (1898) 22 Bom 112 (132), *Empress* v. *Bal Gangadhar Tilak*.
   (1900) 2 Bom L R 286 (298), *Empress* v. *Laxman Narayan Joshi*.
   (1900) 2 Bom L R 304 (308), *Empress* v. *Vinayak Narayan Bhatye*.
   (1892) 19 Cal 35 (45), *Empress* v. *Jogendra Chunder Bose*.
2. (1865) 3 Suth W R Cr 69 (70), *Queen* v. *Setul Chunder Bagchee*.

Note 4.

1. (1934) 1934 Cal 853 (855, 856) : 1934 Cri Cas 1368 : 62 Cal 312 : 36 Cri L Jour 485, *Kasimuddeen* v. *Emperor*. Distinguishing 1929 Cal 726.
   (1909) 10 Cri L Jour 65 (66) : 2 Ind Cas 517 (Bom), *Emperor* v. *Kesari Dayal Kanji*.
   (1925) 1925 Cal 887 (888) : 26 Cri L Jour 606, *Sheikh Abdul* v. *Emperor*.
   (1935) 1935 Cal 308 (309) : 1935 Cri Cas 459 : 36 Cri L Jour 921, *Kishori Kishore Mishra* v. *Emperor*.

Note 5.

1. (1865) 3 Suth W R Cr 41 (41), *Queen* v. *Satoo Sheikh*.
   (1908) 8 Cri L Jour 143 (144) (Bom), *Emperor* v. *Chandra Krishna*.
   (1875) 23 Suth W R 61 (62), *Queen* v. *Lukhi Narain Agoovi*.
   (1910) 11 Cri L Jour 630 (630) : 13 Oudh Cas 295, *Shubrati* v. *Emperor*.

Note 6.

1. (1916) 1916 Low Bur 114 (115) : 17 Cri L Jour 49 (50) : 8 Low Bur Rul 306, *Nga Mya* v. *Emperor*.

300.* In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict. **Sec. 300**

Retirement to consider.

Except with the leave of the Court, no person other than a juror, shall speak to, or hold any communication with, any member of such jury.

Synopsis.

Other Topics.

Charge before verdict—Essential. See S. 297, Note 2.
Court — Directions by, during deliberation. See Note 2, Pts. 6 and 7.
Dispersal of jury before verdict. See Note 1, Pt. 1.
Enquiry as to acts of jurors—Statements of jurors. See Note 1, Pt. 4.
Fresh trial and fresh jury. See Note 2, Pts. 10 and 11.
Opinion expressed beforehand. See Note 2, Pts. 10 and 11.
Police—Presence of. See Note 2, Pts. 4 and 5.
Separation of jury before verdict. See Note 1, Pt. 2.
Verdict. See S. 301, Notes.

1. Retirement to consider verdict.

After the Judge has finished his charge, the jury may retire to the jury-room immediately. The Section does not contemplate that the jury should be allowed to disperse and then re-assemble in the jury-room to consider their verdict. Hence, where owing to the indisposition of the foreman of the jury the jurors were allowed to disperse for a few hours and then they returned to the Court and considered and delivered their verdict, it was held that the verdict was illegal.[1]

The jury must not separate until they have considered and delivered their verdict. They should all be in the retiring room together during the whole of the time between the moment of their retirement and the moment when their verdict is taken by the presiding Judge. Hence, where out of nine members who constituted the jury, five first came out of the jury room and sat in the Court but the remaining four stayed in the jury-room for half an hour more when they came and sat in the Court and the foreman delivered his verdict, *held* that the verdict was vitiated.[2]

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* **(Code of 1882—S. 300—Same.)**

(Code of 1872—S. 263, Para. 1.)

Cases tried by jury.

263. In cases tried by jury, the jury may retire to consider their verdict. It shall be the duty of an officer of the Court not to suffer any person to speak to, or hold any communication with, any member of such jury. * * * * * * *

(Code of 1861—S. 352.)

When and how long jury may retire for finding.

352. At the close of the trial, and after the Judge has summed up the evidence as hereinafter provided by S. 379 of this Act, the jury may retire to consider the finding, and it shall be the duty of an Officer of the Court not to suffer any person to speak to or hold any communication with any member of such jury. * * * *

Section 300—Note 1.

1. (1925) 1925 Pat 595 (596) : 26 Cri L Jour 861, *Sariman Ahir* v. *Emperor.*

2. (1930) 1930 Cal 446 (447) : 1930 Cri Cas 707 : 31 Cri L Jour 1090, *Kaseruddin* v. *Emperor.*

Sec. 300 Notes 1—2

In considering their verdict, the jury ought to be guided, on questions of law, by the directions of the presiding Judge. They are not entitled to consult a commentary on the law during their deliberation.[3]

When the verdict is attacked on the ground of anything that happened in the jury-room while the jurors were considering their verdict, it is not desirable to receive in evidence the statements of individual jurors in order to impeach the verdict.[4]

2. Prohibition of communication with non-jurors.

The second paragraph of the Section prohibits non-jurors from speaking to or holding any communication with the jurors without the leave of the Court before they have delivered their verdict. If it is proved that a non-juror communicated with a member of the jury contrary to this provision, it is sufficient to upset the verdict and it is not necessary to enquire into the nature of the communication held with the juror.[1] Hence, proper precautions must be taken by the Sessions Judge to see that no non-juror holds any communication with the jurors when they have retired to consider their verdict.[2] But where a juror addressed to a police officer a casual remark unconnected with the case and the police officer made no reply, it was held that the provisions of the Section were not infringed.[3] Similarly, the mere presence of a police officer in the jury-room does not vitiate the verdict unless it is shown that he spoke to or held any communication with any of the jurors.[4] But it is undesirable to post a police officer in the jury room or at any place from where he can hear the deliberations of the jury.[5]

The Section does not prohibit the Judge from giving fresh directions to the jury if the latter require such directions for correctly understanding the case. Fresh directions should however, be given in open Court and not in chambers.[6] In a Sessions trial by the High Court, the clerk of the Crown can be sent to the jury-room to enquire if the jury require further assistance from the Judge.[7]

The prohibition contained in this Section does not in terms apply to stages of the trial before the Judge *has finished his charge* to the jury. Hence, where during an adjournment of the case before the Judge's charge to the jury was finished, one of the jurors was seen conversing with a non-juror but it did not appear that the conversation related to the case, it was held that the trial and verdict were not vitiated.[8] But it is undesirable that jurors should have communication with non-

3. (1895) Ratanlal 736 (737), *Empress* v. *Bharmia.*
   (1904) 1 Cri L Jour 265 (267) (Bom), *Empress* v. *Bharmia.*
4. (1917) 1917 Cal 149 (153) : 18 Cri L Jour 311 (315): 44 Cal 723, *In re Bonomally Gupta.*
   (1913) 14 Cri L Jour 392 (395) : 40 Cal 693, *Hara Kumar Barman Roy* v. *Emperor.* Verdict attacked as arrived at by casting lots.

Note 2.

1. (1919) 1919 Cal 512 (513): 47 Cal 207 : 19 Cri L Jour 737, *Benimadhab Kundu* v. *Emperor.*
2. (1919) 1919 Cal 512 (514): 47 Cal 207 : 19 Cri L Jour 737, *Benimadhab Kundu* v. *Emperor.*
   (1925) 1925 Pat 595 (596) : 26 Cri L Jour 861, *Sariman Ahir* v. *Emperor.*
3. (1917) 1917 Cal 149 (151) : 18 Cri L Jour 311 (313) : 44 Cal 723, *In re Bonomally Gupta.*
4. (1917) 1917 Cal 149 (151) : 18 Cri L Jour 311 (313) : 44 Cal 723, *In re Bonomally Gupta.*
5. (1917) 1917 Cal 149 (151): 18 Cri L Jour 311 (314) : 44 Cal 723, *In re Bonomally Gupta.*
6. (1923) 1923 Cal 647 (648): 25 Cri L Jour 343, *Bilaschandra Banerjee* v. *Emperor.* But mere fact that a question was put by the jury to the Judge not in open Court but in chambers did not vitiate the trial and it was at best a mere irregularity.
7. (1917) 1917 Cal 149 (152) : 18 Cri Jour 311 (314) : 44 Cal 723, *In re Bonomally Gupta.*
8. (1919) 1919 Mad 222 (222) : 20 Cri L Jour 790, *Puli Subba Reddi, In re.*

jurors upon the subject of a pending trial.[9] Hence, where before the Judge had summed up his case, one of the jurors, in a room occupied by the clerks of pleaders in answer to questions put to him, said that in his opinion the accused was guilty of the charge, it was held that there should be a fresh trial before a fresh jury.[10] *See also* the undermentioned cases.[11] **Sec. 300 Note 2**

301.* When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority. **Sec. 301**

Delivery of verdict.

Synopsis.

Other Topics.

1. Delivery of verdict.

By "verdict" should be understood the collective opinion of the jury as a body, arrived at after mutual consultation and ascertained and announced by the foreman.[1] A recommendation made by the jurors in the verdict is, however, not a part of the verdict.[1a] In cases where an accused person is tried for various offences arising out of a single act or series of acts, the word "verdict" means the entire verdict on all the charges and is not limited to the verdict on a particular charge.[2]

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* **(Code of 1882—S. 301** and **Code of 1872—S. 263, Para 1**—Same as in 1898 Code.)

(Code of 1861—Nil.)

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9. (1917) 1917 Cal 149 (151): 18 Cri L Jour 311 (312): 44 Cal 723, *In re Bonomally Gupta.* But the fact that a juryman on his way to the Court house or to the waiting room is addressed by a stranger some remarks on the case to which he does not reply, cannot have the effect of invalidating the trial.
(1927) 1927 Cal 628 (629): 55 Cal 279: 28 Cri L Jour 783, *Bhuban Chandra Prodhan* v. *Emperor.*
10. (1921) 1921 Cal 631 (631): 22 Cri L Jour 510, *Emperor* v. *Nazar Ali Beg.*
11. (1929) 1929 Cal 57 (58): 56 Cal 150: 30 Cri L Jour 435, *Rebati Mohan Chakrabarti* v. *Emperor.* Where it appeared that the foreman had been talking with the Court inspector and the Judge on that ground discharged him and took another man present, empanelled him and proceeded with the trial—*Held* that the procedure was not objectionable.
(1929) 1929 Cal 343 (345): 56 Cal 1032: 31 Cri L Jour 366, *Abdur Rashid* v. *Emperor.* A jury having once been discharged should not be recalled to do duty as jurors in the same case as it is reasonable to suppose that after discharge those jurors might have mixed freely with the people and talked about the case with others.

Section 301—Note 1.

1. (1914) 1914 Mad 319 (321): 36 Mad 585 (589): 15 Cri L Jour 197, *Public Prosecutor* v. *Abdul Hameed.*
(1925) 1925 Oudh 746 (746): 26 Cri L Jour 1346, *Jagannath* v. *Emperor.*
1a (1934) 1934 Oudh 34 (35): 1934 Cri Cas 88, *Emperor* v. *Vidya Sagar.*
2. (1895) 22 Cal 377 (382), *Krishna Dhan Mandal* v. *Empress.*

Sec. 301 Notes 1—2

As said already, the verdict is the opinion of the jury *as a body*.[3] In case of disagreement, the individual opinions of the members of the jury should never be disclosed and the Judge commits an irregularity in recording the individual opinions of the jurors.[4]

The jury must return a verdict on all the charges on which an accused is tried (*see* S. 303, *infra*). Where there are several accused persons in a case, the jury must return a verdict as against each.[5] Where there are several charges, it would be a convenient course to follow to take the verdict of the jury upon each charge *separately*; this would obviate the difficulty in ascertaining what their verdict is on the various charges[6]. A verdict that the jury gave the accused the benefit of doubt is not a verdict according to law, although such a verdict is often returned. A verdict of "not guilty" covers every condition from mere hesitating doubt to conviction of innocence.[7] Mere repugnancy in a verdict is not sufficient to quash a conviction based on such verdict.[8]

Where, after delivering the verdict the foreman attempted to add something and the Judge stopped him from doing so, it was held that it was not proper to stop the jury at such a stage because, it may so happen that before the verdict is recorded the foreman of the jury may make some observations in respect of that verdict which may show that the jury have not properly understood the case in which case it would be necessary to re-charge the jury so as to lay the case properly before them.[9] *See also* Notes under Sections 302 and 303.

There is no particular form in which the jury are to deliver their verdict.[9a] The mere fact that the jury add to their verdict their finding on the facts on which the verdict is based does not vitiate the verdict.[9b]

As to interpretation of verdicts, *see* the undermentioned cases.[10]

A verdict of the jury after they have been discharged is not legal.[11]

2. Verdict as to offence not specifically charged.

Sections 237 and 238, *ante*, lay down the circumstances under which an accused person who is charged with one offence can be convicted of a different

3. (1901) 24 Mad 523 (537), *Emperor* v. *Tirumal.*
4. (1914) 1914 Mad 319 : 15 Cri L Jour 197 : 36 Mad 585 (589), *Public Prosecutor* v. *Abdul Hameed.*
   (1925) 1925 Oudh 746 (746) : 26 Cri L Jour 1346, *Jagannath* v. *Emperor.*
5. (1912) 13 Cri L Jour 715 (715) : 16 Ind Cas 523 (Cal), *Jamiruddi Biswas* v. *Emperor.*
6. (1924) 1924 Cal 47 (48) : 50 Cal 658 : 24 Cri L Jour 838, *Eran Khan* v. *Emperor.*
7. (1933) 1933 Cal 404 (405) : 1933 Cri Cas 582 : 34 Cri L Jour 608, *Emperor* v. *Panchonan Sarkar.*
8. (1924) 1924 Cal 1031 (1032) : 52 Cal 112 : 26 Cri L Jour 11, *Umadasi Dasi* v. *Emperor.*
   (1914) 1914 Cal 456 (469) : 41 Cal 350 : 15 Cri L Jour 385, *Ramesh Chandra Banerjee* v. *Emperor.*
   (1914) 1914 Cal 886 (887) : 41 Cal 754 : 15 Cri L Jour 402, *Manindra Chandra* v. *Emperor.*
9. (1902) 30 Cal 485 (487), *Narayan Changa* v. *Emperor.*
9a (1935) 1935 Cal 31 (31, 32) : 1935 Cri Cas 196 : 36 Cri L Jour 480, *Kasimuddin* v. *Emperor.*
9b (1935) 1935 Cal 31 (31, 32) : 1935 Cri Cas 196 : 36 Cri L Jour 480, *Kasimuddin* v. *Emperor.*
10. (1906) 10 Cal W N 37*n* (38*n*) (P C), *Whener* v. *The King.* Where jury found that accused had caused death but that he was not responsible for his actions owing to influence of liquor : *Held* this did not amount to verdict of guilty.
   (1908) 7 Cri L Jour 362 (365) (Cal), *Emperor* v. *Khudiram Dass.*
   (1929) 1929 Sind 145 (145) : 1929 Cri Cas 313 : 23 Sind L R 397 : 30 Cri L Jour 877, *Mir Ahmed Shah* v. *Emperor.*
   (1932) 1932 P C 275 (278), *Paul Pronek* v. *Winnipeg Rly. Co.* The language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly.
11. (1934) 1934 P C 227 (227) : 1934 Cri Cas 1134 (P C), *Warren Ducane Smith* v. *The King.*

offence though not specifically charged with it. The principle of these Sections applies also to the verdict of a jury and the jury can return a verdict of guilty in respect of an offence different from that specifically charged against the accused provided the circumstances of the case fall within the purview of these Sections. Thus, where on a charge of murder, the jury finds that the accused was deprived of his self-control by grave and sudden provocation, they can return a verdict of culpable homicide not amounting to murder. (See Section 238).[1] Similarly, on a charge of rape, the jury can return a verdict of attempt to commit rape (S 238).[2] On a charge of dacoity, the jury can return a verdict of theft (Section 238)[3] or of abetment of dacoity or robbery (S. 237).[4] On a charge under Section 149 read with Section 325, I. P. C., it is open to the jury, if it disbelieves the evidence as to the unlawful assembly, to convict the accused under S. 325 alone though there was no separate charge under that Section.[5] *See also* the undermentioned cases.[5a]

Where the jury returned a verdict of not guilty on the charges framed, but by the same verdict found the accused guilty of an offence triable with assessors only, and the Judge convicted the accused on such finding, it was held that in the absence of any miscarriage of justice the conviction will not be set aside.[6]

3. Special Verdict.

A special verdict is one where the jury merely state certain *facts* as proved and leave it to the Judge to draw the legal inference from them.[1] Such a verdict is recognised as a proper verdict under the English Law.[2] But there is a conflict of decisions as to whether a special verdict would be a legal verdict under the Code. On the one hand, it has been held by the Bombay High Court, that a special verdict would be a legal verdict under the Code.[3] The High Court of Calcutta is inclined to the same view.[4] On the other hand, the Madras High Court has held that such a verdict is not a legal verdict.[5]

In dealing with special verdicts, a Judge is confined to the facts positively

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Note 2.

1. (1896) 20 Bom 215 (217), *Empress* v. *Devji.*
2. (1910) 11 Cri L Jour 630 (630): 13 Oudh Cas 295, *Shabrati* v. *Emperor.*
3. (1908) 8 Cri L Jour 143 (144) (Bom), *Emperor* v. *Chandra Krishna.*
4. (1915) 1915 L B 39 (45): 8 Low Bur R 274: 16 Cri L Jour 676 (680), *S. P. Ghosh* v. *Emperor.*
5. (1880) 5 Cal 871 (873), *Govt. of Bengal* v. *Mahaddi.*
   [But see (1915) 1915 Cal 292 (294): 15 Cri L Jour 155 (158): 41 Cal 662, *Emperor* v. *Maden Mondol.*]

5a (1932) 1932 Cal 297 (298): 1932 Cri Cas 266: 59 Cal 1040: 33 Cri L Jour 546, *Durlau Namasudra* v. *Emperor.* Persons charged under Sections 302 and 201, Penal Code—Jury while acquitting them under Section 302 can find them guilty of minor charge under Section 201.

(1914) 1914 Mad 425 (428): 13 Cri L Jour 739 (741): 37 Mad 236, *In re Adabala Muthiyalu.* Charge under Section 397—Verdict of guilty under Section 326.

(1875) 23 Suth W R Cr 61 (62), *Queen* v. *Lukhinarain Agoori.* Charge under Sections 304, 325, 323—Verdict of guilty under Section 335.

(1865) 3 Suth W R Cr 41 (41), *Queen* v. *Satoo Sheikh.* Verdict of guilty for a minor offence when offence charged is a major offence.

6. (1928) 1928 Mad 275 (275): 29 Cri L Jour 351, *Arumuga Kone* v. *Emperor.*

Note 3.

1. (1895) 19 Bom 735 (736), *Queen* v. *Madhav Rao.* If in a charge of rape, the jury returned a verdict that the accused did the act, but with the consent of the woman; it is not necessary to ask them to return a verdict of guilty or not guilty.

(1896) 20 Bom 215 (217), *Empress* v. *Derji Govindji.*

2. (1912) 13 Cri L Jour 586 (587): 15 Ind Cas 1002 (Mad), *Arunachala Thevan* v. *Emperor.*
3. (1891) 15 Bom 452 (465), *Empress* v. *Dada Ana.*

(1895) 19 Bom 735 (736), *Empress* v. *Madhav Rao.*

(1896) 20 Bom 215 (217), *Empress* v. *Derji Govindji.*

4. (1924) 1924 Cal 257 (284): 25 Cri L Jour 817, *Emperor* v. *Barendra Kumar Ghose.*
5. (1912) 13 Cri L Jour 586 (587, 588): 15 Ind Cas 1002 (Mad), *Arunachala Thevan*

Sec. 301 Notes 3—4

stated in the verdict and cannot himself supply by intendment or implication any defect in the statement.[6] But if the special verdict is ambiguous or incomplete it is open to him to question the jury under Section 303, *infra*, and have their verdict supplemented.[7]

4. Verdict arrived at by casting lots.

As seen in Note 1, *ante*, the verdict of a jury is the collective opinion of the jury as a body arrived at after mutual consultation and ascertained and announced by the foreman. Hence, a verdict arrived at by casting lots among the jurors would not be legal. But the sworn statement of a juror is not admissible for the purpose of showing that a verdict was arrived at by casting lots.[1]

Sec. 302

302.* If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver the verdict, although they are not unanimous.

Procedure where jury differ.

Synopsis.

Other Topics.

Absurd verdict. See Note 1, F-N. (8).
Ambiguity in verdict. See Note 1, Pt. 6.
Further directions. See Note 1, Pts. 7 and 8.
Further explanation of law. See Note 1, Pt. 4.
No reconsideration after ascertaining majority and views. See Note 1, F-N. (3).
No reconsideration after verdict. See Note 1, Pt. 3.
Unanimous verdict. See Note 1, Pt. 5.

1. Scope of the Section.

This Section empowers the Judge, when the jury are not unanimous in their verdict, to require them to retire for further consideration.[1] Hence, when the jury differ in their opinion, the proper course for the Judge is to direct them under this Section to reconsider their verdict.[2] But the Section is intended to be applied as soon as the Judge ascertains that there is a difference of opinion among the jurors and before the verdict is delivered. The Section does not apply to

* (Code of 1882—S. 302 and Code of 1872—S. 263, Para. 3—Same as in 1898 Code.)

(Code of 1861—S. 352.)

352. * * * * *

When and how long jury may retire for finding.

In any case in which a jury shall be prepared to deliver their finding, the Judge shall ask the jury whether they are unanimous, and if the foreman or one of the jury shall declare that they are not unanimous, the Judge may require such jury to retire for further consideration. If, after such a period as the Judge shall consider reasonable, the foreman or any one of the jury shall declare that they are not unanimous, the jury may deliver their verdict.

v. *Emperor*.

6. (1894) Ratanlal 710 (714), *Empress* v. *Abdul Razak*.
7. (1894) Ratanlal 710 (713), *Empress* v. *Abdul Razak*.
(1876) 14 Suth W R Cr 59 (62), *Queen* v. *Hurry Prosad Gangooly*.
(1906) 3 Cri L Jour 1 (3): 3 Low Bur Rul 75, *Hla Gyi* v. *Emperor*.

Note 4.

1. (1913) 14 Cri L Jour 392 (395): 40 Cal 693, *Hara Kumar Barman Roy* v. *Emperor*.

Section 302—Note 1.

1. (1898) Ratanlal 982 (983), *Empress* v. *Chunilal Vithal*.
2. (1882) 8 Cal 739 (754), *In re Jhubboo Mahton*.

cases where the verdict has actually been delivered.[3] When directing the jury to re-consider their verdict under this Section, it is open to the Judge to give them fresh directions on matters of law.[4] **Sec. 302 Note 1**

If the jury are unanimous, their verdict must be received unless it is contrary to law.[5] Hence, where the verdict is ambiguous, the proper procedure is to question the jury under Section 303, *infra*, and clear up the matter and not to direct the jury to re-consider the verdict.[6] But where the verdict is not in accordance with the law[7] or where from the observations of the foreman of the jury it is clear that the jury have not understood the case,[8] the Judge can give them fresh directions and ask them to retire for further consideration of the verdict.

303.* (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is. **Sec. 303**

Verdict to be given on each charge.

Judge may question jury.

(2) Such questions and the answers to them shall be recorded.

Questions and answers to be recorded.

Synopsis.

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* **(Code of 1882—S. 303—Same.)**

(Code of 1872—S. 263, Para. 2)

263. * * * * * * * * * *

Verdict to be given on each charge. Judge may question jury.

The jury shall return a verdict on all the charges on which the accused is tried, and the Court may ask them such questions as are necessary to ascertain what their verdict is. Such questions and the answers to them shall be recorded.

(Code of 1861—Nil.)

(1895) Ratanlal 736 (737), *Empress* v. *Bharmia*.

3. (1914) 1914 L B 244 (245) : 15 Cri L Jour 678 : 7 Low Bur R 140, *Kya Nyun* v. *Emperor*. Section does not prevent ascertainment of actual majority.

(1884) 10 Cal 140 (144), *Hurri Churn* v. *Empress*. After asking what is the actual majority Judge cannot proceed under Section.

4. (1895) Ratanlal 736 (737), *Empress* v. *Bharmia*.

(1904) 1 Cri L Jour 265 (268) (Bom), *Empress* v. *Bharmia*.

5. (1880) 5 Cal 871 (873), *The Government of Bengal* v. *Mahaddi*.

(1928) 1928 Cal 228 (228) : 29 Cri L Jour 228, *Superintendent & Legal Remembrancer* v. *Juhay Sheikh*.

(1906) 3 Cri L Jour 1 (3, 4) : 3 Low Bur Rul 75, *Hla Gyi* v. *Emperor*.

6. (1906) 3 Cri L Jour 1 (3) : 3 Low Bur Rul 75, *Hla Gyi* v. *Emperor*.

7. (1864) 1 Suth W R Cri 50 (51), *Queen* v. *Uckoor Ghose*. Jury not entitled to pronounce on the law or to give their own definition of "murder."

(1880) 5 Cal 871 (873, 874), *Government of Bengal* v. *Mahaddi*.

8. (1903) 30 Cal 485 (487, 488), *Narayan Changa* v. *Emperor*.

(1894) 2 Weir 514 (514), *Veerappan, In re*.

(1930) 1930 Cal 320 (320) : 1930 Cri Cas 401 : 57 Cal 61 : 31 Cri L Jour 761, *Hamid Ali Haldar* v. *Emperor*. If the verdict is absurd, the Judge can ask them to consider it—Not bound to accept it either as a verdict of guilty or not guilty.

Sec. 303 Notes 1—3

Other Topics.

Effect of no finding on some charges. See Note 1, Pt. 2.
Object of the Section. See Note 3, Pt. 1.
Questions as to nature in a finding of provocation. See Note 3, Pt. 6.
Question not for learning the nature of the majority. See Note 3, F-N (11).
Question only when the verdict is ambiguous. See Note 3, Pt. 3.
Reasons for the verdict. See Note 3, Pts. 12 and 13.

1. Verdict to be on all the charges.

Where there are several charges against an accused and evidence has been heard on all the charges the jury should submit a verdict on *all* the charges.[1] A failure to give a verdict on one of the charges framed does not, however, amount to an acquittal on that charge, and the accused can be ordered to be re-tried again on the charge on which the verdict was silent.[2]

2. Form of verdict.

The law does not prescribe any special form in which the jury are to return their verdict. They are at liberty to deliver it in any form they like and if that finding is not exhaustive as to the facts in issue which go to make up the charge, it is the duty of the Judge to put such questions as shall elicit a complete finding.[1] In a trial for an offence under Section 408, Penal Code in respect of a gross sum said to have been misappropriated within a year and composed of more than three items, the proper form in which the verdict should be given is a verdict in respect of an offence under Section 408 and not in respect of each of the items alleged to be misappropriated.[2] *See also* the following case.[3]

3. "May ask them such questions as are necessary to ascertain what their verdict is."

A Judge is empowered to put questions to the jury where they are necessary to ascertain *what their verdict is.*[1] It is only in cases where the jury have failed to return a complete verdict *on all the charges* or heads of charge[2] or the verdict returned is *ambiguous* and not clear[3] that the Judge may ask questions in order to find out what exactly the verdict is. Thus where the verdict is not exhaustive as to the facts in issue which go to make up the charge or charges, it is competent

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Section 303—Note 1.

1. (1886) Ratanlal 286 (287), *Empress* v. *Lingo.*
   (1865) 3 Suth W R Cri 29 (31), *Queen* v. *Sheikh Gholam Mastuffa.*
   (1880) 5 Cal 871 (873), *Govt. of Bengal* v. *Mahaddi.*
   (1928) 1928 Mad 207 (208) : 28 Cri L Jour 1007, *In re Virumandi Thevan.*
   (1926) 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ram Prasad* v. *Emperor.*
   (1895) Ratanlal 746 (747), *Empress* v. *Berkia Markia.*
2. (1924) 1924 Cal 809 (811) : 25 Cri L Jour 1048, *Emperor* v. *Usman Surdar.*

Note 2.

1. (1870) 14 Suth W R Cri 59 (62), *Queen* v. *Hari Prasad Gangooly.*
   (1906) 3 Cri L Jour 1 (3) : 3 Low Bur R 75, *Hla Gyi* v. *Emperor.*
2. (1930) 1930 Cal 717 (719) : 1930 Cri Cas 1117 : 32 Cri L Jour 321, *Rahim Bux Sarkar* v. *Emperor.*
3. (1864) 1 Suth W R Cri Cir 2 (2).

Note 3.

1. (1905) 2 Cri L Jour 259 (264) : 32 Cal 759, *Emperor* v. *Abdul Hamid.*
   (1931) 1931 Cal 636 (636) : 1931 Cri Cas 836 : 33 Cri L Jour 29, *Emperor* v. *Karim Dai.*
   (1874) 21 Suth W R Cri 1 (2), *Queen* v. *Sustiram Mandal.*
   (1904) 1 Cri L Jour 265 (268) (Bom), *Empress* v. *Bharmia.*
   (1904) 1 Cri L Jour 331 (332) : 28 Bom 412, *Emperor* v. *Kondiba Dhondiba.*
   (1928) 1928 Pat 203 (205) : 7 Pat 55 : 29 Cri L Jour 466, *Ramjay Ahir* v. *Emperor.*
   (1883) 9 Cal 53 (61) : *In re Dhunum Kazee.*
2. (1886) Ratanlal 289 (290), *Empress* v. *Sida.*
   (1924) 1924 Cal 47 (47) : 50 Cal 658 : 24 Cri L Jour 838, *Eran Khan* v. *Emperor.* Incomplete verdict.
   (1870) 14 Suth W R Cri 59 (62), *Queen* v. *Hari Prasad Gangooly*
3. (1894) 21 Cal 955 (973), *Wafadar Khan* v.

Sec. 303 Note 3

to the Judge to ask questions so as to elicit a complete finding.[4] Similarly where the jury return a verdict of guilty of an offence under Section 304, Penal Code, the Judge can ask questions for the purpose of finding out under which part of the Section they find the accused guilty.[5] So also, where, in a charge of murder the verdict was "guilty of murder under grave and sudden provocation" the Judge can ask questions under this Section for the purpose of ascertaining if the provocation was sufficient to destroy self-control.[6] Likewise where, in a charge under Section 326, Penal Code, the jury returned a verdict of "guilty but not voluntarily" the Judge can ask the jury to explain their verdict inasmuch as voluntariness of the act is the gist of the offence under that Section.[7] Where the jury return a verdict of not guilty of culpable homicide, it is the duty of the Sessions Judge to require the jury to find expressly whether or not any minor offence had been committed.[8]

On the other hand, where the verdict is clear, complete and unambiguous, the Judge is bound to accept the same,[9] or, if he disagrees with it, make a reference to the High Court under Section 307, *infra*.[10] He has no power to ask questions of the jury.[11] Thus he has no power to ask questions of the jury as

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Empress. Jury leaving it uncertain what the common object of unlawful assembly was.
(1870) 14 Suth W R Cr 59 (62), *Queen* v. *Hari Prasad Gangooly.*
(1931) 1931 Cal 636 (636) : 1931 Cri Cas 836: 33 Cri L Jour 29, *Emperor* v. *Karim Dai.*
(1904) 1 Cri L Jour 331 (332) : 28 Bom 412, *Emperor* v. *Kondiba Dhondiba.*
(1926) 1926 Cal 895 (896) : 27 Cri L Jour 926, *Emperor* v. *G. C. Wilson.*
(1903) 7 Cal W N 135 (137), *Emperor* v. *Chidghan Gossain.*
(1925) 1925 Cal 260 (262) : 26 Cri L Jour 532, *Khirode Kumar Mookerjee* v. *Emperor.*
(1905) 2 Cri L Jour 259 (264) : 32 Cal 759, *Emperor* v. *Abdul Hamid.*
(1896) 20 Bom 215 (217), *Empress* v. *Devji Govindji.*
(1894) 21 Cal 955 (973), *Wafadar Khan* v. *Empress.*
(1931) 1931 Mad 775 (776) : 1931 Cri Cas 1031 : 55 Mad 256 : 32 Cri L Jour 1276, *Sundaram Iyer* v. *Emperor.*

4. (1870) 14 Suth W R Cr 59 (62), *Queen* v. *Harry Prasad Gangooly.*
5. (1895) 19 Bom 741 (743), *Empress* v. *Rego Montopoulo.*
(1934) 1934 Cal 173 (174) : 1934 Cri Cas 295 : 61 Cal 256 : 35 Cri L Jour 496 (SB), *Sadek Mandal* v. *Emperor.*
(1905) 9 Cal W N 222*n* (222*n*), *Amanatulla Mandal* v. *Emperor.*
(1871) 15 Suth W R Cr 17 (18), *Queen* v. *Kaii Churn Dass.*
(1865) 2 Suth W R Cr L 11 (11).
(1869) 12 Suth W R Cr 35 (35, 36), *Queen* v. *Amir Khan.* Otherwise it will be assumed that jury had found that the lesser form of offence had been committed.
(1890) Ratanlal 530 (530), *Empress* v. *Ladkya.*
(1927) 1927 Rang 68 (70) : 4 Rang 488 : 28 Cri L Jour 213 (F B), *Emperor* v. *Nga Tin Gyi.*
6. (1896) 20 Bom 215 (217), *Empress* v. *Devji Govindji.*
7. (1908) 7 Cri L Jour 362 (365) (Cal), *Emperor* v. *Khudiram Dass.*
8. (1900) 2 Bom L R 334 (334), *Empress* v. *Pandukal Patil.*
9. (1927) 1927 Rang 68 (70) : 4 Rang 488 : 28 Cri L Jour 213 (F B), *Emperor* v. *Nga Tin Gyi.*
(1883) 9 Cal 53 (61), *In re Dhunum Kazee.*
(1907) 6 Cri L Jour 373 (374) : 30 Mad 469, *In re Seranadu.*
10. (1914) 1914 Low Bur 244 (245) : 7 L B R 140 : 15 Cri L Jour 678, *Kya Nyun* v. *Emperor.*
(1934) 1934 Cal 173 (174) : 1934 Cri Cas 295 : 61 Cal 256 : 35 Cri L Jour 496, *Sadek Mandal* v. *Emperor.*
(1931) 1931 Mad 775 (776) : 1931 Cri Cas 1031 : 55 Mad 256 : 32 Cri L Jour 1276, *Sundaram Aiyer* v. *Emperor.*
11. (1920) 1920 Cal 406 (407) : 21 Cri L Jour 829, *Edon Karikar* v. *Emperor.*
(1906) 3 Cri L Jour 371 (372) : 29 Mad 91, *Emperor* v. *Chellan.*
(1889) Ratanlal 442 (448), *Empress* v. *Desai Daji.*
(1905) 2 Cal L Jour 75*n* (75*n*), *Emperor* v. *Aun Parui.*
(1891) 15 Bom 452 (466), *Empress* v. *Dada Ana.*
(1905) 2 Cri L Jour 357 (358) (All), *Emperor* v. *Chirkua.*
(1923) 1923 Cal 647 (649) : 25 Cri L Jour 343. *Bilaschandra Banerjee* v. *Emperor.*
(1928) 1928 Cal 228 (228) : 29 Cri L Jour 228, *Superintendent and Legal Re-*

Sec. 303 Notes 3—5

to their *reasons* for the verdict.[12] As to whether for the purpose of making a reference under Section 307, the Judge can question the jury as to their reasons for the verdict, *see* Section 307, Note 13.

The mere fact that the jury were unable to give reasons for their verdict cannot be held to show that they had no adequate reasons for their verdict.[13]

4. Questions and answers to be recorded.

A Judge who does not record the questions put to the jury and their answers thereto but gives only a substance of the result cannot be deemed to have complied with the direction of law under this Section.[1] The provisions of this and the next Section imply that the jury are cognizant of the record as made by the Judge of the questions put to them and answers given by them. It is extremely desirable that such record should be immediately read over to the jury and this should always be done.[2] The omission to record the verdict of the jury in the terms prescribed by the Code is not however such an irregularity as requires the trial to be quashed and new one ordered.[3]

5. Re-consideration of the verdict.

Where the jury have delivered a clear and legal verdict, the Judge *cannot ask them to re-consider their verdict* ; if he disagrees with the verdict he should act under Section 307, *infra*.[1] Thus where in a case of robbery the jury disbelieving the evidence as to the use of force gave a verdict of guilty of theft only it was held that such a finding was not contrary to law and that the Judge

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membrancer v. *Jahay Sheikh.*
(1884) 10 Cal 140 (144), *Harry Charn Chuckerbutty* v. *Empress.* If the jury are not unanimous, the judge should not make enquiries to learn the nature of the majority and its opinion.
(1930) 1930 Pat 208 (209) : 31 Cri L Jour 54, *Emperor* v. *Bhukhan Dubey.* Clear verdict giving benefit of doubt—Judge cannot question as to nature of doubt.

12. (1928) 1928 Pat 203 (205) : 7 Pat 55 : 29 Cri L Jour 466, *Ramjag Ahir* v. *Emperor.*
(1931) 1931 Mad 775 (776) : 1931 Cri Cas 1031 : 55 Mad 256 : 32 Cri L Jour 1276, *Sundaram Aiyer* v. *Emperor.*
(1930) 1930 Cal 443 (444) : 1930 Cri Cas 751 : 31 Cri L Jour 1150, *Derajtullah Sheikh* v. *Emperor.*
(1904) 1 Cri L Jour 331 (332) : 28 Bom 412, *Emperor* v. *Kondiba Dhondiba.*
(1910) 11 Cri L Jour 557 (557) : 8 Ind Cas 52 (Cal), *Asfar Sheikh* v. *Emperor.*
(1931) 1931 Cal 636 (656) : 1931 Cri Cas 836 : 33 Cri L Jour 29, *Karim Dai* v. *Emperor.*
(1912) 13 Cri L Jour 586 (588) : 15 Ind Cas 1002 (Mad), *Arunachalla Thevan* v. *Emperor.*
(1920) 1920 Mad 170 (170, 171) : 43 Mad 744 : 21 Cri L Jour 466, *In re, Subbiah Thevan.*
(1920) 1920 Cal 406 (407) : 21 Cri L Jour 829, *Edon Karikar* v. *Emperor.*
[But see (1904) 1 Cri L Jour 265 (268) (Bom), *Empress* v. *Bharmia.*
(1895) Ratanlal 736 (737), *Empress* v. *Bharmia.*
(1912) 13 Cri L Jour 285 (285) : 14 Ind Cas 669 (Mad), *In re Rama Naicker.*
(1906) 3 Cri L Jour 371 (372) : 29 Mad 91, *Emperor* v. *Chellan.* The jury may give reasons if they like.
(1923) 1923 Pat 474 (474) : 26 Cri L Jour 856, *Emperor* v. *Ali Hyder.*
(1873) 20 Suth W R Cr 50 (50), *Queen* v. *Meajan Sheikh.*]

13. (1925) 1925 Cal 525 (529, 530) : 26 Cri L Jour 806, *Emperor* v. *Nishi Kanta Banikya.*

Note 4.

1. (1882) 8 Cal 739 (754), *In re, Jhubboo Mahton.*
(1911) 12 Cri L Jour 140 (141) : 9 Ind Cas 788 (Mad), *Palavesa Thevan* v. *Emperor.*
(1926) 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ramprasad* v. *Emperor.*
2. (1931) 1931 Cal 345 (348) : 1931 Cri Cas 409 : 58 Cal 1138 : 32 Cri L Jour 598, *Ifatulla* v. *Emperor.*
3. (1871) 15 Suth W R Cr 11 (14), *In re Sheikh Tenoo.*

Note 5.

1. (1914) 1914 Low Bur 244 (245) : 7 Low Bur Rul 140 : 15 Cri L Jour 678, *Kya Nyun* v. *Emperor.*
(1914) 1914 Mad 319 (322) : 36 Mad 585 : 15 Cri L Jour 197, *Public Prosecutor* v. *Abdul Hamid.*
(1931) 1931 Mad 775 (776) : 1931 Cri Cas

could not direct a reconsideration of the verdict.[2] Similarly where the jury returned a verdict of guilty under Section 325, Penal Code, although it was not the subject of a separate charge but was entered in a charge coupled with Section 149 of that Code, it was held that the verdict was according to law and that the Judge could not direct reconsideration of the verdict.[3] **Sec. 303 Note 5**

But where there is no *legal verdict* at all[4] or where the verdict is silent on a particular part of the case, as where the foreman replies that they have not considered a particular part of the case as to which the Judge wanted their opinion,[5] they can be sent back to reconsider the verdict. In the case of an obviously and admittedly inconsistent verdict, the Judge can make a further charge to the jury instead of referring the case to the High Court under Section 307, *infra*.[5a] So also, where in a trial for murder the jury at first stated that their unanimous verdict was "guilty of culpable homicide not amounting to murder" and the Judge in order to ascertain which degree of the offence the jury intended, asked them questions and from their answers found that they were in doubt as to what they meant and sent them back to reconsider their verdict, it was held that until the jury had intimated under which part of Section 304, Penal Code, their verdict fell, there was no complete verdict capable of being accepted and recorded, that their subsequent answers showed that they had come to no unanimous verdict and that it was the duty of the Judge to send them back for further consideration of their verdict.[6]

See also the undermentioned cases.[7]

304.* When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended. **Sec. 304**

Amending verdict.

Synopsis.

	Note No.		Note No.
Grounds for amendment.	**1**	**Final verdict to stand.**	**3**
Time for amendment.	**2**		

Other Topics.

Amendment when refused. See Note 2, Pt. 2
Scope of the Section—Where there is no mistake or accident. See Note 1, Pts. 1 to 3.
Second verdict. See Note 1, Pt. 6.

* **(Code of 1882—S. 304**—Same.)

(Codes of 1872 and 1861—Nil.)

1031 : 55 Mad 256 : 32 Cri L Jour 1276, *Sundaram Aiyer* v. *Emperor*.
(1925) 1925 Cal 260 (262) : 26 Cri L Jour 532, *Khirode Kumar Mookerjee* v. *Emperor*.
(1935) 1935 All 1020 (1022) : 36 Cri L J 1377 : 1935 Cri Cas 1254, *Dori* v. *Emperor*.

2. (1864) 1 Suth W R Cr Letters 13 (13).
(1865) 2 Suth W R Cr 13 (13), *Queen* v. *Sakhaut Sheikh*.

3. (1880) 6 Cal L R 349 (351), *Empress* v. *Mahaddi*.

4. (1864) 1 Suth W R Cr 50 (51), *Queen* v. *Uckroo Ghose*.

5. (1927) 1927 All 721 (723) : 50 All 365 : 28 Cri L Jour 950, *Sur Nath Bhaduri* v. *Emperor*.

5a (1933) 1933 Cal 640 (640, 641) : 1933 Cri Cas 1053 : 60 Cal 729 : 34 Cri L Jour 1084, *Rafat Sheikh* v. *Emperor*.

6. (1927) 1927 Rang 68 (70) : 4 Rang 488 : 28 Cri L Jour 213, *Emperor* v. *Nga Tin Gyi*.

7. (1894) 2 Weir 514 (514), *In re, Veerappan*.
(1886) 2 Weir 497 (498), *In re, Dorasawmy Aiya Tevan*.
(1876) 25 Suth W R Cr 36 (36), *Queen* v. *Gokool Kahar*.

Sec. 304 Note 1

1. Grounds for amendment.

A verdict could be amended by the jury only where by *accident* or *mistake* a wrong verdict is delivered.[1a] The Section contemplates cases where the verdict delivered is not in accordance with what was really intended *to be delivered* by the jury. Where there is no mistake or accident in the delivery of the verdict but the verdict is erroneous by reason of the jury having misunderstood the law, it can be corrected only under Section 307, *infra*, by a reference to the High Court.[1] Similarly where the jury delivered a unanimous verdict of not guilty of murder but guilty of culpable homicide not amounting to murder and the Judge asked them under what part of the Section 304, Penal Code, they found the accused guilty, the jury cannot review their former verdict or amend it unless by mistake or accident a wrong verdict has been delivered.[2] So also where the jury delivered a unanimous verdict of not guilty but in answer to some questions by the Judge they said that they had been misled by the notes of their foreman and wanted to reconsider their verdict, it was held that the verdict could not be said to have been delivered by accident or mistake and could not be amended under this Section.[3]

But where there has been no legal verdict at all, as where the jury gave a verdict to the effect "we have no doubt that the accused killed the deceased, we think that the deceased gave no provocation, but we do not think it murder, because the prisoner had no object in killing," the jury could be asked to re-consider their verdict.[4] It has also been held that the Judge will not be acting wrongly in asking the jury to re-consider their verdict where it is absurd or confused and not clear and definite.[5]

All the evidence on both sides should be concluded before the case can be submitted to the jury. There is no power in the Judge to present a case to the jury subject to any conditions and once they deliver the verdict they cannot re-consider the same except under this Section. Thus where a Judge presented a case to the jury before the defence evidence was heard and they gave a verdict of guilty, and then further defence evidence was taken and the jury submitted a fresh verdict, it was held that the second verdict was a nullity and the judgment thereon was without jurisdiction.[6]

Even after formally delivering the verdict the jury ought to be allowed if they wish to do so, to say immediately after their verdict what they had in their mind in order that the delivery of the verdict may be complete.[7]

Statements of individual jurors afterwards obtained to support an applica-

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Section 304—Note 1.

1a (1900) 4 Cal W N 683 (683), *Queen-Empress* v. *Mojahur Rahman.*
(1895) 19 Bom 735 (736), *Empress* v. *Madhav Rao.*
(1896) 20 Bom 215 (217), *Empress* v. *Devji Govindji.*

1. (1904) 1 Cri L Jour 331 (332): 28 Bom 412, *Emperor* v. *Kondiba Dhondiba.*
(1931) 1931 Mad 775 (776): 1931 Cri Cas 1031: 55 Mad 256: 32 Cri L Jour 1276, *Sundaram Aiyer* v. *Emperor.*

2. (1898) Ratanlal 982 (983), *Empress* v. *Chunilal Vithal.*

3. (1912) 13 Cri L Jour 285 (285): 14 Ind Cas 669 (Mad), *In re Rama Naiker.*

4. (1864) 1 Suth W R Cr 50 (50, 51), *Queen* v. *Uckoor Ghose.*

5. (1930) 1930 Cal 320 (320): 1930 Cri Cas 401: 57 Cal 61: 31 Cri L Jour 761, *Hamid Ali Haidar* v. *Emperor.*
(1894) 2 Weir 514 (514), *In re Veerappan.*
(1934) 1934 Oudh 34 (35): 1934 Cri Cas 88, *Emperor* v. *Vidya Sagar.*
(1932) 1932 Cal 118 (118, 119): 1932 Cri Cas 103: 58 Cal 1335: 33 Cri L Jour 135, *Girishchandra Namadas* v. *Emperor.* Conviction based on fresh verdict is not illegal where the original one was based on a misconception.

6. (1924) 1924 Lah 17 (20, 21): 4 Lah 382: 25 Cri L Jour 377, *John Thomas Lyme* v. *Emperor.*

7. (1903) 30 Cal 485 (487), *Narayan Changa* v. *Emperor.*

tion to set aside a verdict after it has been recorded and acted upon are inadmissible to show how the verdict was arrived at.[8]

Sec. 304 Notes 1—3

2. Time for amendment.

This Section provides for an amendment of a wrong verdict but it clearly contemplates that such a verdict can be amended only *before or immediately after it is recorded*, in other words, before the jurors have left the Court and while they are still under the observance of the presiding Judge.[1] Where the foreman publicly announced the verdict as the unanimous verdict of all the members in the hearing of all and without any dissent on the part of any of them and the verdict was recorded and the accused acquitted, the Court refused to set aside the verdict when it was learnt some days after, that the verdict was not the unanimous verdict of the jury.[2]

3. Final verdict to stand.

Where there is some uncertainty in the minds of the jury, the Judge can question them. Then there is no verdict delivered and there could be no verdict formally recorded until the last of the questions has been answered[1] and it is the verdict as ultimately amended that should stand. An amendment of the charge under Section 227 can be made at any time till the final verdict of the jury in this sense is returned.[2]

Sec. 305

305.* (1) When in a case tried before a High Court the jury are unanimous in their opinion, or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

Verdict in High Court when to prevail.

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

Discharge of jury in other cases.

(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury.

Synopsis.

Scope of the Section. Note No. 1

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* (**Code of 1882—S. 305**—Same.)

(**Codes of 1872 and 1861**—Nil.)

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8. (1913) 14 Cri L Jour 392 (395): 40 Cal 693, *Hara Kumar Barman Roy* v. *Emperor.*

Note 2.

1. (1931) 1931 Cal 345 (348, 349): 1931 Cri Cas 409: 58 Cal 1138: 32 Cri L Jour 598, *Ifatullah* v. *Emperor.*

2. (1912) 13 Cri L Jour 815 (821): 1913 Pun Re Cr No. 6, *Emperor* v. *Brian Bonham Carter.*

Note 3.

1. (1874) 21 Suth W R Cr 1 (2), *Queen* v. *Sustiram Mandal.*
2. (1884) 8 Bom 200 (211), *Queen-Empress* v. *Appa Subhana Mendre.*

Sec. 305
Note 1

Other Topics.

Majority of six and Judge's agreement—Effect. See Note 1, Pt. 2.

Unanimous verdict—Judge's agreement immaterial. See Note 1, Pt. 1.

1. Scope of the Section.

Under this Section, if the jury return a unanimous verdict, the Judge must pass judgment in accordance with it, whether or not he agrees with the opinion of the jury.[1] If the jury are not unanimous but six of them are of one opinion and the Judge agrees with them, such opinion has the same legal force as a unanimous verdict of the jury and the Judge must pass judgment in accordance therewith.[2] When the Judge disagrees with the opinion of the majority of the jury under sub-section 3, it is competent to him to express his view as to the innocence or guilt of the accused.[3]

Sec. 306

306.* (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

Verdict in Court of Session when to prevail.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of Section* 562, pass sentence on him according to law.

Synopsis.

Other Topics.

No reference under S. 307 after verdict is accepted. See Note 3, Pt. 1.

* **(Code of 1882—S. 306—Same.)**

(Code of 1872—S. 263, Para. 4.)

263. * * * * * * *

If the Court does not think it necessary to dissent from the verdict of a majority of the jurors, it shall give judgment accordingly. If the accused person is acquitted, the Court shall record judgment of acquittal. If the accused person is convicted, the Court shall proceed to pass sentence upon him according to law.

(Code of 1861—S. 380.)

Acquittal or conviction.

380. If the accused person is acquitted, the Court shall record a judgment of acquittal. If the accused person is convicted, the Court shall proceed to pass sentence upon him according to law.

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Section 305—Note 1.

1. (1915) 1915 Low Bur 39 (41) : 8 Low Bur Rul 274 : 16 Cri L Jour 676 (679), *S. P. Ghosh* v. *Emperor.*
2. (1915) 1915 Cal 773 (781) : 16 Cri L Jour 561 (566, 571, 572) (F B), *Emperor* v. *Upendra Nath Das.*
3. (1935) 1935 Sind 189 (190, 191) : 1935 Cri Cas 952 : 36 Cri L Jour 1359, *Prem Chand* v. *Emperor.*

1. Legislative changes.

The words "unless he proceeds in accordance with the provisions of Section 562" were added by Section 80 of the Criminal Procedure Code Amendment Act, XVIII of 1923.

2. Verdict to prevail where Judge does not disagree with it.

In a trial by jury, the position of a Judge in India differs from that of a Judge in England who is merely an instrument for passing a sentence or directing a release, once a verdict is given. In India the Judge must under this Section and the next, *make up his mind whether he agrees or disagrees with the verdict.*[1] In the former case he should act under this Section, and in the latter case, under the next Section.[2] This does not mean that whenever he disagrees with the verdict he is bound to make a reference to the High Court. He must be of opinion that it is necessary in the ends of justice to submit the case to the High Court.[3]

The Sessions Judge should make a clear record for the information of the High Court whether he agreed with the verdict or not.[4] He cannot record evidence in the absence of the jury and rely on it for the purpose of determining whether or not he should disagree with the verdict.[5]

The Judge has no power to control the jury and direct them to give a specified verdict. It is for the jury alone to convict or acquit the accused as they thought proper[6] and where the verdict entirely depends on oral evidence, weight should be attached to the verdict of the jury whose function it is to decide the questions of fact.[7]

3. Judgment to be according to the verdict.

Where the Judge does not consider it necessary to express disagreement with the verdict of the jury, he is bound to give judgment accordingly. It is not open to him, when he has once accepted the verdict and postponed the case for passing sentence, to reconsider his order and refer the case to the High Court under Section 307 of the Code.[1] When a charge triable with the aid of assessors is tried with the aid of the jury, the trial is not, in view of Section 536, *infra*, illegal and the verdict must be accepted as a legal one. If the Judge disagrees with the verdict he must proceed under Section 307, *infra*, and cannot treat the verdict as the opinion of the assessors and record a finding in opposition to that verdict.[2]

4. Sentence to be according to law.

The Judge in passing sentence after conviction according to the verdict

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Section 306—Note 2.

1. (1932) 1932 Lah 345 (348) : 1932 Cri Cas 426 : 13 Lah 573 : 33 Cri L Jour 220, *Emperor* v. *Barwick.*
2. (1880) 5 Cal 871 (874), *Govt. of Bengal* v. *Mahaddi.*
3. (1929) 1929 Pat 313 (314) : 1929 Cri Cas 99 : 8 Pat 344 : 30 Cri L Jour 721, *Ramdas Rai* v. *Emperor.*
4. (1867) 7 Suth W R Cr 6 (7), *Queen* v. *Chand Baydee.*
   (1871) 15 Suth W R Cr 46 (47), *Queen* v. *Bhar Ali Kahar.*
5. (1906) 3 Cri L Jour 42 (43) (Bom), *Emperor* v. *Ningappa Sayadappa.*
6. (1867) 7 Suth W R Cr 22 (23), *Queen* v. *Joy Kristo Gossamy.*
7. (1933) 1933 Pat 273 (273) : 1933 Cri Cas 755 : 34 Cri L Jour 731, *Emperor* v. *Sitalu Ahir.*
   (1876) 25 Suth W R Cr 25 (26), *Queen* v. *Wuzir Mundal.*
   (1924) 1924 All 511 (513) : 26 Cri L Jour 324, *Lakhan* v. *Emperor.* On question of fact jury is the legal tribunal.

Note 3.

1. (1900) 4 Cal W N 683 (683), *Queen-Empress* v. *Mojahur Rahman.*
2. (1901) 25 Bom 680 (682), *Emperor* v. *Parbhu Sankar.*
   (1879) 4 Cal L R 405 (408, 410), *In re*

Sec. 306 Notes 4—5

should give no weight whatever to any doubts he had personally entertained as to the propriety of the verdict of the jury or cannot mitigate the sentence on that account. Having accepted the verdict he is bound to pass sentence according to law as if he had agreed with the verdict.[1] The sentence again must be suitable to the offence of which the accused is found guilty though the Judge thinks a graver offence has been committed.[2] When a number of persons are charged under Sections 149 and 302 of the Indian Penal Code and it is not possible to say who struck the fatal blow, it cannot be assumed that there is no case for a capital sentence.[3]

5. Judgment of acquittal.

The prisoner is entitled to be discharged from custody immediately a judgment of acquittal is pronounced when there is no other charge pending against him. His further detention is illegal and no formal warrant of release from the Judge to the Superintendent of the jail is necessary.[1]

Sec. 307

Procedure where Sessions Judge disagrees with verdict.

307. (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which the accused has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly, recording the grounds of

Procedure where Sessions Judge disagrees with verdict.

307.* (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which *any accused person* has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case *in respect of such accused person* to the High Court, he shall submit the

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* (Code of 1882—S. 307.)

Same except that for the words "so completely that he considers," the words "and is clearly of opinion that" were substituted in 1898 Code.

(Code of 1872—S. 263, Paras. 5 and 6.)

263. * * * * *

If the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it *may* submit the case to the High Court, and may either remand the prisoner to custody, or admit him to bail.

The High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and if it does so, shall pass such sentence as might have been passed by the Court of Session.

(Code of 1861—Nil.)

Bhootnath Dey.

(1898) 25 Cal 555 (557), *Surja Kurmi* v. *Empress.*

Note 4.

1. (1929) 1929 Pat 313 (316) : 1929 Cri Cas 99 : 8 Pat 344 : 30 Cri L Jour 721, *Ramdas Rai* v. *Emperor.*

(1865) 3 Suth W R Cr 29 (30), *Queen* v. *Sheikh Ghulam.* The Judge may take other steps to get the release of the accused if he thinks the charge against him is not made out.

2. (1917) 21 Cal W N 139*n* (139*n*), *Azu Sheikh* v. *King-Emperor.*

3. (1929) 1929 All 160 (161) : 30 Cri L Jour 559, *Parshadi* v. *Emperor.*

Note 5.

1. (1869-70) 5 Mad H C R App 2 (2, 3).

his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed.

case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, *and in such case, if the accused is further charged under the provisions of Section 310, shall proceed to try him on such charge, as if such verdict had been one of conviction.*

Sec. 307

(2) Whenever the Judge submits a case under this Section, he shall not record judgment of acquittal or of conviction on any of the charges on which *such accused* has been tried, but he may either remand *such accused* to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict *such accused* of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

Synopsis.

Other Topics.

Acceptance of verdict on some charges. See Note 3, Pt. 4; Note 5, Pts. 1 and 2.
Applicability of Section 537. See Note 11, Pt. 19.
Considerations for High Court. See Note 11, Pts. 17 to 19, F-N. (5) and (7).
Contents of Reference. See Note 7, Pts. 1, 2 and 4.
Conviction for offence not charged, See Note 16, Pt. 2, F-N. (2) and (3).

Sec. 307 Note 1

1. Scope and object of the Section.

This Section provides for a reference to the High Court, in cases tried by jury, where the Judge

(1) *disagrees* with the verdict, and

(2) is *clearly of opinion* that it is necessary for the ends of justice to submit the case to the High Court.[1]

A Judge, in this country, is not, like a Judge in an English Court, an instrument for passing a sentence or directing a release, once verdict is given; (compare provisions of Section 305, *ante*, in regard to Sessions trials in High Court) he must make up his mind whether he agrees or disagrees with the verdict, and, in the latter case, he must form an opinion whether in the interests of justice it is necessary to submit the case to the High Court.[2] To this extent the matter may be said to be in the discretion of the Court. But where the two conditions are satisfied, the Section requires that the Judge *shall* make the reference; the reference is no longer a matter of discretion, but is one of *obligation*.[3] The object of the Section is really to provide a safeguard, in trials by jury, against possible miscarriage of justice.[4]

Where the Judge, either does *not disagree* with the verdict[5] or is *not clearly*

Section 307—Note 1.

1. (1904) 1 Cri L Jour 743 (744) (Bom), *Emperor* v. *Irya Doddappa Katagi*.
(1929) 1929 All 338 (338) : 30 Cri L Jour 1078, *Emperor* v. *Jukhan*.
(1933) 1933 Cal 472 (474) : 1933 Cri Cas 752: 34 Cri L Jour 965, *Emperor* v. *Makhanlal Garodia*.

2. (1932) 1932 Lah 345 (348) : 1932 Cri Cas 426 : 13 Lah 573 : 33 Cri L Jour 220, *Emperor* v. *Barwick*.

3. (1925) 1925 Cal 795 (796) : 26 Cri L Jour 1006, *Saroda Charan Mistri* v. *Emperor*.
(1931) 1931 Cal 15 (17) : 1931 Cri Cas 47 : 57 Cal 1183 : 32 Cri L Jour 452, *Jogikar* v. *Emperor*.
(1929) 1929 Cal 415 (416) : 1929 Cri Cas 28 : 56 Cal 473 : 30 Cri L Jour 1036, *Ebrahim Molla* v. *Emperor*.

4. (1887) 9 All 420 (425), *Empress* v. *Mccarthy*.
(1931) 1931 Cal 15 (17) : 1931 Cri Cas 47 : 57 Cal 1183 : 32 Cri L Jour 452, *Gogikar* v. *Emperor*.
(1931) 1931 Cal 601 (603) : 1931 Cri Cas 753: 33 Cri L Jour 11, *Bhoudar* v. *Emperor*.
(1934) 1934 Cal 847 (849) : 62 Cal 337 : 36 Cri L Jour 358 : 1934 Cri Cas 1364, *Enayat Karim* v. *Emperor*. The powerful weapon conferred by this Section is not available even to a Judge trying a Sessions case with a jury in the High Court.

5. (1933) 1933 Cal 472 (474) : 1933 Cri Cas 752: 34 Cri L Jour 965, *Emperor* v. *Makkhan Lal Garodia*.
(1904) 1 Cri L Jour 743 (745) (Bom), *Emperor* v. *Irya Doddappa Katagi*.

of opinion that it is necessary in the ends of justice to make the reference, he is neither bound[6] nor entitled[7] to submit the case to the High Court under this Section. Where a reference *is* made in such cases, the High Court will not act on it or interfere with the verdict on the basis of such reference.[8]

Where no reference is made by the Sessions Judge under this Section, the High Court cannot interfere with the verdict of the jury[9] or direct the Judge to make a reference.[10]

Where the jury have returned a clear and unambiguous verdict, it is not open to the Judge to re-charge the jury and ask them to return a fresh verdict merely because he disagrees with their verdict. The Judge can only refer the case to the High Court under this Section, if he thinks fit to do so.[11]

As to applicability of the Section to cases erroneously tried by jury, *see* Note 15, *infra*.

2. Who can refer.

The words "in any such case" refer to cases tried before a Court of Session and consequently the word "Judge," must mean the Sessions Judge.

A reference under this Section is not invalid in consequence of its having been made by a Judge who held the trial, but who, at the time of the reference had ceased to be a Judge.[1]

It has been held by a Full Bench of the Judicial Commissioner's Court of Sind that the Judicial Commissioner's Court of Sind is a *High Court* and not a Court of Session for the purposes of this Section and that consequently, a Judge of that Court holding a Sessions trial by jury has no power to make a reference under this Section.[2] *See* Section 266, *ante*.

Under the Code as it stood before 1923, there were certain provisions (now repealed) such as Section 451, under which a District Magistrate was empowered to make a reference under this Section to the High Court.[3] These are now no longer law.

3. "Disagrees with the verdict."

As has been seen in Note 1, *ante*, the Judge cannot make a reference under

6. (1928) 1928 Pat 120 (123, 124); 6 Pat 817 : 29 Cri L Jour 81, *Bajit Mian* v. *Emperor*.
   (1926) 1926 Cal 728 (729) : 27 Cri L Jour 398, *Haricharan Das* v. *Emperor*. Mere disagreement without considering that it is in the ends of justice to make a reference.
   (1897) 2 Cal W N 49 (54), *Queen-Empress* v. *Chatradhari Goula*.
   (1924) 1924 Cal 47 (48) : 50 Cal 658 : 24 Cri L Jour 838, *Eran Khan* v. *Emperor*.
   (1891) 14 Mad 36 (37), *Empress* v. *Chinna Tevan*.
   (1909) 9 Cri L Jour 93 (94) (Mad), *In re Kaiyan*.
7. (1915) 1915 Cal 292 (294) : 41 Cal 662 : 15 Cri L Jour 155, *Emperor* v. *Madan Mondal*.
   [See also (1930) 1930 Pat 208 (208) : 31 Cri L Jour 54, *Emperor* v. *Bhukhan Dubey*.]
8. (1923) 1923 Cal 453 (455) : 50 Cal 41 : 24 Cri L Jour 763, *Emperor* v. *Profulla Kumar Majumdar*.
9. [See the cases cited in foot-note (6).]
10. (1928) 1928 Cal 444 (446) : 29 Cri L Jour 819, *Bepin Chandra Mandal* v. *Emperor*.
    [But see (1925) 1925 Cal 795 (796) : 26 Cri L Jour 1006, *Saroda Charan Mistri* v. *Emperor*.]
11. (1935) 1935 All 1020 (1022) : 36 Cri L Jour 1377 : 1935 Cri Cas 1254, *Dori* v. *Emperor*.

Note 2.

1. (1905) 2 Cri L Jour 386 (387) (Cal), *Emperor* v. *Dil Mohammad Sheikh*.
2. (1928) 1928 Sind 149 (157) : 22 Sind L R 349 : 29 Cri L Jour 945, *Emperor* v. *Giand*.
   (1925) 1925 Sind 34 (34, 35) : 25 Cri L Jour 428, *Emperor* v. *Mithoo*.
   [But see (1921) 1921 Sind 145 (146) : 26 Cri L Jour 609 (609) : 16 Sind L R 143, *Emperor* v. *Pir Mahomed Bux*. Case before 1923.]
3. (1902) 29 Cal 128 (132), *Emperor* v. *H. Lyall*.
   (1914) 1914 Low Bur 23 (24) : 7 Low Bur Rul 319 : 15 Cri L Jour 243, *Emperor* v. *A. J. Cooke*.
   (1887) 9 All 420 (423) : *Queen* v. *Mccarthy*.

Sec. 307 Notes 3—4

this Section unless he *disagrees* with the verdict. Under the Code of 1882 the disagreement was required to be *so complete* that it was necessary in the ends of justice to make a reference. The words "so completely that" have been omitted in the present Code, with the result that the fact that the Judge disagrees with the verdict need not always involve the proposition that it would be in the ends of justice to make a reference : the words "ends of justice" mean something more than mere disagreement, and the necessity of submitting the case depends upon the gravity of the offence, and its prevalence and other considerations of a similar nature.[1] A contrary view, namely that unless the disagreement is such as to involve the necessity of making, in the ends of justice, a reference under this Section, it is not a disagreement at all, has however been taken in the undermentioned cases.[1a] It is submitted that this is not correct.

The disagreement contemplated by the Section is with the *verdict* and not merely with the *grounds* on which the verdict was given : thus, where the jury gave a verdict of acquittal and the Judge was of the opinion that the jury ought to have given the benefit of doubt to the accused rather than have believed the defence version, it was held that this did not amount to disagreement with the verdict.[2]

Where the Judge directs the jury that if they find the accused not guilty of the offence charged, they might find him guilty of a lesser offence, and the jury gives a verdict of not guilty but the Judge is of opinion that the accused is guilty of the minor offence, it has been held that it is sufficient disagreement within the meaning of this Section.[3]

Where, however, on a charge of an offence under Section 326, *read with* Section 149, the jury acquitted the accused on the charge of rioting, it was held that the Judge could not say that he disagreed with the verdict so far as an offence under Section 326 alone was concerned, and make a reference under this Section.[4]

Where once the verdict is accepted, the Judge cannot at the time of passing the sentence, change his mind and disagree with the verdict, so as to make a submission under this Section.[5]

4. "Is clearly of opinion that it is necessary for the ends of justice."

There is a difference of opinion on the question whether the power of the Judge to make a submission under this Section is limited to cases where he is satisfied that the verdict is *perverse* or *manifestly wrong* or is *unreasonable*. According to the High Courts of Calcutta, Lahore and Patna the power is not so limited but it is sufficient if he should be clearly of opinion that a reference is necessary *for the ends of justice*.[1] A Full Bench of the High Court of Madras

Note 3.

1. (1933) 1933 Cal 404 (405) : 34 Cri L Jour 608 : 1933 Cri Cas 582, *Emperor* v. *Panchanon Sarkar*.

1a (1932) 1932 Pat 246 (247) : 11 Pat 669 : 33 Cri L Jour 877 : 1932 Cri Cas 643, *Emperor* v. *Rafi Mian*.
(1929) 1929 Cal 415 (416) : 56 Cal 473 : 1929 Cri Cas 28 : 30 Cri L Jour 1036, *Ebrahim Molla* v. *Emperor*.
(1925) 1925 Cal 795 (796) : 26 Cri L Jour 1006, *Saroda Charan* v. *Emperor*.

2. (1933) 1933 Cal 404 (405) : 34 Cri L Jour 608 : 1933 Cri Cas 582, *Emperor* v. *Panchanon Sarkar*.

3. (1929) 1929 Nag 114 (115) : 30 Cri L Jour 793, *Emperor* v. *Harilal Tamaboli*.
(1923) 1923 Cal 108 (110) : 24 Cri L Jour 674, *Emperor* v. *Hari Das Mitra*.
(1908) 8 Cri L Jour 143 (144) (Bom), *Emperor* v. *Chandra Krishna*.

4. (1915) 1915 Cal 292 (294) : 41 Cal 662 : 15 Cri L Jour 155, *Emperor* v. *Madan Mondal*.

5. (1900) 4 Cal W N 683 (683, 684), *Queen-Empress* v. *Majahur Rahman*.
(1925) 1925 Cal 795 (796) : 26 Cri L Jour 1006, *Saroda Charan* v. *Emperor*.

Note 4.

1. (1919) 1919 Cal 536 (536) : 19 Cri L Jour 830, *Ismail Sarkar* v. *Emperor*.
(1925) 1925 Cal 795 (796) : 26 Cri L Jour 1006, *Saroda Charan Mistri* v. *Emperor*.
(1926) 1926 Cal 1107 (1108) : 27 Cri L Jour 1402, *Jahur Sheikh* v. *Emperor*.

has, on the other hand, held that in order to enable the Judge to make a submission, he should come to the conclusion that the verdict is one which is *unreasonable*.[2] It may be conceded that when the verdict is perverse or unreasonable or is not supported by evidence, it should ordinarily be in the ends of justice to make a submission. In such cases the Judge *should* always make a reference.[3] It may also be stated as a rule of guidance that where a verdict cannot be said to be unwarranted by the evidence in the case[4] or is one which reasonable men might find on the evidence placed before them[5] no reference *should* be made. But to say that the power is limited to cases where the verdict is considered *perverse* or *unreasonable* is to import conditions which are not found in the Section. It is submitted that the Madras view is not correct.

In view of the provisions of this Section it is necessary that the trial Judge should for himself appreciate the evidence and form his own opinion on the case so as to see whether it is necessary for the ends of justice to make a reference against the verdict of the jury.[6]

Where the same body of persons sit as jurors as well as assessors in a case (*see* Section 269, sub-section 3) the Judge ought not to use their reasons given for their opinions delivered as *assessors* as material for saying that their verdict as *jury* is perverse.[7]

5. "He shall submit the case."

Sub-section 2 of this Section provides that where a case is submitted under this Section the Judge shall not record a judgment on any of the charges on which a particular accused has been tried. It is clear from this that a submission must be of the *whole case* against the particular accused and not merely of those *charges* on which he disagrees, since, by this limited reference the High Court will be precluded from considering the entire evidence on the record against such accused.[1]

(1909) 10 Cri L Jour 57 (58) : 2 Ind Cas 593 (Cal), *Emperor* v. *Abdul Rahman.*

(1932) 1932 Lah 345 (348) : 13 Lah 573 : 1932 Cri Cas 426 : 33 Cri L Jour 220, *Emperor* v. *C. Barwick.*

(1922) 1922 Pat 348 (352) : 23 Cri L Jour 421, *Emperor* v. *Punit Chain.*

(1929) 1929 Pat 313 (314) : 8 Pat 344 : 30 Cri L Jour 721 : 1929 Cri Cas 99, *Ramdas Rai* v. *Emperor.* Latter part.

(1932) 1932 Pat 246 (247) : 11 Pat 669 : 1932 Cri Cas 643 : 33 Cri L Jour 877, *Emperor* v. *Rafi Mian.*
[But see (1914) 1914 Cal 65 (69) : 14 Cri L Jour 660 (664) : 41 Cal 621, *Emperor* v. *Surnamoyee Biswas.* Following opinion of Macpherson, J. in 20 Suth W R Cr 73.]

2. (1928) 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cri L Jour 317 (F B), *Veerappa Goundan* v. *Emperor.*

3. (1926) 1926 Mad 370 (370) : 27 Cri L Jour 176, *Vellayan Ambalam, In re.* Trial of several accused for the same offence before the same Judge and jury — Evidence the same against all and summing up of Judge for the acquittal of all—Jury giving verdict of not guilty to one only and guilty to the rest —Verdict is perverse and reference should be made.

(1890) 13 Mad 343 (344), *Queen* v. *Guruvadu.* Verdict being supported by evidence.

(1931) 1931 Cal 15 (17) : 57 Cal 1183 : 1931 Cri Cas 47 : 32 Cri L Jour 452, *Jogi* v. *Emperor.*

(1930) 1930 Pat 174 (176) : 30 Cri L Jour 1114 : 1930 Cri Cas 270, *Emperor* v. *Lal Mohammad.*

(1931) 1931 Mad 775 (776) : 55 Mad 256 : 1931 Cri Cas 1031 : 32 Cri L Jour 1276, *Sundaram Aiyer* v. *Emperor.* Jury misunderstanding the law.

4. (1902) 7 Cal W N 135 (140), *Emperor* v. *Chidghau Gosain.*

5. (1896) 20 Bom 215 (218), *Queen* v. *Devaji Govindji.*

6. (1934) 1934 Cal 847 (849) : 62 Cal 337 : 1934 Cri Cas 1364 : 36 Cri L Jour 358, *Enayat Karim* v. *Emperor.*

7. (1929) 1929 Mad W N 281 (281) (F B), *Sessions Judge of South Arcot* v. *Jailabuddin.*

Note 5.

1. (1917) 1917 Cal 833 (835) : 18 Cri L Jour 551 (553), *Emperor* v. *Ananda Charan Roy.*

(1933) 1933 Cal 47 (48) : 60 Cal 427 : 34 Cri L Jour 164 : 1933 Cri Cas 61, *Emperor* v. *Dwarika Nath Goswami.*

(1933) 1933 Cal 665 (666, 667) : 34 Cri L

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In other words, the Judge should not divide the verdict of the jury, accept a part and make a submission with reference to the other part.[2]

6. "In respect of such accused person."

This Section does not intend that when there are *several* accused and the Sessions Judge is not prepared to accept the verdict of the jury against *all* but only against *some* he should refer the whole case to the High Court. It contemplates only a reference in the case of those persons in respect of whom the Judge declines to accept the verdict. In respect of any other accused against whom the judge agrees with the verdict of the jury, the Judge should convict and sentence or acquit him as the case may be.[1]

7. Grounds of opinion to be recorded.

The Judge referring a case under this Section must first of all record *his opinion*. If he does not record it, it is not possible for the High Court to pass orders on the reference.[1] The letter of reference should further state the case, the verdict of the jury and concisely the *ground* upon which the Judge differs from the jury and considers it necessary in the ends of justice to submit the case to the High Court.[2] It should, in other words, be complete in itself and the High Court should not be required to refer to the order sheet for the particulars required by the Section to be given.[3] It was observed in the undermentioned case[4] that the referring order should be in *the nature of a judgment* which would give the High Court a proper summary of the evidence and reasons of the learned Judge for holding it to be credible or otherwise. Merely repeating remarks made in the charge to the jury and adding such vague remarks as "for these and other reasons I submit the case for the orders of the High Court" are not sufficient.[5] The Judge should state exactly what material portion of the evidence he believes to be true and his reasons for arriving at his conclusions.[6] The reference should, further, be based upon the *evidence placed before the jury* and not on case not so presented

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Jour 918 : 1933 Cri Cas 1104 (S B), *Emperor* v. *Bisnoo Chandra Das.*

(1928) 1928 Pat 596 (596) : 30 Cri L Jour 390, *Emperor* v. *Wazira Mahto.*

(1935) 1935 Pat 357 (357) : 14 Pat 717 : 36 Cri L Jour 856 : 1935 Cri Cas 987, *Ramjanam Tewari* v. *Emperor.*

(1930) 1930 All 489 (489) : 52 All 881 : 32 Cri L Jour 81 : 1930 Cri Cas 733, *Emperor* v. *Nawal Behari Lal.*

(1932) 1932 Pat 156 (157) : 11 Pat 395 : 33 Cri L Jour 505 : 1932 Cri Cas 273, *Emperor* v. *Hazari Lal.*

(1899) 27 Cal 144 (148), *Queen* v. *Deodhar Singh.*

(1926) 1926 Cal 925 (925) : 27 Cri L Jour 617, *Emperor* v. *Ekambbar.*

2. (1923) 1923 Cal 453 (456) : 50 Cal 41 : 24 Cri L Jour 763, *Emperor* v. *Profulla Kumar Majumdar.*

(1935) 1935 Pat 357 (357) : 36 Cri L Jour 856 : 14 Pat 717 : 1935 Cri Cas 987, *Ramjanam Tewari* v. *Emperor.*

Note 6.

1. (1915) 1915 Cal 731 (731) : 16 Cri L Jour 321 (322) : 42 Cal 789, *Emperor* v. *Babar Ali Gazi.*

Note 7.

1. (1921) 1921 Cal 252 (253) : 23 Cri L Jour 244, *Emperor* v. *Taribullah Shaikh.*

(1904) 1 Cri L Jour 743 (744) (Bom), *Emperor* v. *Irya Doddappa Katagi.*

[See also (1932) 1932 Pat 246 (247) : 1932 Cri Cas 643 : 11 Pat 669 : 33 Cri L Jour 877, *Emperor* v. *Rafi Mian.*]

2. (1931) 1931 Cal 15 (17) : 57 Cal 1183 : 1931 Cri Cas 47 : 32 Cri L Jour 452, *Emperor.* v. *Jogikar.*

(1867) 7 Suth W R Cr 6 (7), *Queen* v. *Chand Bagdee.* It is the duty of the Sessions Judge to record distinctly, whether he agrees with the verdict of the jury or not.

(1905) 9 Cal W N Notes 66 (66), *Rajeswari Bairagi* v. *Emperor.*

(1929) 1929 Pat 16 (17) : 30 Cri L Jour 210, *Sakhichand Kumhar, In re.*

3. (1921) 1921 Cal 252 (253) : 23 Cri L Jour 244, *Emperor* v. *Taribullah Sheikh.*

4. (1928) 1928 All 622 (623, 624) : 50 All 540 : 29 Cri L Jour 342, *Emperor* v. *Sheo Din.*

5. (1904) 1 Cri L Jour 586 (586) (Bom), *Emperor* v. *Dyamanaik Annappanaik.*

6. (1908) 7 Cri L Jour 192 (193) (Bom), *Emperor* v. *Chandra Krishna.* Judge's view of the evidence and credibility

to them. The High Court should not be asked to consider the case on matters not placed before the jury.[7]

Where a reference shows that the Judge's opinion was that the verdict was perverse, but this was not clearly stated, the High Court will presume that the reference has been made on the ground that the verdict is perverse.[8]

It is unfair for the Judge to make reflections on the conduct of the jurors which are not supported by the record.[9]

8. Letter of reference against verdict of acquittal should state the offence.

Where the Judge disagrees with a *verdict of acquittal* he should in his letter of reference state the *offence which he considers to have been committed* by the accused.[1] But a mere omission to do so will not entail a rejection of the reference.[2]

9. Charge under Section 310.

Prior to the amendment of the Section in 1923, it was held that in cases of reference under this Section, there was no conviction or acquittal in the Sessions Court and that it was for the High Court to convict or acquit the accused and that therefore it was not until after conviction by the High Court that the accused can be asked to plead to prior conviction.[1] The present Section as amended makes provision for proceeding under Section 310 where there is a charge under that Section, even before referring the case to the High Court.

10. "Shall not record judgment of acquittal or conviction."

It was held under the Code of 1861, in which there was no Section corresponding to this, that the Sessions Judge was bound to pass judgment even though he disagreed with the jury, but that he could only refer the case to the Local Government for remission of the sentence.[1] It is now clear that no judgment should be recorded where the Judge refers the matter to the High Court.

10a. Bail pending reference to High Court.

Where the jury returns a unanimous verdict of guity on a serious charge like that of murder, but the Judge 'disagreeing with the verdict thinks it proper

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should be given.

(1903) 7 Cal W N 345 (347), *Emperor* v. *Bhut Nath Ghose.* Merely asking the High Court to take the charge as part of the letter of reference is insufficient.

(1922) 1922 Pat 348 (350) : 23 Cri L Jour 421, *Emperor* v. *Punit Chain.*

(1904) 1 Cri L Jour 743 (744) (Bom), *Emperor* v. *Irya Doddappa Katagi.*

7. (1899) 27 Cal 295 (304), *Queen* v. *Jadub Das.*

(1904) 1 Cri L Jour 743 (744) (Bom), *Emperor* v. *Irya Doddappa Katagi.* Result of another trial not relevant.

8. (1929) 1929 Oudh 280 (281) : 30 Cri L Jour 570 : 1929 Cri Cas 13, *Emperor* v. *Bhagwan Din.*

9. (1924) 1924 Cal 321 (322) : 51 Cal 347 : 25 Cri L Jour 758, *Emperor* v. *Dhananjay Ray.*

(1924) 1924 Cal 323 (326) : 51 Cal 418 : 25 Cri L Jour 776, *Mamfru Chowdhury* v. *Emperor.*

Note 8.

1. (1933) 1933 Cal 404 (406) : 34 Cri L Jour 608 : 1933 Cri Cas 582, *Emperor* v. *Panchanon Sarkar.*

(1878) 3 Cal 623 (624, 625), *Empress* v. *Sahe Ree.*

(1921) 1921 Cal 252 (253) : 23 Cri L Jour 244, *Emperor* v. *Tari Bulla.*

(1908) 7 Cri L Jour 192 (193) (Bom), *Emperor* v. *Chandra Krishna.*

2. (1933) 1933 Cal 404 (406) : 34 Cri L Jour 608 : 1933 Cri Cas 582, *Emperor* v. *Panchanon Sarkar.*

Note 9.

1. (1907) 5 Cri L Jour 422 (423) : 30 Mad 134, *Emperor* v. *Kandasami Goundan.*

(1900) 2 Bom L R 336 (337), *Queen-Empress* v. *Govind Jhavarya.*

(1907) 5 Cri L Jour 422 (423) : 30 Mad 134, *Emperor* v. *Kandaswami Goundan.*

Note 10.

1. (1872) 18 Suth W R Cr 45 (46), *Queen* v. *Nidheeram Bagdee.*

(1872) 18 Suth W R Cr 46 Note (46), *Queen*

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to refer the case to the High Court, it is desirable that the accused is kept in custody pending the reference and not released on bail.[1]

11. Powers of the High Court under this Section.

Sub-section 3 specifies the powers which the High Court may exercise where a reference is made to it under this Section. The High Court may exercise any of the powers *which it may exercise on an appeal*, and *subject* thereto, it shall after considering the *entire evidence* and after giving *due weight to the opinions of the Sessions Judge and jury*, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it.

The words "subject thereto" were introduced into the Section only in the year 1896. Before the said introduction, it had been held that the powers of the High Court on a reference were not in any way affected or curtailed by Section 418 or Sec. 423 of the Code which limits the powers of the appellate Court, in cases tried by jury, to interfere on *matters of law*, and that therefore the High Court could go into the question of *fact* as well as questions of law.[1] It has been held that the introduction of the words "subject thereto" is not inconsistent with the said view, the object of such introduction being to clothe the High Court, when acting under this Section, with all the powers as *regards procedure* of a Court of appeal if for good reasons it desires to exercise any of them.[2]

There is however a difference of opinion as to the *extent* of the powers of the High Court to interfere on matters of fact. One view is:

1. that the guiding principle in exercising this power should be that the decision of the tribunal appointed by law to determine the guilt or innocence of the accused should not be touched except under strong circumstances;[3]
2. that where two views are *possible* on the evidence and the jury has taken one of such views, the High Court has no power to interfere even though it may itself take a contrary view;[4]

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v. *Shib Chander Mundli.*
(1864) 1 Suth W R Cr L 9 (9).
(1866) 6 Suth W R Cr 6 (6), *Queen* v. *Bissonath Mitter.*

Note 10a.

1. (1935) 1935 Cal 407 (412) : 1935 Cri Cas 630 : 62 Cal 900 : 36 Cri L Jour 944 (S B), *Emperor* v. *Bent Permanick.*

Note 11.

1. (1887) 9 All 420 (425), *Queen-Empress* v. *Mccarthy.*
(1873) 20 Suth W R Cr 1 (4), *Queen* v. *Koonjo Leth.*
(1933) 1933 Cal 47 (48) : 60 Cal 427 : 1933 Cri Cas 61 : 34 Cri L Jour 164, *Emperor* v. *Dwarika Nath Goswami.*
2. (1928) 1928 All 207 (210) : 50 All 625 : 29 Cri L Jour 353, *Emperor* v. *Shera.*
3. (1875) 1 Bom 10 (12, 13), *Reg* v. *Khanderaw Bajiraw.*
(1887) 9 All 420 (425), *Queen-Empress* v. *Mccarthy.*
(1892) Ratanlal 626 (626), *Queen-Empress* v. *Vithal.*
(1873) 20 Suth W R Cr 70 (71), *Queen* v. *Nobin Chunder.*
(1924) 1924 Cal 956 (957) : 25 Cri L Jour 1284, *Emperor* v. *Golam Kader.*
[See also (1928) 1928 Cal 444 (446) : 29 Cri L Jour 819, *Bepin Chandra Mandal* v. *Emperor.*
(1933) 1933 Cal 665 (668) : 34 Cri L Jour 918 : 1933 Cri Cas 1104 (S B), *Emperor* v. *Bisnoo Chandra Das.*
(1928) 1928 Pat 120 (124) : 6 Pat 817 : 29 Cri L Jour 81, *Bajit Mian* v. *Emperor.*
(1925) 1925 Cal 394 (395) : 26 Cri L Jour 677, *Emperor* v. *Faruttulla Mondal.*]
4. (1905) 2 Cri L Jour 357 (358) (All), *Emperor* v. *Chirkna.*
(1924) 1924 Cal 317 (320) : 24 Cri L Jour 897, *Emperor* v. *Nritya Gopal Roy.*
(1924) 1924 All 411 (411, 412) : 46 All 265 : 25 Cri L Jour 981, *Emperor* v. *Panna Lal.*
(1932) 33 Cri L Jour 745 (745) : 139 Ind Cas 272 (Bom), *Emperor* v. *Bai Lali.*
(1924) 1924 Cal 956 (957) : 25 Cri L Jour 1284, *Emperor* v. *Golam Kader.*
(1922) 1922 Pat 348 (351) : 23 Cri L

3. that therefore the High Court cannot interfere unless the verdict is perverse,[5] or manifestly wrong,[6] or unreason- **Sec. 307 Note 11**

Jour 421, *Emperor* v. *Punit Chain*. Something more than mere estimate of the evidence of fact is necessary.
(1924) 1924 Cal 449 (451) : 51 Cal 271 : 25 Cri L Jour 773, *Emperor* v. *Akbar Molla*.
(1929) 1929 Pat 313 (314) : 1929 Cri Cas 99 : 8 Pat 344 : 30 Cri L Jour 721, *Ramdas Rai* v. *Emperor*.

5. (1929) 1929 Nag 36 (37) : 29 Cri L Jour 963, *Ramadhin Brahmin* v. *Emperor*.
(1905) 2 Cri L Jour 357 (358) (All), *Emperor* v. *Chirkna*.
(1924) 1924 All 411 (412) : 46 All 265 : 25 Cri L Jour 981, *Emperor* v. *Panna Lal*.
(1933) 1933 All 94 (95) : 34 Cri L Jour 432 : 1933 Cri Cas 120, *Harischandra* v. *Emperor*.
(1875-77) 1 Bom 10 (14, 15) *Reg* v. *Khanderav*.
(1886) 10 Bom 497 (502), *Queen-Empress* v. *Mania Dayal*.
(1891) 15 Bom 452 (458, 475, 486), *Queen-Empress* v. *Dada Ana*.
(1933) 1933 Bom 144 (144) : 34 Cri L Jour 660 : 1933 Cri Cas 331, *Emperor* v. *Dagadu Kondaji*. The verdict must be perverse before the High Court can interfere. But in dealing with the weight and volume of the evidence the two cases (of acquittal and conviction) differ because of the presumption of innocence. Where a jury have convicted, the High Court has to see not merely that there is evidence of guilt but that the evidence is strong enough to preclude any reasonable doubt in the minds of the jury as to the guilt of the accused.
(1883) 9 Cal 53 (57), *In re, Dhunum Kazee*.
(1907) 6 Cri L Jour 359 (360) (Cal), *Emperor* v. *Kamar Ali*.
(1931) 1931 Cal 601 (603) : 33 Cri L Jour 11 : 1931 Cri Cas 753, *Bhondar* v. *Emperor*.
(1932) 1932 Cal 656 (658) : 1932 Cri Cas 648 : 33 Cri L Jour 593 (F B), *Emperor* v. *Nashai Sardar*.
(1884) 2 Weir 388 (389), *In re, Pamanna*.
(1926) 1926 Nag 308 (309) : 22 Nag L R 42 : 27 Cri L Jour 773, *Emperor* v. *Kankaya*.
(1929) 1929 Nag 36 (37) : 29 Cri L Jour 963, *Ramadhin Brahmin* v. *Emperor*.
(1926) 1926 Oudh 57 (58) : 26 Cri L Jour 1576, *Emperor* v. *Mahammad Shafi*. The High Court is not to decide what would appeal to it as true or false but it has to consider whether the view taken by the jury was such as could not be supported on any consideration of the case whatsoever.
(1929) 1929 Oudh 86 (86, 87) : 3 Luck 456 : 29 Cri L Jour 452, *Emperor* v. *Behari*. It is the practice of the Chief Court of Oudh.
(1933) 1933 Oudh 181 (182) : 8 Luck 439 : 1933 Cri Cas 384 : 34 Cri L Jour 795, *Emperor* v. *Chheda*.
(1932) 33 Cri L Jour 745 (745) : 139 Ind Cas 272 (Bom), *Emperor* v. *Bai Lali*.
[See also (1900) 27 Cal 295 (308), *Queen-Empress* v. *Jadub Das*.
(1889) Ratanlal 442 (446, 447), *Queen Empress* v. *Desai Daji*.
(1919) 1919 Cal 1016 (1017) : 20 Cri L Jour 20, *Emperor* v. *Asgar Mandal*.
(1923) 1923 Cal 579 (581), *Emperor* v. *Ahirannessa Bibi*.
(1902) 1902 All W N 143 (144), *King-Emperor* v. *Rahmatullah*.
(1911) 12 Cri L Jour 193 (197) : 10 Ind Cas 684 (Cal), *Rashidazzaman* v. *Emperor*.]

6. (1929) 1929 Nag 36 (37) : 29 Cri L Jour 963, *Ramadhin Brahmin* v. *Emperor*.
(1924) 1924 All 411 (412) : 46 All 265 : 25 Cri L Jour 981, *Emperor* v. *Panna Lal*.
(1890) 14 Bom 331 (343), *Queen-Empress* v. *Chagan Dayaram*.
(1891) 15 Bom 452 (458, 475, 486), *Queen-Empress* v. *Dada Ana*.
(1896) 20 Bom 215 (218), *Queen-Empress* v. *Deoji Govindji*.
(1904) 1 Cri L Jour 265 (268) (Bom), *Empress* v. *Bharmia*.
(1929) 1929 Bom 296 (302) : 53 Bom 479 : 1929 Cri Cas 114 : 31 Cri L Jour 65, *Emperor* v. *C. E. Ring*.
(1873) 20 Suth W R Cr 33 (33), *Queen* v. *Ramchurn Ghose*.
(1873) 20 Suth W R Cr 73 (73), *Queen* v. *Sahm Bagdee*.
(1874) 21 Suth W R Cr 4 (4), *Queen* v. *Harol Munjee*.
(1876) 25 Suth W R Cr 25 (27), *Queen* v. *Wazir Mundal*.
(1884) 11 Cal 85 (91), *Queen-Empress* v. *Jacquiet*.
(1874) 14 Beng L R App 1 (3), *Queen* v. *Mt. Itwarya*.
(1914) 1914 Cal 65 (69) : 41 Cal 621 : 14 Cri L Jour 660, *Emperor* v. *Surnamoyee Biswas*. Must be manifestly wrong.
(1924) 1924 Cal 317 (320) : 24 Cri L Jour 897, *Emperor* v. *Nritya Gopal*.
(1924) 1924 Cal 321 (322) : 51 Cal 347 : 25 Cri L Jour 758, *Emperor* v. *Dhananjoy Ray*.
(1929) 1929 Cal 737 (738) : 31 Cri L Jour

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able,[7] or definitely contrary to evidence,[8] or not supported by any evidence.[9]

The second view is :

1. that the sanctity of a verdict really rests on the requirement of the law for the disagreement of the Judge, and that if that disagreement is expressed (as it must where a reference is made under this Section), the special sanctity of the verdict disappears and it has no greater force than the decision of any other tribunal of fact;[10]
2. that the *whole case* is opened up on a reference,[11] that the functions

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698 : 1929 Cri Cas 399, *Meajan Howladar* v. *Emperor.*

(1930) 1930 Cal 141 (142) : 31 Cri L Jour 667 : 1930 Cri Cas 141, *Emperor* v. *Bai Ghose.*

(1911) 12 Cri L Jour 48 (49) : 9 Ind Cas 288 (Mad), *In re, Lal Singh.*

(1932) 1932 Mad 21 (23) : 33 Cri L Jour 215 : 1932 Cri Cas 1, *Venkatachala Goundan* v. *Emperor.*

(1929) 1929 Pat 313 (314) : 8 Pat 344 : 30 Cri L Jour 721 : 1929 Cri Cas 99, *Ram Rai* v. *Emperor.*

(1929) 1929 Nag 113 (114) : 30 Cri L Jour 789, *Ramdayal* v. *Emperor.*

(1910) 11 Cri L Jour 630 (630) : 13 Oudh Cas 295, *Shubrati* v. *Emperor.*

[See also (1880) 6 Cal L R 431 (433), *Empress* v. *Behari Lall Bose.*]

7. (1929) 1929 Nag 36 (37) : 29 Cri L Jour 963, *Ramadhin Brahmin* v. *Emperor.*

(1878) 2 Cal L R 518 (519), *In re Hurree Narain Mookerjee.*

(1925) 1925 Cal 876 (884) : 52 Cal 987 : 26 Cri L Jour 1256, *Emperor* v. *Premananda Dutt.*

(1931) 1931 Cal 15 (16) : 57 Cal 1183 : 1931 Cri Cas 47 : 32 Cri L Jour 452, *Jogikar* v. *Emperor.*

(1928) 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cri L Jour 317, *Veerappa Goundan* v. *Emperor.* Verdict must be confirmed if not unreasonable.

(1929) 1929 Mad 135 (137) : 30 Cri L Jour 843, *Mottaya Pillai* v. *Emperor.*

(1929) 1929 Mad W N 281 (282), *Sessions Judge of Arcot* v. *Jailabuddin.*

(1928) 1928 Pat 497 (500) : 8 Pat 74 : 29 Cri L Jour 1035, *Emperor* v. *Vidyasagar Pande.*

(1934) 35 Cri L Jour 285 (286) : 147 Ind Cas 53 (Oudh), *Emperor* v. *Chupai.*

(1934) 35 Cri L Jour 33 (33) : 146 Ind Cas 303 (Oudh), *Emperor* v. *Ashgar Hussain.*

(1929) 1929 Cal 287 (288) : 56 Cal 132 : 30 Cri L Jour 584, *Emperor* v. *Nagarali.*

(1929) 30 Cri L Jour 804 (806) : 117 Ind Cas 602 (Cal), *Izazuddin* v. *Emperor.*

(1929) 1929 Oudh 280 (281) : 30 Cri L Jour 570 : 1929 Cri Cas 13, *Emperor* v. *Bhagwandin.*

(1929) 30 Cri L Jour 125 (128) : 113 Ind Cas 285 (Cal), *Emperor* v. *Khuday Gazi.*

(1927) 1927 Oudh 607 (607) : 28 Cri L Jour 895, *Emperor* v. *Shankat Husain.*

(1929) 1929 Cal 287 (288) : 56 Cal 132 : 30 Cri L Jour 584, *Emperor* v. *Nagar Ali.*

(1927) 1927 Cal 848 (850) : 54 Cal 708 : 28 Cri L Jour 903, *Emperor* v. *Har Mohan Das.* The test that has to be applied in estimating the weight of the verdict of the jury is whether the opinion is such as could on the particular facts and evidence of the case have been held by reasonable men however much the Judge may differ from that view.

(1924) 1924 Cal 1029 (1030) : 52 Cal 172 : 26 Cri L Jour 350, *Emperor* v. *Alinish Chandra.*

(1920) 1920 Cal 78 (79) : 21 Cri L Jour 266, *Emperor* v. *Pramatha Nath Bagchi.*

8. (1928) 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cri L Jour 317, *Veerappa Goundan* v. *Emperor.*

(1929) 1929 Cal 737 (738) : 31 Cri L Jour 698 : 1929 Cri Cas 399, *Meajan Howladar* v. *Emperor.*

(1929) 1929 Pat 313 (314) : 8 Pat 344 : 1929 Cri Cas 99 : 30 Cri L Jour 721, *Ramdas Rai* v. *Emperor.*

9. (1925) 1925 Cal 795 (796) : 26 Cri L Jour 1006, *Saroda Cheran Mistri* v. *Emperor.*

(1905) 2 All L Jour (Notes) 271 (271), *King-Emperor* v. *Ishri.*

(1890) 13 Mad 343 (344), *Queen-Empress* v. *Guruvadu.*

(1926) 1926 Pat 535 (536) : 5 Pat 573 : 27 Cri L Jour 1308, *Emperor* v. *Govind Singh.*

10. (1932) 1932 Pat 246 (247) : 11 Pat 669 : 1932 Cri Cas 643 : 33 Cri L Jour 877, *Emperor* v. *Rafi Mian.*

(1932) 1932 Mad 21 (24) : 33 Cri L Jour 215 : 1932 Cri Cas 1, *Emperor* v. *Venkatachala Goundan.* Per Waller, J.

(1906) 3 Cri L Jour 371 (374, 375) : 29 Mad 91, *Emperor* v. *Chellan.* It becomes then only a mere opinion.

[See also (1888) 15 Cal 269 (278, 279), *Queen-Empress* v. *Itwari Saho.*]

11. (1902) 29 Cal 128 (133), *Emperor* v. *H. Lyall.*

of both the judge and the jury are cast upon the High Court,[12] and that the High Court is entitled to act up to its *own view* of the case, though in forming its view it should give *due weight* to the opinions of the Judge and the jury;[13]

3. that, therefore, where the verdict appears to the High Court to be one which ought not to be upheld, it is entitled to interfere even though the verdict is *neither unreasonable nor perverse.*[14]

A third view has been expressed by a Full Bench of the High Court of Madras to the effect that it must be assumed that a Judge will not make a reference unless the verdict is *unreasonable or perverse*, and that on such assumption the duty of the High Court is discharged when it expresses its agreement or disagreement with the view of the Sessions Judge.[15]

It is submitted that the first and third views are not correct. There is nothing in the Section to limit the power of the High Court to interfere in cases where the verdict is perverse or unreasonable. Where the High Court considers on the evidence that the verdict ought not to be upheld, it will in fact amount to a miscarriage of justice if the verdict is to be upheld by reason of a sort of conventional respect for the jury. Further it may be noted that the Section speaks of the *opinion* of the jury, and not of the *verdict.*[16] The principle of the sanctity of

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(1908) 8 Cri L Jour 143 (144) (Bom), *Emperor* v. *Chandra Krishna.*
(1909) 10 Cri L Jour 32 (39) : 36 Cal 629, *Emperor* v. *Annada Charan Thakur.*
(1933) 1933 Cal 47 (48) : 60 Cal 427 : 1933 Cri Cas 61 : 34 Cri L Jour 164, *Emperor* v. *Dwarika Nath Goswami.*
[See also (1924) 1924 Cal 960 (963) : 25 Cri L Jour 1217, *Emperor* v. *Sagarmal Agarwalla.*]

12. (1891) 15 Bom 452 (476, 480), *Queen-Empress* v. *Dada Ana.* Per Candy, J.
(1928) 1928 Pat 596 (596) : 30 Cri L Jour 390, *Emperor* v. *Wazira Mehto.*

13. (1909) 10 Cri L Jour 57 (58) : 2 Ind Cas 593 (Cal), *Emperor* v. *Abdul Rahman.*
(1922) 1922 Pat 348 (352) : 23 Cri L Jour 421, *Emperor* v. *Punit Chain.* Per Coutts, J.
(1907) 5 Cri L Jour 484 (486) (Cal), *Emperor* v. *Sri Narain Prasad.*
(1925) 1925 Cal 525 (529) : 26 Cri L Jour 805, *Emperor* v. *Nishi Kanta Banikya.*
(1925) 1925 Cal 909 (911) : 26 Cri L Jour 1298, *Emperor* v. *Mofizet Peada.*
(1899) 22 Mad 15 (18), *Queen-Empress* v. *Anga Valayan.*
(1929) 1929 Nag 84 (85) : 30 Cri L Jour 310, *Emperor* v. *Tukaram.*
(1920) 1920 Pat 674 (676) : 21 Cri L Jour 278, *Emperor* v. *Mt. Zohra.*
(1921) 1921 Pat 191 (192) : 23 Cri L Jour 11 : 6 Pat L Jour 264, *Emperor* v. *Bhuilotan Singh.*
(1934) 1934 Pat 533 (535) : 36 Cri L Jour 262 : 1934 Cri Cas 1189, *Emperor* v. *Suar Gola.*
(1914) 1914 Low Bur 197 (198) : 15 Cri L Jour 513, *Emperor* v. *Kotiya.*
[See also the cases cited in footnotes (11) and (12).]

14. (1902) 29 Cal 128 (133), *Emperor* v. *H. Lyall.*
(1909) 10 Cri L Jour 32 (36, 39) : 36 Cal 629, *Emperor* v. *Annada Charan Thakur.*
(1922) 1922 Pat 348 (352) : 23 Cri L Jour 421, *Emperor* v. *Punit Chain.* Per Coutts, J.
(1932) 1932 Lah 345 (348) : 13 Lah 573 : 1932 Cri Cas 426 : 33 Cri L Jour 220, *Emperor* v. *Barwick.*
(1878) 1 Cal L R 275 (281, 282), *Empress* v. *Mukhun Kumar.*
(1892) 2 Weir 390 (391), *In re, Nagan.*
[See also (1932) 1932 Cal 658 (659) : 1932 Cri Cas 650 : 33 Cri L Jour 476 (S B), *Mabajjan Bibi* v. *Emperor*]
(1874) 11 Bom H C R 137 (138), *Reg* v. *Balvant Pendharkar.*
(1905) 2 Cal L Jour (Notes) 77 (78), *Emperor* v. *Purna Hazra.*

15. (1928) 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cri L Jour 317 (F B), *Veerappa Goundan* v. *Emperor.*
(1932) 1932 Mad 21 (22, 24) : 33 Cri L Jour 215 : 1932 Cri Cas 1, *Venkatachala Goundan* v. *Emperor.* (Per Pandalai, J.; Waller, J., *contra.*) Waller, J., however expressed the view that some of the observations of the Full Bench in 1928 Mad 1186 (F B) were too wide.

16. (1906) 3 Cri L Jour 371 (374, 375) : 29 Mad 91. *Emperor* v. *Chellan.*

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the verdict need not be applied with strictness to the *opinion* of the jury.

It is however necessary before the High Court can interfere under this Section that it should come to the conclusion on the evidence that the decision of the jury is *wrong*. Where the decision is correct or cannot be said to be wrong, there is no room for any interference.[17] Where on the other hand the decision is perverse, or unreasonable or against the evidence or is not supported by evidence, the High Court will interfere,[18] though it has been said before that its powers are not limited to the perversity or unreasonableness of the verdict.

It has been held by the High Court of Bombay in the undermentioned case that the powers of the High Court under this Section are controlled by Section 537 and that consequently where there is no failure of justice, the High Court cannot interfere.[19]

12. Reference in case falling under Section 449.

The High Court of Lahore has held that where a reference is made in the case of a verdict appealable under Section 449, *infra*, the powers of the High Court are not governed by the rulings which hold that the High Court cannot

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(1924) 1924 Mad 232 (233) : 25 Cri L Jour 145, *Nanni Kudumban* v. *Emperor*.

17. (1916) 1916 Mad 783 (784) : 16 Cri L Jour 440 (441), *In re, Irula Sadayan*.
(1927) 1927 Cal 820 (821) : 28 Cri L Jour 874, *Emperor* v. *Irjan*.
(1879) 1879 Pun Re Cr No. 36 page (114), *Empress* v. *Joseef Casorati*.
(1930) 1930 Oudh 334 (334) : 31 Cri L Jour 719 : 1930 Cri Cas 524 : 5 Luck 720, *Emperor* v. *Chiraunji Lal*.
(1931) 32 Cri L Jour 1028 (1028): 133 Ind Cas 475 (All), *Emperor* v. *Madan Gopal*.
(1934) 1934 Pat 533 (536) : 36 Cri L Jour 262 : 1934 Cri Cas 1189, *Emperor* v. *Suar Gola*.
(1928) 30 Cri L Jour 820 (824) : 117 Ind Cas 680 (Cal), *Emperor* v. *Yunus Ali*.
(1935) 1935 Pat 433 (434, 435) : 1935 Cri Cas 1104, *Emperor* v. *Bhagwat Sahu*. Verdict depending mainly on the question whether the testimony of witnesses is to be believed—Verdict not perverse—Such verdict is to be upheld.

18. (1929) 1929 All 338 (339) : 30 Cri L Jour 1078, *Emperor* v. *Jukhan*.
(1896) 20 Bom 215 (218), *Queen-Empress* v. *Devji Govindji*.
(1873) 19 Suth W R Cri 45 (46), *Queen* v. *Doorjodhun Shamonto*.
(1905) 2 Cri L Jour 259 (264) : 32 Cal 759, *Emperor* v. *Abdul Hamid*.
(1922) 1922 Cal 382 (386) : 49 Cal 358 : 24 Cri L Jour 685, *Emperor* v. *Balaram Das*.
(1923) 1923 Cal 97 (99) : 25 Cri L Jour 748, *Emperor* v. *Sristidhar Mazumdar*.
(1924) 1924 Cal 960 (963) : 25 Cri L Jour 1217, *Emperor* v. *Sagarmal*.
(1928) 1928 Cal 233 (233), *Emperor* v. *Komoruddin Sheikh*.
(1934) 1934 Cal 432 (433) : 35 Cri L Jour 1311 : 1934 Cri Cas 669, *Emperor* v. *Dharanidhar Mandal*.
(1884) 2 Weir 388 (389), *In re Ramanna*.
(1923) 1923 Pat 474 (474) : 26 Cri L Jour 856, *Emperor* v. *Ali Hyder*.
(1926) 1926 Pat 566 (568) : 27 Cri L Jour 1041, *Emperor* v. *Zahir Haider*.
(1933) 1933 Pat 273 (273) : 34 Cri L Jour 731 : 1933 Cri Cas 755, *Emperor* v. *Sitalu Ahir*.
(1933) 1933 Pat 481 (484) : 34 Cri L Jour 828 : 1933 Cri Cas 1010, *Emperor* v. *Kameshwar Lal*.
(1934) 35 Cri L Jour 285 (286) : 147 Ind Cas 53 (Oudh), *Emperor* v. *Chupai*.
(1925) 1925 Oudh 311 (311, 312) : 26 Cri L Jour 310 : 28 Oudh Cas 69, *Emperor* v. *Ali Raza*.
(1928) 1928 Oudh 277 (280) : 3 Luck 494 : 29 Cri L Jour 983, *Mohammad Hadi Husain* v. *Emperor*.
(1934) 1934 Oudh 399 (400) : 35 Cri L Jour 1130 : 1934 Cri Cas 1324, *Emperor* v. *Abdul Rahim*.
(1924) 25 Cri L Jour 165 (166) : 76 Ind Cas 389 (Cal), *Emperor* v. *Sukhu Bewa*.
(1921) 1921 Sind 145 (147) : 26 Cri L Jour 609 (611, 612) : 16 Sind L R 143, *Emperor* v. *Pir Mahomed Bux*.
(1932) 33 Cri L Jour 465 (466) : 137 Ind Cas 346 (Oudh), *Emperor* v. *Ramdas*.
(1934) 1934 Oudh 399 (400) : 35 Cri L Jour 1130 : 1934 Cri Cas 1324, *Emperor* v. *Abdul Rahim*. Unanimous verdict —Perverse and against evidence — Interference proper.
(1935) 1935 All 970 (970, 973, 974) : 1935 Cri Cas 1193, *Emperor* v. *Sri Kishen*. Evidence conclusively pointing to guilt of accused — Jury returning verdict of not guilty — Verdict is perverse.

19. (1922) 1922 Bom 368 (369, 370) : 47 Bom 31 : 25 Cri L Jour 315, *Emperor* v. *Shankar Balkrishna Deshpande*.

interfere unless the verdict is *perverse* or *unreasonable*.[1] The High Court of Patna has however taken a contrary view.[2] The assumption in both the cases that the High Court cannot in a reference under Section 307 interfere unless the verdict is perverse or unreasonable, is, as has been seen in Note 11, *ante*, open to question.

13. "After giving due weight to the opinion of the Sessions Judge and the jury."—*See* Note 11, *ante*.

In arriving at a conclusion, the High Court is required to give due weight to the opinions of the Sessions Judge and the jury. There is a difference of opinion as to the relative weight to be given to such opinions, one view being that the opinion of the jury must stand unless the evidence and opinion of the Judge shows clearly that it is wrong and that in the interests of justice it ought to be reversed;[1] a second view being that more weight should be given to the opinion of the Sessions Judge inasmuch as, in addition to the fact that he has, equally with the jury, heard the witnesses, he has been trained to appreciate evidence and gives reasons for his opinion,[2] and a third view being that the opinion of the one is not entitled to more weight than that of the other and that they are both entitled to equal weight.[3] In the undermentioned case[4] it was held that the measure of the relative weight to be attached to the opinions cannot be crystallized into an inflexible formula, but depends upon the facts of each case, though the trend of opinion is to prefer the opinion of the jurors.

There is also a difference of opinion on the question whether the opinion of the jury includes the reasons for the verdict, or whether it means the verdict only. On the one hand it has been held that the Judge has no power to ask the jury, under Section 303, the reasons for their verdict, and that consequently the opinion of the jury does not include the reasons, but only the verdict.[5] On the other hand, it has been held that, for the purpose of satisfying himself as to the advisability of making a reference under this Section, the Judge is entitled to question the jury as to their reasons for their verdict, and that the reasons so given are included in the word "opinion" and can be considered by the High Court.[6] The opinion of the Sessions Judge means the opinion expressed in the reference or at the

Note 12.

1. (1925) 1925 Lah 401 (402) : 6 Lah 98 : 26 Cri L Jour 1241, *Emperor* v. *Bimal Parshad.*
2. (1926) 1926 Pat 566 (568) : 27 Cri L Jour 1041, *Emperor* v. *Zahir Haidar Bilgrami.*

Note 13.

1. (1924) 1924 Cal 701 (703) : 51 Cal 160 : 25 Cri L Jour 1000, *Emperor* v. *Jamaldi Fakir.*
2. (1928) 1928 Cal 732 (733) : 55 Cal 879 : 29 Cri L Jour 823, *Emperor* v. *Ramachandra Roy.*
3. (1924) 1924 Oudh 314 (314) : 27 Oudh Cas 29 : 25 Cri L Jour 785, *Emperor* v. *Ramcharan.*
   (1913) 14 Cri L Jour 556 (558) : 21 Ind Cas 156 (Cal), *Emperor* v. *Sheikh Neamatlulla.*
4. (1924) 1924 Cal 321 (322) : 51 Cal 347 : 25 Cri L Jour 758, *Emperor* v. *Dhananjay.*
5. (1906) 3 Cri L Jour 371 (375) : 29 Mad 91, *Emperor* v. *Chellan.*
   (1928) 1928 Pat 203 (205) : 7 Pat 55 : 29 Cri L Jour 466, *Ram Ahir* v. *Emperor.*
   (1891) 15 Bom 452 (457), *Empress* v. *Dada Ana.*
   (1924) 1924 Mad 232 (233) : 25 Cri L Jour 145, *Nanni Kudumban* v. *Emperor.* It becomes an *opinion* on disagreement.
   (1914) 1914 Cal 394 (395) : 15 Cri L Jour 31, *Emperor* v. *Tara Pada Naskur.*
   (1907) 6 Cri L Jour 373 (373, 374) : 30 Mad 469, *In re Serandu.*
6. (1920) 1920 Mad 170 (170, 171) : 43 Mad 744 : 21 Cri L Jour 466, *In re, Subbiah Thevan.* Per Sadasiva Iyer, J., Spencer, J., dissenting.
   (1920) 1920 Pat 674 (676) : 21 Cri L Jour 278, *Emperor* v. *Zohra.*
   (1909) 10 Cri L Jour 32 (35) : 36 Cal 629, *Emperor* v. *Annada Charan Thakur.*
   (1922) 1922 Pat 348 (351) : 23 Cri L Jour 421, *Emperor* v. *Punit Chain.* Opinion will include the opinion of the

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hearing.[7] It does not include his speculations as to what external considerations, such as the conduct of the jury, might have affected the verdict of the jury.[8]

14. Power of High Court to order re-trial or order additional evidence to be taken.

The High Court can, in a reference under this Section, not only determine the facts itself but may also order a re-trial.[1] It may also call for additional evidence under Section 428 of the Code.[2]

The jurisdiction exercised in such cases is not, however, ordinarily original jurisdiction[3] although it is not a Court of appeal.[4]

15. Verdict of jury in cases not triable by jury—Applicability of this Section.

Where by mistake an offence which is triable with the aid of assessors is tried by jury, the Judge, when he discovers the mistake, may treat the trial as legal and refer the case to the High Court under this Section if he disagrees with the verdict of the jury.[1a]

Where a charge is triable with the aid of the jury as assessors (Section 269, sub-section 3), but is tried by the jury and a verdict is given the procedure, though irregular, is legal and a reference is competent under this Section.[1] Where a case is triable with regard to some of the charges by a jury and with regard to others with the jury as assessors under Section 269, sub-section 3, the mere fact that a reference is made with regard to the charges triable by jury does not absolve the Court from proceeding under Section 309 to judgment in respect of the other charges. The whole case should not be submitted.[2] It has been held by the High Court of Bombay that in such a case the High Court can on the reference set aside the sentence passed by the Judge with regard to the offence triable with the aid of assessors (though not appealed against).[3]

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minority also.

(1926) 1926 Nag 308 (309) : 22 Nag L R 42 : 27 Cri L Jour 773, *Emperor* v. *Kankaya.*

(1929) 1929 Nag 84 (85) : 30 Cri L Jour 310, *Emperor* v. *Tukaram.*

(1915) 1915 Lah 135 (136) : 16 Cri L Jour 587 (588), *Emperor* v. *Walter Turner.* [See also (1933) 34 Cri L Jour 411 (412) (Nag), *Emperor* v. *Baliram Krishnaji Kunbi.*

(1884) 2 Weir 388 (389), *In re Pamanna.*]

7. (1924) 1924 Mad 232 (233) : 25 Cri L Jour 145, *Nanni Kudumban* v. *Emperor.*

8. (1924) 1924 Cal 321 (322): 51 Cal 347 : 25 Cri L Jour 758, *Emperor* v. *Dhananjay Ray.*

Note 14.

1. (1895) 19 Bom 749 (762), *Empress* v. *Ramachandra Govind Harshe.*

(1935) 1935 Cal 184 (189) : 62 Cal 572 : 1935 Cri Cas 241 : 36 Cri L Jour 808 (FB), *Rafiqueuddin Ahmad* v. *Emperor.*

(1879) 1879 Pun Re Cr No 30, page (127), *Empress* v. *Joseph Casorati.*

2. (1929) 1929 Cal 244 (246) : 56 Cal 566 : 30 Cri L Jour 1031, *Debendra Narain* v. *Emperor.*

3. (1902) 29 Cal 286 (297, 303), *In the matter of Horace Lyall.*

4. (1928) 1928 All 207 (210) : 50 All 625 : 29 Cri L Jour 353, *Emperor* v. *Shera.*

Note 15.

1a (1935) 1935 Pat 433 (435) : 1935 Cri Cas 1104, *Emperor* v. *Bhagwata Sahu.*

1. (1899) 23 Bom 696 (697), *Empress* v. *Jeyram Haribhai.*

(1898) 25 Cal 555 (557), *Sarja Kurmi* v. *Empress.*

(1879) 4 Cal L R 405 (406), *In re, Bhootnath Dey.*

2. (1932) 1932 Bom 61 (62, 63) : 33 Cri L Jour 172 : 1932 Cri Cas 85, *Emperor* v. *Chanbasappa Baslingappa.*

(1932) 1932 Mad 512 (512) : 55 Mad 715 : 1932 Cri Cas 430 : 33 Cri L Jour 533, *Pachaimuthu* v. *Emperor.*

(1906) 4 Cri L Jour 192 (193) (Bom), *Emperor* v. *Kalidas Bhudar.*

(1919) 1919 Mad 19 (19) : 20 Cri L Jour 352, *In re Kambala Narayana.*

(1934) 1934 Pat 424 (425) : 36 Cri L Jour 469 : 1934 Cri Cas 928, *Emperor* v. *Lachman Gangota.*

[See also (1908) 7 Cri L Jour 236 (238) (Bom), *Emperor* v. *Vyankatsingh Sambhusingh.*]

3. (1922) 1922 Bom 284 (287) : 24 Cri L Jour 928, *Emperor* v. *Hasrat Mohani.*

16. Acquit or convict of any offence, etc.

It has been seen in Note 12 that the whole case is open to the High Court and it can come to its own conclusion therein. In hearing a reference under this Section the High Court can acquit the accused or convict him of any offence of which the jury could have convicted the accused on the charges framed and placed before them.[1] In cases falling within Sections 237 and 238, *supra*, the accused can be convicted of an offence different from the one for which he was charged. So the High Court can, hearing a reference, under this Section, convict the accused of an offence different from the one he was charged with, within the limits imposed by those two Sections. Thus in a case under Section 302, I. P. C., the High Court can convict the accused of an offence under Section 304-A of that Code, even though the accused was not specifically charged under that Section since such a case comes under Sections 237 and 238 of this Code.[2] On a case submitted under this Section the High Court can acquit the accused if it so thinks fit on facts notwithstanding that the jury has found the prisoner guilty[3] and it can convict the accused notwithstanding that the jury have found the prisoner not guilty.[4]

17. Procedure at the hearing of reference.

The High Court under this Section on a reference against the verdict of acquittal must deal with the case as an appeal by the prosecution.[1] In such a case the Crown is the party who asks for a conviction and he *must begin the case* and satisfy the High Court that there is a case calling upon the prisoner for an answer.[2]

18. Notice of reference.

This Section is silent as to whether any notice of reference to the accused is necessary. It is, however, fair to him that such notice should be given and that he should have time to bring forward any objection he may have to recommendations of the Sessions Judge.[1]

19. Difference between Judges hearing reference—Procedure.

Where a reference is heard by two Judges and they differ in their opinions,

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Note 16.

1. (1919) 1919 Cal 195 (196): 20 Cri L Jour 223, *Emperor* v. *Chhanoo Lal Bania.*
2. (1915) 1915 Bom 297 (298): 16 Cri L Jour 305, *Emperor* v. *Ramava Chennappa.*
   (1877) 3 Cal 189 (191, 192), *Empress* v. *Harai Mirdha.*
   (1914) 1914 Mad 425 (428): 37 Mad 236: 13 Cri L Jour 739, *In re Adabala Muthiyalu.* Can convict under S. 326. I. P. C., where the charge was only under S. 397, I. P. C.
   (1921) 1921 Sind 145 (147, 149): 16 Sind L R 143: 26 Cri L Jour 609. *Emperor* v. *Mahomed Bux.*
   (1924) 1924 Pom 450 (451): 26 Cri L Jour 211, *Emperor* v. *Charles John Walker.* Charge under S. 304, conviction under S. 304-A.
   (1895) 22 Cal 1006 (1010), *Empress* v. *Sitanath Mandal.* Can convict under S. 365, I. P. C., even though the charge was only under Ss. 366, 376, I. P. C.
3. (1873) 20 Suth W R Cr 1 (4), *Empress* v. *Koonjo Leth.*
   (1926) 1926 Cal 1034 (1037): 27 Cri L Jour 1341, *Emperor* v. *Yakub.*
   [See also (1914) 1914 Mad 425 (428): 13 Cri L Jour 739 (741): 37 Mad 236, *In re Adabala Muthiyalu.* Charge under S. 397—Conviction under S. 326.]
   (1887) 14 Cal 42 (46). *In re Gibbons.*
4. (1873) 19 Suth W R Cr 38 (39), *Empress* v. *Oottum Dhoba.*
   (1878) 2 Cal L R 1 (2), *In the matter of Tiluckdharee.*
   (1878) 3 Cal 623 (625), *Empress* v. *Sahae Rae.*
   (1924) 1924 Cal 718 (721): 51 Cal 469: 26 Cri L Jour 24, *Emperor* v. *Bansi Sheikh.*
   (1875) 24 Suth W R Cr 80 (81), *Empress* v. *Nityo Gopal Dass Byragee.*

Note 17.

1. (1873) 20 Suth W R Cr 70 (71), *Queen* v. *Nobin Chunder.*
2. (1873) 20 Suth W R Cr 33 (33), *Empress* v. *Ram Churan Ghose.*

Note 18.

1. (1873) 19 Suth W R Cr 38 (39), *Empress* v. *Oottum Dhoba.*

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the decision is not to be governed by the opinion of the senior Judge; the matter must be referred to a third Judge in the manner required by Section 429.[1]

20. Appeal.

Inasmuch as no judgment of acquittal or of conviction is to be recorded where a reference is made under this Section, there can be no appeal as from a Sessions Judge to the High Court.[1] But where no reference is made, it is clear that the judgment that must follow the verdict will be appealable under Sections 417[2] and 418, *infra*.

A judgment passed by the High Court on a reference under this Section is itself not open to appeal to the High Court.[3]

G.—Re-trial of accused after discharge of Jury.

Sec. 308

308.* Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury, unless the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

Re-trial of accused after discharge of jury.

Synopsis.

Other Topics.

Accused not re-tried—Impropriety of remarks as to guilt. See Note 4, pt. 1.

1. Legislative changes.

There was no Section corresponding to this in the Codes of 1861 and 1872. This Section was first introduced in the Code of 1882.

2. "Whenever the jury is discharged."—*See* Section 282, Note 2.

3. Re-summoning of a jury.

In the undermentioned case,[1] Rankin, J., observed as follows:

"With reference to the question whether, had we thought that the discharge of the jury was *illegal*, we would have ordered a re-summoning of the old jury, I only desire to say for myself that it would require very strong circumstances indeed to make me give an order for the re-summoning of a jury that have been at large since the 16th of August. Taking one thing with another, it would require some little further time before the case possibly could be

* (Code of 1882—S. 308—Same.)

(Codes of 1872 and 1861—Nil.)

(1873) 20 Suth W R Cr 33 (33), *Empress* v. *Ram Churan Ghose*.

Note 19.

1. (1894) 15 Bom 452 (474), *Empress* v. *Dada Ana*.
   (1905) 2 Cal L Jour 77*n* (77*n*), *Emperor* v. *Purna Hazara*.
   [See also (1916) 1916 Mad 783 (785): 16 Cri L J 440, *In re Irula Sadayan*.]

Note 20.

1. (1929) 1929 Mad 135 (137): 30 Cri L Jour 843, *Mottayya Pillai* v. *Emperor*.
2. (1878) 2 Bom 526*n* (526*n*), *In re Hari Ganu*.
3. (1894) Ratanlal 691 (691), *Empress* v. *Adveppa*.

Section 308—Note 3.

1. (1927) 1927 Cal 199 (200): 28 Cri L Jour 141, *Emperor* v. *Monmotha Nath*.

re-started and . . . . . it would be improper and inconvenient for persons to be re-summoned who have been released from their oath as jurors by an order of discharge and who therefore have been perfectly entitled in the *interim* to discuss the matter either with their friends or with the accused or with anybody they like. Such an order as that, I hope, will never be made by this Court except in very exceptional circumstances."

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4. "The Judge shall make an entry."

In an order under this Section that the accused should not be re-tried, the Judge cannot pass remarks implying the guilt of the accused.[1] But the Judge can record his opinion that the accused is innocent.[2]

H.—Conclusion of trial in cases tried with Assessors.

309. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence, for the prosecution and defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

Delivery of opinions of assessors.

309.* (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally *on all the charges on which the accused has been tried* and shall record such opinion, *and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions*

Sec. 309

Delivery of opinions of assessors.

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* (Code of 1882—S. 309—Same as in 1898 Code.)

(Code of 1872—S. 255, Para. 1 and Ss. 261 and 262.)

Assessors' opinion and charge to jury.

255. When the case for the defence and the prosecutor's reply, if any, are concluded, the Court shall proceed :—

In cases tried with assessors, to ask the assessors their opinion, and shall record it:

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Cases tried with assessors.

261. In cases tried with assessors, the Court shall proceed to pass judgment of acquittal or conviction, having considered the opinions of the assessors, but not being bound to conform to them. If the accused person is convicted, the Court shall proceed to pass sentence on him according to law.

Decision vested in Judge.

262. The opinion of each assessor shall be given orally and shall be recorded in writing by the Court; but the decision is vested exclusively in the Judge.

(Code of 1861—S. 324.)

324. * * * * * *

Trial before the Sessions Court with assessors.

The opinion of each assessor shall be given orally and shall be recorded in writing by the Court, but the decision is vested exclusively in the Judge.

Note 4.

1. (1929) 1929 Sind 145 (146): 1929 Cri Cas 313: 23 Sind L R 397: 30 Cri L Jour 877, *Mir Ahmad Shah* v. *Emperor*.

2. (1935) 1935 Sind 189 (191): 1935 Cri Cas 952: 36 Cri L Jour 1359, *Premchand K. Shahani* v. *Emperor*.

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(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

Judgment.

(3) If the accused is convicted, the Judge shall pass sentence on him according to law.

and the answers to them shall be recorded.

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

Judgment.

(3) If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of Section 562*, pass sentence on him according to law.

Synopsis.

Other Topics.

Assessors case tried as jury case—Procedure. See Note 13, Pt. 3.
Assessors not to be cross-examined. See Note 11, Pt. 6.
Assessors' opinion based on evidence and not on personal knowledge. See Note 13, Pt. 4.
Consultation by assessors. See Note 4, F-N (1) and (2).
Double capacity of jurors and assessors to be explained. See Note 2, Pt. 7.
Duty of Judge to assist assessors. See Note 10, Pt. 2.
Further opinion. See Note 10, Pt. 4.
Individual opinion and not concurrence. See Note 5, F-N (2).
Judge unable to record — Procedure. See Note 2, F-N (8).
Judge's opinion not to be forced on assessors. See Note 2, Pt. 6; Note 3, Pt. 5 and Note 11, Pt. 6.
Legislative changes. See Note 2, Pt. 2.
Medical evidence after opinion. See Note 12, F-N (2).
No amendment of charge after taking opinion of assessors. See Note 8, Pt. 1.
No cancellation of trial after opinion. See Note 12, Pt. 1.
No local inspection after opinion. See Note 12, Pt. 3.
No trial after taking opinion. See Note 12, Pts. 1 to 3.
Object of summing up. See Note 2, Pt. 4.
Omission to ask for or record opinion—Effect. See Note 3, Pts. 3 and 4 and Note 5, Pts. 8 and 4.
Opinion and not bare result. See Note 9, F-N (2).
Opinion of committing Magistrate. See Note 12, Pt. 4.
Record of summing up. See Note 2, Pt. 8.
Weight to assessors' opinion. See Note 13, Pt. 5.

1. Scope of the Section.

The Code provides for two modes of trial before the Sessions Court :

(1) trial by jury, and

(2) trial with the aid of assessors.

Sections 297 to 307, *ante*, provide for the procedure to be followed, at the

conclusion of a trial by jury after the arguments on either side have been completed. This Section provides for the procedure to be followed at the conclusion of a trial with the aid of assessors. The following are some of the important points of distinction between the verdict of a jury and the opinion of assessors[1]:—

1. The verdict of a jury is *conclusive* though the Judge disagrees with it unless he considers it fit to submit the case to the High Court under Section 307. But in a trial with the aid of assessors, the Judge is not bound to pronounce judgment in accordance with the opinion of the assessors, although in delivering his judgment he is bound to take into consideration the opinion of the assessors. *See* Note 13, *infra*.
2. The jury form a *body* and their verdict is the verdict of the body. But in the case of a trial with the aid of assessors, they do not form a body ; each acts and expresses his opinion individually. *See* Note 5.
3. In the case of a trial by jury the Judge's charge to the jury is an *essential* part of the procedure ; while in a trial with the aid of assessors, it is left to the *discretion* of the Judge whether or not to sum up the evidence to them. *See* Note 2.
4. The jury are entitled to retire for mutual consultation before delivering their verdict ; the assessors are not so *entitled*, although the Judge *may permit* such consultation. *See* Note 4.

2. Summing up of evidence by Judge to assessors.

As seen in Note 1, *ante*, while it is obligatory on the Judge to charge the jury, summing up the evidence and laying down the law by which they are to be guided (Section 297), this Section confers a *discretion* on the Court to sum up, to the assessors, the evidence for the prosecution and the defence.[1] This provision was first introduced into the Section in the Code of 1882[2] but even prior to it, it was held that the Court had a discretion to sum up the evidence to the assessors.[3] The object of the provision is to enable the Sessions Judge in long or intricate cases to place the evidence in an intelligible form before the assessors so as to assist them in arriving at a reasonable conclusion;[4] and the provision should be resorted to only in such cases.[5] In summing up the evidence to the assessors, the Judge should not obtrude on them his own opinion on the value of the evidence.[6] When at the same trial, an accused is tried by jury for some offences and by the Court with the aid of the jurors as assessors for other offences (Section 269, sub-section 3) the Judge in summing up the evidence should explain to the jurors the double capacity in which they are acting.[7] As to the *recording* of the sum-

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Section 309—Note 1.

1. [See (1901) 24 Mad 523 (537, 538), *Emperor* v. *Tirumal Reddi.*]
   (1912) 13 Cri L Jour 677 (678) : 16 Ind Cas 325 (Bom), *Emperor* v. *Shankar Balwaut Kulkarni.*
   (1865) 3 Suth W R Cr 21 (21), *Queen* v. *Bushmo Anant.*
   (1865) 3 Suth W R Cr 6 (6), *Queen* v. *Mt. Mira Nuggerbhatain.*

Note 2.

1. (1912) 13 Cri L Jour 497 (497) : 40 Cal 163 *Nazimuddi* v. *Emperor.*
2. (1883) 9 Cal 875 (876), *Shadulla Howaldar* v. *Empress.*
   (1901) 24 Mad 523 (538), *Emperor* v. *Tirumal Reddi.*
   (1869) 11 Suth W R Cr 39 (39), *Queen* v. *Joga Poly.*
3. (1866) 5 Suth W R Cr 70 (71), *Queen* v. *Burjo Barick.*
   (1871) 15 Suth W R Cr 25 (26), *Queen* v. *Amiruddin.*
4. (1883) 9 Cal 875 (876), *Shadulla Howaldar* v. *Empress.*
5. (1901) 24 Mad 523 (537), *Emperor* v. *Tirumal Reddi.*
6. (1883) 9 Cal 875 (876), *Shadulla Howaldar* v. *Empress.*
7. (1902) 2 Weir 334 (334), *Sivaga, In re.*

Sec. 309 Notes 2—4

ming up, *see* the undermentioned case.[8]

3. Delivery of opinions of assessors.

In a trial by a Sessions Court with the aid of assessors, the Judge is not bound to deliver judgment in conformity with the opinions of assessors (*see* Note 13); but he is bound to ask the assessors to state their opinions and to record such opinions, and has no power either to convict or acquit the accused without having previously made such record. Even where the accused admits his guilt (after the prosecution evidence, in a case where originally he pleaded not guilty) he cannot be convicted without recording such opinion.[1] The power (under Section 289) to record a finding of not guilty and acquit the accused at the conclusion of the case for the prosecution without calling on the accused to enter on his defence and without recording the opinions of the assessors is confined to cases where there is *no* evidence in support of the prosecution. Where such is not the case the Judge is bound to record the opinions of the assessors under this Section though he considers the evidence for the prosecution to be unreliable.[2] The omission to ask for and record such opinion is not a mere irregularity curable under Section 537.[3] But where a prosecution is withdrawn under Section 494, *infra*, the accused is entitled to be acquitted irrespective of the opinions of the assessors and such opinions need not be recorded before he is acquitted.[4]

The opinions of assessors should be recorded as they are expressed without any influence from the Judge.[5]

4. Retirement of assessors to consider their opinions.

This Section makes no provision as to the right of the assessors to retire to consider their opinions (compare Section 300 in the case of jurors). The matter is left to the discretion of the Judge. Though he may, in his discretion, allow the assessors to consult each other before giving their opinions,[1] he is not bound to do so as he is entitled to have before him the independent and individual opinion of each of the assessors.[2]

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8. (1883) 9 Cal 875 (876), *Shadulla Howaldar* v. *Empress*. If the judge is incapable himself of recording the heads of summing up to the assessors he should avail himself of the services of some Court officer or direct it to be done by some independent person and should not ask the pleader for the prosecution to do so and rely on his work as correct.

Note 3.

1. (1905) 2 Cri L Jour 609 (610) (Bom), *Emperor* v. *Bai Nani*.
2. (1888) 10 All 414 (417, 418), *Queen-Empress* v. *Munna Lal*.
   (1883) 9 Cal 875 (876), *Shadulla Howaldar* v. *Empress*.
   (1892) 16 Bom 414 (422), *Queen-Empress* v. *Vajiram*.
   (1895) 9 C P L R 24 (25), *Empress* v. *Tularam Brahmin*.
   (1889) 2 Weir 391 (391, 392).
3. (1888) 10 All 414 (417, 418), *Queen-Empress* v. *Munna Lal*.
   (1912) 13 Cri L Jour 497 (497): 40 Cal 163, *Nazimuddi* v. *Emperor*.
   (1905) 2 Cri L Jour 609 (610) (Bom), *Emperor* v. *Bai Nani*.
   [See (1871) 15 Suth W R Cr 3 (3) *Queen* v. *Bhugwan Lall*. No legal conviction can take place unless the opinion of the assessors is taken on the whole of the evidence in a case.]
   [But see (1875) 1 All 610 (611), *In the matter of the petition of Narain Das*.]
4. (1886) Ratanlal 307 (307), *Queen-Empress* v. *Chanbasapa*.
5. (1886) 1886 All W N 22 (23), *Empress* v. *Tikaram*.

Note 4.

1. (1887) 1887 Pun Re Cr No. 41, page 95 (97), *Empress* v. *Hassan Khan*. The more correct way in such a case would be to put them in a room where no one could have access to them.
   (1915) 1915 Mad 1036 (1037): 16 Cri L Jour 717 (718), *In re Sennimalai Gounden*.
2. (1915) 1915 Mad 1036 (1037): 16 Cri L Jour 717 (718), *In re Sennimalai Gounden*.
   [See (1901) 24 Mad 523 (537), *Emperor* v. *Tirumal Reddi*. Assessors are not to retire for consultation and form their opinions.]

5. Each assessor to be asked his opinion.

In a trial by jury, the jury form a body and the verdict is that of the body. But in a trial by the Court with the aid of assessors the assessors do not form a body ; but each assessor acts and expresses his opinion individually.[1] Hence it is the duty of the Judge to ask each assessor individually his opinion and record it separately.[2] Where the opinion of some of the assessors is not asked for and recorded, the trial is vitiated by an *illegality*.[3] But where the opinions of all the assessors are asked for, the fact that on its being found that all of them are of the same opinion, such opinion is recorded in the *joint statement* instead of separately, is only an irregularity curable by Section 537, *infra*.[4]

6. Assessor's opinion to be stated orally.

The Section requires the opinions of the assessors te be stated *orally*. The submission of written opinions by the assessors is not contemplated by the Section.[1] But the giving of opinions in writing is only an irregularity which will not vitiate the proceedings unless it has occasioned a failure of justice.[2]

7. Opinion to be given on all the charges.

A distinct opinion on each charge on which the accused has been tried must be taken and recorded.[1]

It has been held by the Oudh Chief Court that a failure to comply with the Section in this respect renders the trial illegal.[2]

8. Conviction for offence different from that on which opinions of assessors were taken.

After the opinions of the assessors have been taken, it is not open to the Court to add to or *alter the charge* (Section 227). But if a case falls within the purview of Section 237 or Section 238, the accused can be *convicted* of an offence different from that on which the opinion of the assessors was taken.[1] Thus, where the accused was charged under Section 302, Penal Code (murder) and the opinion of the assessors was taken on such charge, it is open to the Sessions Judge

Note 5.

1. (1901) 24 Mad 523 (537), *Emperor* v. *Tirumal Reddi.*
2. (1892) 14 All 502 (506), *Queen-Empress* v. *Mulna.*
   (1879) 4 Cal L R 405 (409, 410), *In re, Bhootnath Dey.*
   (1901) 24 Mad 523 (537), *Emperor* v. *Tirumal Reddi.*
   (1883) 9 Cal 875 (877), *Shadulla Howladar* v. *Empress.*
   (1887) 1887 Pun Re Cr No. 41, page 95 (98), *Queen* v. *Hassan Khan.*
   (1865) 4 Suth W R Cr L 9 (10). Each assessor should be asked to state his *individual* opinion, and not merely signify concurrence with his co-assessor.
3. (1903) 26 Mad 598 (599), *Ramakrishna Reddi* v. *Emperor.*
4. (1887) 1887 Pun Re Cr No. 41, page 95 (98), *Queen* v. *Hassan Khan.*
   (1892) 14 All 502 (506), *Queen-Empress* v. *Mulna.*

Note 6.

1. (1912) 13 Cri L Jour 433 (433, 434) : 39 Cal 119, *Lalit Chandra* v. *Emperor.*
2. (1925) 1925 P C 130 (131) : 6 Lah 226 : 26 Cri L J 1059 (P C), *Begu* v. *Emperor.*

Note 7.

1. (1928) 1928 Nag 257 (261) : 29 Cri L Jour 561, *Mt. Shevanti* v. *Emperor.*
   (1874) 22 Suth W R Cr 34 (34, 35), *Queen* v. *Matam Mal.*
   (1935) 1935 Sind 23 (23, 24) : 28 Sind L R 295 : 1935 Cri Cas 118 : 36 Cri L Jour 504, *Ditto* v. *Emperor.*
2. (1934) 1934 Oudh 354 (358) : 35 Cri L Jour 1066: 1934 Cri Cas 1049, *Behari Singh* v. *Emperor.*

Note 8.

1. (1925) 1925 P C 130 (131) : 6 Lah 226 : 26 Cri L Jour 1059 (P C), *Begu* v. *Emperor.*
   (1928) 1928 Bom 130 (133, 134) : 52 Bom 385 : 29 Cri L Jour 403, *Emperor* v. *Ismail Khadirsab.*
   (1929) 1929 Sind 147 (148) : 30 Cri L Jour 875 : 1929 Cri Cas 315, *Haroon* v. *Emperor.*
   [But see contra (1924) 1924 Bom 246 (247) : 26 Cri L Jour 394, *Appaya Baslingappa* v. *Emperor.* Submitted not good law in view of 1925 P C 130 (131) (P C).
   (1902) 2 Weir 334 (334), *In re*

Sec. 309 Notes 8—11

(in a proper case) under Section 237, *ante*, to convict the accused under Section 201 of the Penal Code (causing disappearance of evidence of the offence by removing the dead body) though the opinions of the assessors were not taken on such offence.[2] Similarly, (in a proper case) an accused can be convicted under Section 403, Penal Code (criminal misappropriation), though the charge against him was under Section 395 (dacoity) and the opinion of the assessors was taken only on such charge.[3]

9. Recording of opinions.

The opinions of assessors should be recorded correctly[1] and fully.[2] They should be recorded in the very words used by each assessor immediately after he delivers his opinion.[3] It was held in the undermentioned case[4] that the failure to *record* the opinions of the assessors vitiated the proceedings and that the conviction must be set aside.

10. Questioning assessors.

This Section empowers the Judge to ask the assessors such questions as are necessary to ascertain what their opinions are. Thus, if there is anything obscure in the opinions expressed by the assessors, the Judge can clear up the obscurity by questioning the assessors.[1] Sometimes it may become the *duty* of the Judge to assist the assessors by putting them specific questions concerning the facts of the case. Thus, when there is a mixed question of fact and law to be decided, as for instance, a question of private defence, it may be necessary to ask the assessors specific questions on the facts on which the law will turn.[2] But the Judge should allow the assessors in the first instance to give their opinion in their own way and when they have completed their statements, it would be open to him to question them to elucidate their opinion.[3] In questioning the assessors they should first be asked to give their opinion as to what happened and then, if necessary, they should be asked to give a further opinion on such matters as intention, knowledge, etc.[4]

11. Reasons for opinions, if may be asked.

There is a conflict of decisions as to whether the assessors may be asked to give reasons for their opinions. In a recent decision of the Madras High Court it has been held that as in the case of jurors, so also in the case of assessors, the

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Sivaga. (Do.)
(1898) 2 Weir 301 (301, 302), *In re, Perumal Nadan.* (Do).
(1864) 1 Suth W R Cr 40 (41), *Queen* v. *Dye Bhola.* (Do.)]

2. (1925) 1925 P C 130 (131): 26 Cri L Jour 1059 : 6 Lah 226 (P C), *Begu* v. *Emperor.*
3. (1929) 1929 Sind 147 (148) : 30 Cri L Jour 875 : 1929 Cri Cas 315, *Haroon* v. *Emperor.*

Note 9.

1. (1891) 1891 All W N 145 (146), *Empress* v. *Barmajit.*
2. (1900) 2 Bom L R 323 (324), *Queen-Empress* v. *Fakira.* Opinions of assessors should be recorded otherwise than by simple statement that assessor No. 1 found all the accused not guilty and that assessor No. 2 concurred in such opinion.
3. (1921) 1921 Pat 109 (115): 6 Pat L Jour 147 : 22 Cri L Jour 417, *Fatu Santal* v. *Emperor.*
4. (1934) 1934 Pat 561 (564): 13 Pat 729: 36 Cri L Jour 17: 1934 Cri Cas 1215, *Bhikari Singh* v. *Emperor.*

Note 10.

1. (1912) 13 Cri L Jour 497 (497): 40 Cal 163, *Nazimuddi* v. *Emperor.*
2. (1918) 1918 Pat 308 (310, 311): 3 Pat L Jour 653: 19 Cri L Jour 983, *Sundar Buksh Singh* v. *Emperor.*
3. (1914) 1914 Cal 456 (459): 41 Cal 350: 15 Cri L Jour 385, *Romesh Chandra* v. *Emperor.*
   (1912) 13 Cri L Jour 497 (497): 40 Cal 163, *Nazimuddi* v. *Emperor.* No power to question assessors until they have delivered their opinions orally and judge has recorded such opinions.
4. (1929) 1929 Lah 37 (37) : 30 Cri L Jour 378, *Khewna* v. *Emperor.* *e.g.*, whether accused struck the deceased and if

Judge ought not to ask the assessors to give *reasons* for their opinions beyond what is necessary to decide whether they have understood the case.[1] On the other hand, it has been held by the Bombay High Court that the assessors can and should be asked to give reasons for their opinions.[2] A similar view was held by the Calcutta High Court in certain old decisions.[3] The Punjab Chief Court and the Chief Court of Lower Burma were also inclined to the same view.[4] The view proceeds on the ground that in the case of a jury their verdict is a simple verdict of guilty or not guilty, while in the case of assessors, they merely give an *opinion* and its weight depends solely on the reason and sense on which it is supported.[5]

In any view it is not open to the Judge to *cross-examine* the assessors ; they must be allowed to give their *independent* opinion on the case.[6] *See also* Note 13, *infra*.

12. "The Judge shall then give judgment."

The Section requires that on taking the opinions of the assessors, the Judge should proceed to deliver his judgment. He has no power, after the opinions of the assessors have been recorded, to cancel the trial and to hold a fresh trial.[1] Nor can he, at such stage, take fresh evidence[2] or make a local inspection[3] and base his judgment on such evidence or inspection. In delivering his judgment, though the Judge is not bound to conform to the opinions of the assessors he is entitled to take into consideration such opinions in arriving at his conclusions (*See* Note 13, *infra*). But the Judge is not entitled to refer in his judgment to the opinion of the *committing Magistrate*.[4]

13. Judge not bound to conform to opinion of assessors.

Sub-section 2 expressly provides that in delivering his judgment, the Judge is not bound to conform to the opinion of the assessors.[1] But the Judge can and

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so, when, with what intention or knowledge, etc.

Note 11.

1. (1931) 1931 Mad W N 1139 (1140), *Kunnammal Krishnan, In re.*
2. (1900) 2 Bom L R 322 (323), *Queen-Empress* v. *Mahadu Tukaram.*
   (1900) 2 Bom L R 323 (324), *Queen-Empress* v. *Fakira.*
3. (1865) 3 Suth W R Cr Cir 1, *Criminal Circular No.* 4, 23*rd June* 1865.
   (1865) 3 Suth W R Cr 6 (6), *Queen* v. *Mt. Mira Nuggerbhatain.*
   (1865) 3 Suth W R Cr 21 (21), *Queen* v. *Bushmo Anent.*
   (1879) 4 Cal L R 405 (410), *In re Bhootnath Dey.*
4. (1905) 1905 Pun Re Cr No. 48, page 117 (117) : 3 Cri L Jour 132, *Guranditta* v. *Emperor.*
   (1893-1900) 1893-1900 Low Bur Rul 126 (127), *Nga Shan* v. *Empress.*
5. (1865) 3 Suth W R Cr 6 (6), *Queen* v. *Mt. Mira Nuggerbhatain.*
6. (1912) 13 Cri L Jour 497 (497) : 40 Cal 163, *Nazimuddin* v. *Emperor.*

Note 12.

1. (1915) 1915 Bom 149 (150) : 16 Cri L Jour 824, *Emperor* v. *Nathu Rewa.*
2. (1893) 15 All 136 (136), *Queen Empress* v. *Ramlal.*
   (1888) 1888 Pun Re Cr No. 29, page 59 (62), *Hasan* v. *Empress.* Though opinions of assessors are again taken after such fresh evidence.
   (1870) 1870 Pun Re Cr No. 14, page 26 (26), *Soojawal* v. *Crown.*
   (1934) 35 Cri L Jour 1002 (1005) : 149 Ind Cas 442 (Lah), *Santa Singh* v. *Emperor.* Examination of chemical examiner called as Court witness under S. 540 after assessors' opinions were recorded—Procedure irregular —But conviction not set aside as in circumstances of case, accused had not suffered any prejudice.
   [See also (1889) 1889 All W N 181 (184), *Queen Empress* v. *Jia Lal.* Taking, after recording assessors' opinions, opinion of Civil Surgeon concerning mental condition of accused illegal.]
3. (1918) 1918 Low Bur 22 (23) : 9 Low Bur Rul 88 : 19 Cri L Jour 54, *Deya* v *Emperor.*
4. (1875) 22 Cal 805 (810), *Dewan Singh* v. *Queen Empress.*

Note 13.

1. (1901) 24 Mad 523 (538), *Emperor* v. *Tirumal Reddi.*
   (1912) 13 Cri L Jour 677 (678) : 16 Ind Cas 325 (Bom), *Emperor* v. *Shankar Balwant Kulkarni.*
   (1924) 1924 All 511 (513) : 26 Cri L Jour 324,

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should take into consideration such opinions, and although there is no express provision in the Code making it obligatory on the Judge to discuss in his judgment the opinions of the assessors, still, as a matter of practice, it is desirable that he should do so.[2]

The sub-section applies only to cases which are actually tried with the aid of assessors. Where a case which is so triable is, as a matter of fact, tried by jury, the Judge cannot treat the verdict of the jury as the opinions of assessors and pronounce judgment contrary to the verdict ; but he must, if he disagrees with it, proceed under Section 307, *ante*.[3]

The opinions of the assessors which a Judge can take into account in pronouncing his judgment are opinions based *on the evidence* in the case. The Judge cannot refer in his judgment to the opinion of an assessor based on the latter's *personal knowledge*.[4]

See the undermentioned cases,[5] which bear on the weight to be attached to the opinion of assessors.

14. Opinion of assessors recorded by one Judge—Judgment delivered by his successor—Legality.

Where after hearing part of a case a Judge is transferred or goes on leave his successor must hear the case *de novo* from the beginning and not only from the point at which the previous Judge left the case.[1] Even where the previous Judge is transferred or goes on leave *after* the opinions of the assessors have been recorded, the successor cannot pronounce judgment without hearing the case *de novo* from the beginning and taking the opinions of the assessors again.[2] (*Compare* Section 350 in the case of Magistrates.)

15. Sentence.

If the accused is convicted, the Court has no discretion, unless it decides to proceed under Section 562 to refuse to pass sentence according to law.[1]

Lakhan v. *Emperor*.
[See (1917) 1917 P C 25 (28): 44 Cal 876: 18 Cri L Jour 471 (P C), *Dal Singh* v. *Emperor*.]

2. (1933) 1933 Lah 910 (911) : 35 Cri L Jour 168 : 1933 Cri Cas 1297, *Anup Singh* v. *Emperor*.
(1905) 1905 Pun Re Cr No. 48, page 117 (117): 3 Cri L Jour 132, *Guranditta* v. *King Emperor*.
(1893-1900) 1893-1900 Low Bur Rul 126 (127), *Nga Shan* v. *Queen-Empress*.
[See (1869) 6 Bom H C R 55 (56), *Reg.* v. *Kala Karsan*.
(1874) 22 Suth W R Cr 34 (35), *Queen* v. *Matam Mal*.]

3. (1898) 25 Cal 555 (556), *Surja Kurmi* v. *Queen Empress*.
[See also (1879) 4 Cal L R 405 (409, 410), *Bhootnath Dey, In re*.]

4. (1875) 24 Suth W R Cr 28 (28), *Queen* v. *Ram Churn Kurmokar*.

5. (1925) 1925 Oudh 452 (452): 26 Cri L Jour 1291, *Behari* v. *Emperor*. In a case of identification of ornaments of small value the opinion of the assessors is of considerable value.
(1934) 1934 Lah 171 (173): 36 Cri L Jour 491 : 1934 Cri Cas 349, *Ali Mohammed* v. *Emperor*. Approver examined last—Counsel unable to question corroborative witnesses properly — Assessors unable to appreciate corroborative evidence—Opinion of assessors loses its value.

Note 14.

1. (1908) 8 Cri L Jour 121 (123) (Cal), *Durga Charan Sanyal* v. *Emperor*.

2. (1874) 21 Suth W R Cr 47 (47), *Queen* v. *Gopi Noshyo*.

Note 15.

1. (1895) 22 Cal 805 (809), *Dewan Singh* v. *Queen Empress*.

I.—Procedure in case of Previous Conviction.

310. In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence, committed after a previous conviction for any offence, the procedure laid down in Sections 271, 286, 305, 306 and 309 shall be modified as follows :—

Procedure in case of previous conviction.

(*a*) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence ;

(*b*) if he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge ;

(*c*) if he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly ; but, if he denies that he has been so previously convicted, or refuses to, or does not, answer such question, the jury, or the Court and the assessors (as the case may be), shall then hear evidence concerning such previous conviction and in such case

310.* *In the case of a trial by a jury or with the aid of assessors, when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely :—*

Procedure in case of previous conviction.

(a) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until—

(i) he has been convicted of the subsequent offence, or

(ii) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence.

(b) In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.

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* **(Code of 1882—S. 310.)**

Same except the following : In sub-section (c), the words "hear evidence" were substituted for the word "inquire."

(Codes of 1872 and 1861—Nil.)

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(where the trial is by jury) it shall not be necessary to swear the jurors again.

Synopsis.

Other Topics.

Non-applicability to Magistrates. See Note 2, Pt. 6.
Prejudiced or not. See Note 4, F-N. (2).
Record to show when reference to prior conviction made. See Note 3, Pt. 3.
Reference under S. 307. See Note 1, Pt. 1.

1. Legislative changes.

This Section has been substituted for the old Section by the Criminal Procedure Code Amending Act, XVIII of 1923.

Under the Section as it stood before the amendment the accused could be asked about his previous conviction only if he pleaded guilty to or was *convicted* of the subsequent offence. The Court could not ask him about it where the jury had given a verdict and the Court *without convicting him*, made a reference to the High Court under S. 307.[1] This disability has now been removed.

2. Scope and object of the Section.

This provision of law has been taken from the English Statute Law, 6 & 7, William IV, Chapter 3.[1] It is based on the principle that a prisoner on his trial ought not to be prejudiced by a statement of a previous conviction suffered by him.[2] The Section is imperative.[3] It is most essential that the procedure prescribed by it should be conducted with precision, regularity and close adherence to the rules laid down in this Section.[4] This Section indicates the importance of the complete exclusion of the knowledge of previous conviction when weighing the evidence as to the truth or otherwise of the main charge.[5]

The Section is applicable to trials before the Court of Session only and does not apply to trials before Magistrates.[6] As to trials before Magistrates, *see* Section 255-A.

3. When previous conviction should be referred to.

The accused should not be asked about his previous conviction and his plea taken thereto until

(1) after his conviction for the subsequent offence,[1] or

Section 310—Note 1.

1. (1907) 5 Cri L Jour 422 (423): 30 Mad 134, *Emperor* v. *Kandaswami Goundan.* [See also (1900) 2 Bom L R 336 (337), *Queen-Empress* v. *Govind Thavrya.*]

Note 2.

1. (1887) 14 Cal 721 (727), *Empress* v. *Kartick Chunder Das.*
2. (1887) 14 Cal 721 (727), *Empress* v. *Kartick Chundar Das.*
   (1920) 1920 Pat 351 (352): 5 Pat L Jour 706: 22 Cri L Jour 219, *Teka Ahir* v. *Emperor.*
   (1930) 1930 All 17 (19): 31 Cri L Jour 8: 1930 Cri Cas 33, *Goli* v. *Emperor.*
3. (1927) 1927 Lah 774 (775): 28 Cri L Jour 667, *Raju* v. *Emperor.*
4. (1890) 1890 All W N 12 (13), *Empress* v. *Jhinguri.*
5. (1924) 1924 Rang 91 (91): 1 Rang 520: 25 Cri L Jour 618, *Maung E. Gyi* v. *Emperor.*
6. (1923) 1923 Cal 707 (707): 50 Cal 367: 25 Cri L Jour 527, *Dehri Sonar* v. *Emperor.*
   (1924) 1924 Rang 91 (92): 1 Rang 520: 25 Cri L Jour 618, *Maung E. Gyi* v. *Emperor.*
   (1905) 2 Cri L Jour 227 (227, 228) (Rang), *Nga Te* v. *Emperor.*

Note 3.

1. (1920) 1920 Pat 351 (351): 22 Cri L Jour

(2) the jury have delivered their verdict,[1a] or the opinions of the assessors have been recorded on the charge for the subsequent offence.[2] **Sec. 310 Notes 3—6**

The record should invariably show that no reference to the previous conviction was made until the subsequent offence was found proved against the accused.[3]

4. Non-compliance with the Section.

A non-compliance with the provisions of this Section is only an irregularity which will not vitiate the trial[1] unless the accused is shown to have been prejudiced thereby.[2]

5. Evidence as to previous conviction.—*See* Section 311, *infra.*

6. Proof of previous conviction.—*See* Section 511, *infra.*

311. Notwithstanding anything in the last foregoing Section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872. **Sec. 311**

When evidence of previous conviction may be given.

(This Section was added as the last paragraph of Section 310 of the Code of 1882 by Act III of 1891 and takes the place of Section 311* of the Code of 1882, which was repealed by Act XII of 1891.)

*** (Code of 1882—S. 311.)**

J.—List of jurors for High Court, and summoning jurors for that Court.

(Repealed by Act 12 of 1891.)

311. In each Presidency-town, the jurors' book for the year current when this Code comes into force shall be taken as containing a correct list of persons liable to serve as jurors under this Chapter.

Jurors' book.

Those persons whose names are entered in the jurors' book as being liable to serve on special juries only shall be deemed to be persons privileged and liable to serve only as special jurors under this Chapter during the year for which the said list has been prepared.

Exemption of special jurors.

(Codes of 1872 and 1861—Nil.)

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219 : 5 Pat L Jour 706, *Teka Ahir* v. *Emperor.*

(1890) 1890 All W N 12 (13), *Empress* v. *Jhinguri.*

(1886) 1886 All W N 47 (47), *Empress* v. *Sukha.*

(1907) 5 Cri L Jour 422 (423) : 30 Mad 134, *Emperor* v. *Kandaswami Goundan.*

(1901) 28 Cal 689 (693), *Yasin* v. *Emperor.*

(1866) 5 Suth W R Cr Letters 10 (10).

(1866) 5 Suth W R Cr 67 (68), *Empress* v. *Jehan Mullick.*

(1865) 3 Suth W R Cr 38 (38), *Empress* v. *Shiboo Mundle.*

1a (1890) 1890 All W N 12 (12), *Empress* v. *Jhinguri.*

2. (1920) 1920 Pat 351 (351) : 22 Cri L Jour 219 : 5 Pat L Jour 706, *Teka Ahir* v. *Emperor.*

(1866) 6 Suth W R Cr 72 (73), *Empress* v. *Gopal Thakoor.*

(1867) 8 Suth W R Cr 11 (12), *Empress* v. *Phoolchand.*

3. (1883) 12 Cal L R 555 (555), *Kristo Behari Dass* v. *Empress.*

(1935) 1935 Sind 115 (127, 128) : 1935 Cri Cas 494 : 29 Sind L R 121 : 36 Cri L Jour 1310, *Bhurasing* v. *Emperor.* Evidence as to previous conviction can neither be let in before the verdict, nor referred to by the Judge in his charge to the jury.

Note 4.

1. (1883) 13 Cal L R 110 (111), *Bepin Behary Shaha* v. *Empress.*

(1886) 1886 All W N 47 (47), *Empress* v. *Sukha.*

2. (1890) 1890 All W N 12 (13), *Empress* v. *Jhinguri.* Accused prejudiced—Conviction set aside.

(1920) 1920 Pat 351 (353) : 22 Cri L Jour 219 : 5 Pat L Jour 706, *Teka Ahir* v. *Emperor.* (Do.)

(1927) 1927 Lah 774 (774) : 28 Cri L Jour 667, *Raju* v. *Emperor.* (Do.)

(1901) 2 Weir 393 (393), *In re Chundi*

Sec. 311 Note 1

Synopsis.

Scope. Note No. 1

Other Topics.

Prior conviction when relevant. See Note 1.
Offences in which prior conviction is relevant. See Note 1, Pt. 2.

1. Scope.

The guilt of a person accused of an offence is to be established by proof of the *facts*, and not by proof of his *character*. A previous conviction may be proved to show the offender's character. But such evidence might create a prejudice but not lead a step towards substantiation of guilt. Hence, Section 310 *delays* the proof of such previous conviction to a stage *after* the conviction, or the delivery of a verdict by the jury, or the recording of opinions of assessors as the case may be. However, if the fact of the previous conviction is *relevant* under the provisions of the Evidence Act, the present Section provides that the evidence of the same need not be delayed but may be given *at the trial* of the subsequent offence, notwithstanding Section 310.

The relevancy of a previous conviction is to be determined by a reference to the Sections of the Evidence Act. Such evidence is inadmissible save in a few, well defined and exceptional circumstances.[1a] Under Section 54 a previous conviction is relevant as evidence of bad character. But a previous conviction is not admissible in evidence against the accused unless evidence of good character be given by him, in which case the fact that the accused has been previously convicted of an offence is admissible as evidence of bad character. A previous conviction may also be relevant under Section 43 [*See* Illus. (e) and (f)] and under Section 8 as showing motive. It is also relevant under Section 14, when the existence of any state of mind such as intention, knowledge, etc., or existance of any state of body or bodily feeling is in issue or relevant [*See* Illus. (b)].[1] For instance, where a person was charged with the offence of belonging to a gang of persons associated for purpose of *habitually* committing dacoity, it was held that the proof of a previous conviction was admissible under Section 14 of the Evidence Act, having regard to the character of the offence attributed to the accused.[2]

Perugadi. (Do.)
(1880) 5 Cal 768 (769), *Roshun Doosadh* v. *Empress.* (Do.)
(1883) 13 Cal L R 110 (111), *Bepin Behari Shaha* v. *Empress.* No prejudice—Conviction not set aside.
(1886) 1886 All W N 47 (47), *Empress* v. *Sukha.* (Do.)

Section 311—Note 1.

1a (1934) 1934 Cal 198 (202): 1934 Cri Cas 297 : 35 Cri L Jour 722, *Parbati Dasi* v. *Emperor.*
[See also (1864) 2 Bom H C R 125 (126), *Reg* v. *Timmi.* It is improper to allow evidence of bad character against the accused when it is not in question.]
1. (1895) 1895 Pun Re Cr No. 7, page 26 (29, 30), *Wasir* v. *Empress.*
2. (1897) 1 Cal W N 146 (150), *Empress* v. *Naba Kumar Patnaik.*
(1912) 13 Cri L Jour 539 (540): 15 Ind Cas 811 (Bom), *Emperor* v. *Tukaram Malhari.*
(1923) 1923 Bom 71 (72): 46 Bom 958: 24 Cri L Jour 867, *Emperor* v. *Haji Sher Mahomed.*
(1911) 12 Cri L Jour 97 (98) : 38 Cal 408, *Bonai* v. *Emperor.*
(1914) 1914 Cal 589 (591) : 15 Cri L Jour 43, *Baharuddin Mandal* v. *Emperor.*
(1910) 11 Cri L Jour 364 (365) : 6 Ind Cas 492 (Lah), *Walia* v. *Emperor.*
(1914) 1914 Lah 545 (548) : 16 Cri L Jour 300 (302): 1915 Pun Re Cr No 3, *Hidayata* v. *Emperor.*
(1930) 1930 Oudh 455 (459): 32 Cri L Jour 162 : 1930 Cri Cas 1079, *Bachchu* v. *Emperor.*
(1933) 1933 Oudh 355 (358): 9 Luck 22 : 35 Cri L Jour 273 : 1933 Cri Cas 976, *Beni Madho* v. *Emperor.*

J.—List of Jurors for High Court, and summoning Jurors for that Court.

312. The names of not more than four hundred persons shall at any one time be entered in the special jurors' list.

Number of special jurors.

312.* *The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list, provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed.*

Number of special jurors.

Synopsis.

High Court. Note No. 1 | **"May prescribe the number."** Note No. 2

Other Topics.

Legislative changes. See Note 2. Intention of proviso. See Note 2.

1. High Court.

As to the meaning of the expression "High Court," *see* Section 266, *ante*.

2. "May prescribe the number."

Under the Section as it stood before the amendment, it was provided that not more than *four hundred* persons should, at any one time, be entered in the special jurors' list. Under the present Section, as amended by Section 18 of Act XII of 1923, the High Court is empowered to prescribe the number of special jurors. The proviso is intended to secure a list which should "include all persons qualified to whatever nationality they may belong."

313.† (1) The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

Lists of common and special jurors.

(*a*) a list of all persons liable to serve as common jurors; and

(*b*) a list of persons liable to serve as special jurors only.

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein.

(3) No person shall be entitled to have his name entered in

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* **(Code of 1882—S. 312**—Same as in 1898 Code.)

(Codes of 1872 and **1861**—Nil.)

† **(Code of 1882—S. 313**—Same.)

(Codes of 1872 and **1861**—Nil.)

Sec. 313 Note 1

the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

(4) The Governor-General in Council *or the Local Government* in the case of the High Court at Fort William in Bengal, and in the case of other High Courts, the Local Government may exempt any salaried officer of Government from serving as a juror.

Discretion of officer preparing lists.

(5) The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said list as seems to him to be proper, and there shall be no appeal from, or review of, his decision.

(The words " or the Local Government " in sub-section 4 were inserted by the Devolution Act, 1920.)

Synopsis.

Clerk of the Crown. Note No. 1

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Other Topics.

Discretion of Clerk of the Crown—No interference by Court. See Note 1, Pt. 1.

1. Clerk of the Crown.

For the definition, *see* Section 4 (*e*).

The preparation of the list of special jurors is entirely in the discretion of the Clerk of the Crown ; the Court will not interfere.[1]

Sec. 314

314.* (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the local official Gazette before the fifteenth day of April next after their preparation.

Publication of lists, preliminary and revised.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the local official Gazette before the first day of May next after their preparation.

(3) Copies of the said lists shall be affixed to some conspicuous part of the court-house.

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*(Code of 1882—S. 314—Same.)

(Codes of 1872 and 1861—Nil.)

Section 313—Note 1.

1. (1877) 1 Ind Jur N S 106, *In re Shamchand Mitter.*

315. (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each session in each presidency-town at least twenty-seven of those who are liable to serve on special juries, and fifty-four of those who are liable to serve on common juries.

Number of jurors to be summoned in presidency-towns.

315.* (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each session *in the town which is the usual place of sitting of each High Court, as many of those who are liable to serve on special or common juries, respectively, as the Clerk of the Crown considers necessary.*

Number of jurors to be summoned.

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

Supplementary summons.

Synopsis.

	Note No.		Note No.
Legislative changes.	**1**	**"Shall be summoned."**	**2**

Other Topics.

Affixture in absence—Effect. See Note 2, Pt. 2.
Mode of service of summons. See Note 2, Pt. 1.
No duty of jurors to notify address. See Note 2, Pt. 2.
Summons by post illegal. See Note 2, Pt. 1.

1. Legislative changes.

The words "in the town.....considers necessary" in sub-section 1 were substituted by Act 18 of 1923 for the words "in each presidency-town.....on common juries."

2. "Shall be summoned."

The procedure for the service of summons to be followed is the one laid down in Section 68 and the following Sections, and no other mode adopted for such service is justifiable. Thus the issue of summons by a *registered letter* is illegal and no fine can be imposed for non-attendance in pursuance of summons.[1] Where

* **(Code of 1882—S. 315**—Same.)

(Codes of 1872 and 1861—Nil.)

Section 315—Note 2.

1. (1897) 1 Cal W N 116 Notes, *Sharat Chandra Ray* v. *Empress.*

Sec. 315 Note 2

the summons was served by affixing a duplicate on the door of the dwelling house of the juror but the latter had no knowledge thereof as he was living away from his residence, it was held that he was not liable to fine for non-attendance as the law did not contemplate the imposition of any obligation on persons on the jury list either to notify their change of address or to make any arrangement for the acceptance of the summons.[2]

Sec. 316

Summoning jurors outside the place of sitting of High Courts.

316.* Whenever a High Court has given notice of its intention to hold sittings at any place outside the *town which is the usual place of sitting of such High Court* for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

(By the Amending Act of 1923, the words "Presidency-Towns" were substituted by the words italicised.)

Sec. 317

Military jurors.

317.† (1) In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army *or Air Force* resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent *official* duty, or for any other special *official* reason.

Synopsis.

Legislative changes. Note No. 1

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1. **Legislative changes.**

The words "or Air Force" were inserted in sub-section 1 and the word "official" was substituted for "military" in sub-section 2 by Act X of 1927.

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* **(Code of 1882—S. 316**—Same as in the Code of 1898.)

(Codes of 1872 and 1861—Nil.)

† **(Code of 1882—S. 317**—No material difference.)

(Codes of 1872 and 1861—Nil.)

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2. (1902) 6 Cal W N 887 (888), *Moni Lal Roy* v. *Emperor.*

318.* Any person summoned under Section 315, Section 316, or Section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the Judge, to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid:

Failure of jurors to attend.

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

Synopsis.

1. Legislative changes.

Code of 1898.—The words "for a term not exceeding six months" and the proviso were newly added.

2. Failure to attend—Effect of.—*See* Note 2 to Section 315.

K.—List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court.

319.† All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial, held within the district in which they reside, or, if the Local Government, on consideration of

Liability to serve as jurors or assessors.

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* **(Code of 1882—S. 318**—See Note 1 above; otherwise no difference.)

(Codes of 1872 and 1861—Nil.)

† **(Code of 1882—S. 319.)**

319. All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the District in which they reside.

Liability to serve as jurors or assessors.

(Code of 1872—S. 404.)

404. All male persons between the ages of twenty-one and sixty, resident within the local limits of the jurisdiction of the Court of Session, except those hereinafter mentioned, shall be deemed capable of serving as jurors and assessors, and shall be liable to be summoned accordingly.

Jurors and assessors.

(Code of 1861—S. 333.)

333. Except as hereinafter provided, all male persons between the ages of twenty-one and sixty, resident within the limits of the jurisdiction of the Court of Session, shall be deemed capable of serving as jurors and assessors, and shall be liable to be summoned accordingly.

Jurors.

Sec. 319 Notes 1—4

local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

Synopsis.

Other Topics.

Absence for a long time—Exempt. See Note 3, Pt. 1.
Men of high position such as Rajas. See Note 2, Pt. 1.
Mere entry in list—No duty to serve. See Note 3.
Permission to hold Court, at places with no assessors, refused. See Note 4, Pt. 1.
Residence in more than one district. See Note 3.

1. Legislative changes.

The last twenty-three words beginning from "or, if the Local Government" were not found in the Code of 1882 but were newly added in the present Code.

2. "All persons."

It is contrary to the usage of the country and eminently undesirable that a gentleman of high position, such as an hereditary Raja, should be placed on the list or if placed on such list should be summoned to serve as an assessor unless it were known that he would be willing to act as such.[1]

3. "Liable to serve."

The mere fact that a person's name is on the list does not render him liable to serve as an assessor unless he is liable under this Section. Thus a man may reside during the year in more than one District and his name might be entered in the jurors' or assessors' list in each of such districts. But he would be subject to serve as a juror or assessor only if he is residing in the district in which the trial is held. A juror or assessor who is absent for a long time from his ordinary place of residence will be regarded as non-resident in that place and will be exempt from liability to serve as a juror or assessor under this Section.[1]

4. Within the District.

Where the Sessions Judge of Kanara asked the High Court for special permission to hold his Court at Sirsi instead of at Karwar, the High Court declined to permit it as no assessors were available for the Sessions at Sirsi which was outside the area fixed.[1]

Sec. 320

Exemptions.

320.* The following persons are exempt from liability to serve as jurors or assessors, namely :—

*** (Code of 1882—S. 320.)**

Exemptions.

320. The following persons are exempt from liability to serve as jurors or assessors, namely :—

(*a*) Officers in civil employ superior in rank to a District Magistrate ;
(*b*) Judges ;
(*c*) Commissioners and Collectors of Revenue or Customs ;

Section 319—Note 2.

1. (1931) 1931 Pat 160 (160) : 1931 Cri Cas 400: 32 Cri L Jour 740, *Mohamad Ejaz Hussan Khan* v. *Emperor.*

Note 3.

1. (1897) 1897 All W N 167 (167), *In the matter of Bhupindar Bahadur Singh.*

Note 4.

1. (1886) Ratanlal 304 (304).

(*a*) officers in civil employ superior in rank to a District Magistrate;

(*aa*) *members of either chamber of the Indian legislature and members of a Legislative Council constituted under the Government of India Act;*

(*b*) salaried Judges;

(*c*) Commissioners and Collectors of Revenue or Customs;

(*d*) Police-officers and persons engaged in the Preventive Service in the Customs Department;

(*e*) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;

(*f*) persons actually officiating as priests or ministers of their respective religions;

(*g*) persons in Her Majesty's Army *or Air Force*, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors;

(*h*) surgeons and others who openly and constantly practise the medical profession;

(*i*) legal practitioners as definied by the Legal Practitioners Act, (1879), in actual practice;

(*j*) persons employed in the Post-office and Telegraph Departments;

(*k*) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, Sections 640 and 641;

(*l*) other persons exempted by the Local Government from liability to serve as jurors or assessors.

(*d*) persons engaged in the Preventive Service in the Customs Department;

(*e*) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;

(*f*) persons actually officiating as priests or ministers of their respective religions;

(*g*) persons in Her Majest'y Army, except when by any law in force for the time being, they are specially made liable to serve as jurors or assessors;

(*h*) surgeons and others who openly and constantly practise the medical profession;

(*i*) persons employed in the Post-office and Telegraph Departments;

(*j*) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, Sections 640 and 641;

(*k*) other persons exempted by the Local Government from liability to serve as jurors or assessors.

(Code of 1872—S. 406.)

Exemptions.

406. The following persons are exempt from the liability to serve as jurors or as assessors, namely:—

All officers in civil employ superior in rank to a Magistrate of the District.

Judges and other Judicial Officers.

Commissioners and Collectors of Revenue or Customs.

All persons engaged in the Preventive Service in the Customs Department.

All persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty.

Sec. 320 Notes 1—2

Synopsis.

Other Topics.

Exempted persons—Liability in special cases. See Note 2.
Exemption and disqualification. See Note 2.
Persons of High position, See Note 3. See also S. 319, Note 2, Pt. 1.

1. Legislative changes.

Code of 1898 :—

1. Clause (*aa*) was newly added by the Legislative Members Exemption Act, XXIII of 1925.
2. The words "salaried" in Clause (*b*), "Police Officers and" in Clause (*d*) and the whole clause (*i*) are not found in the Code of 1882, but have been added in this Code.
3. The words "or Air Force" were added in Clause (*g*) by Act 10 of 1927.

2. Scope of the Section.

Under this Section, cases of *exemption* are dealt with, while Section 278,

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Chaplains and others employed in religious offices.

All persons in the Military service, except when, by any law in force for the time being, such persons are specially made liable to serve.

Surgeons and others who openly and constantly practise in the profession of physic.

Persons employed in the Post-office and Electric Telegraph Departments.

Persons actually officiating as priests in their respective religions.

All persons exempted by the Local Government; and persons exempted by Government from personal appearance in Court, under the provisions of the Code of Civil Procedure, section twenty-two.

Person exempted is not bound to avail himself of his right of exemption.

The exemption from service given by this Section is a right of which each person exempted may avail himself or not.

Nothing contained in this Section shall be construed to disqualify any such person, if he is willing to serve as a juror or as an assessor.

The Sessions Judge may issue a summons to any exempted person, to serve as an assessor or juror on the trial of a European British subject.

(Code of 1861—S. 335.)

Exemption.

335. The following persons are exempt from the liability to serve as jurors or as assessors, namely :—

Judges and other Judicial Officers.

Commissioners and Collectors of Revenue or Customs.

All persons engaged in the Preventive Service in the Customs Department.

All persons engaged in the collection of the Revenue whom the Collector may think fit to exempt on the ground of official duty.

Chaplains and others employed in Religious Offices.

All persons in the Military service.

Surgeons and others who openly and constantly practise in the profession of physic.

Persons employed in the Post-Office and Electric Telegraph Departments.

Persons actually officiating as priests in their respective religions.

Persons exempted by Government from personal appearance in Court under the provisions of S. 22 of Act 8 of 1859 (for simplifying the procedure of the Courts of Civil Judicature not established by Royal Charter.)

Person exempted is not bound to avail himself of his right of exemption.

The exemption from service given by this Section is a right of which each person exempted may avail himself or not. Nothing herein contained shall be construed to disqualify any such person if he shall be willing to serve as a juror or as an assessor.

ante, deals with cases of *disqualification*. Thus, the Code makes a clear distinction between exemption and disqualification. The persons enumerated in this Section, though they are *capable*, are not *liable* to serve as jurors or assessors (*see* Section 321). This right to exemption has, however, to be claimed and established (Section 324). Where the proper number of Europeans and Americans cannot otherwise be obtained, even the exempted persons may, under the proviso to Section 326, sub-section 3, *infra*, be summoned to try Europeans and Americans. **Sec. 320 Notes 2—3**

3. Persons exempted under Civil Procedure Code—Clause (k).

Sections 640 and 641 of the Civil Procedure Code of 1882 are now Sections 132 and 133 of the present Civil Procedure Code, 1908. Under the former Section women, who, according to the customs and manners of the country, ought not to be compelled to appear in public, are exempt from personal appearance in Court. Under the latter Section, the Local Government may, by notification in the Local Official Gazette, exempt from personal appearance in Court any person whose rank entitles him to the privilege of exemption, the names and residences of such persons being forwarded to the High Court.

321.* (1) The Sessions Judge, and the Collector of the district or such other officer as the Local Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under Section 278, Clauses (*b*) to (*h*), both inclusive. **Sec. 321**

List of jurors and assessors.

(2) The list shall contain the name, place of abode and quality or business of every such person; and, if the person is an European or an American, the list shall mention the race to which he belongs.

Synopsis.

Preparation of list of persons liable to serve as jurors or assessors. Note No. 1

Other Topics.

Men of high status such as Rajas. See Note 1, Pt. 1.

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* **(Code of 1882—S. 321**—Same.)

(Code of 1872—S. 400.)

400. The Sessions Judge and the Collector of the district, or such other officer as the Local Government from time to time appoints in this behalf, shall prepare and make out in alphabetical order a list of persons residing within ten miles from the place where trials before the Court of Session are held, or within such other distance as the Local Government thinks fit to direct, who are, in the judgment of the Sessions Judge and Collector or other officer as aforesaid, qualified from their education and character to serve as jurors or as assessors respectively.

List of jurors and assessors.

The list shall contain the name, place of abode, and quality or business of every such person, and if the person is an European or an American, the list shall mention the race to which he belongs.

(Code of 1861—S. 329.)

(Materially the same as that of 1872 Code.)

Cr. P. C. 212 & 213

Sec. 321 Note 1

1. Preparation of list of persons liable to serve as jurors or assessors.

It is undesirable that a gentleman of a high position such as an hereditary Raja should be placed on the list of jurors or assessors.[1]

Sec. 322

Publication of list.

322.* Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid, and in the court-houses of the District Magistrate and of the District Court, and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside.

Sec. 323

Objections to list.

323.† To every such copy or extract shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the Sessions court-house, and at a time to be mentioned in the notice.

Sec. 324

Revision of list.

324.‡ (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid, and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror, or as an assessor, or who may establish his right to any exemption from service given by Section 320, and

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* **(Code of 1882—S. 322.)**

322. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid, and in the court-houses of the District Magistrate and of the District Court, and in some conspicuous place in the town or towns in or near which the persons named in the list reside.

Publication of list.

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(Code of 1872—S. 401, Para 1 and a part of S. 330 of 1861 Code.)

Same as in the Code of 1882.

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† **(1882—S. 323; 1872—S. 401, Para 2 and 1861—S. 330.)**

Same as in 1898 Code.

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‡ **(Code of 1882—S. 324 and Code of 1872—S. 402.)**

Same as the first five sub-sections of 1898 Code.

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(Code of 1861—S. 331.)

331. The Collector or other officer as aforesaid shall at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not qualified in his judgment to serve as a juror or as an assessor, and insert the name of any person omitted therefrom, whom he deems qualified for such service. A copy of the revised list shall be signed by the Collector or other officer as aforesaid and transmitted to the Court of Session. Any order of the Collector or other officer as aforesaid in preparing and revising the list shall be final.

Revision of list.

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Section 321—Note 1.

1. (1897) 1897 All W N 167 (167). *In the matter of Bhup Inder Bahadur Singh.*

insert the name of any person omitted from the list whom they deem qualified for such service. Sec. 324 Note 1

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list.

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

(5) Any exemption not claimed under this Section shall be deemed to be waived until the list is next revised.

Annual revision of list.

(6) * The list so prepared and revised shall be again revised once in every year.

(7) The list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

Synopsis.

Annual revision of the list—Sub-section 6. Note No. **1.**

1. Annual revision of the list—sub-Section 6.

The list of jurors or assessors can be revised only once a year.[1]

325.† In the case of any district for which the Local Government has declared that the trial of certain offences shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed, a special list containing the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors: Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of his liability to serve as an ordinary juror in cases not tried by special jury. Sec. 325

Preparation of list of special jurors.

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* **(1882—S. 325 ; 1872—S. 403 ; 1861—S. 332.)**
Same as sub-sections 6 and 7 of 1898 Code.

† **(Code of 1882—S. 325-A**—Same.)

(Codes of 1872 and 1861—Nil.)

Section 324—Note 1.

1. (1886) Ratanlal 304 (304).

Sec. 326

326.* (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate, requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial.

District Magistrate to summon jurors and assessors.

326.† (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate, requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial *and including, where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial.*

District Magistrate to summon jurors and assessors.

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months, unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

(3) Where the accused requires and is entitled to be tried under the provisions of Section 275, there shall be chosen by lot, in the manner prescribed by or under Section 276, from the whole number

* **(Code of 1898**, before its amendment in 1923—See also Section 462.)

† **(Code of 1882—S. 326**—Same, except the additions noted in Note 1.)

(Code of 1872—S. 407.)

407. The Court of Session shall ordinarily, three days at the least before the time fixed for the holding of the sessions, send a precept to a Magistrate directing him to summon as many persons named in the said revised list, as seem to the Court to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any case about to be tried at such sessions.

Court to summon jurors.

The names of the persons to be summoned shall be drawn by lot in open Court, excluding those on the revised list who have served within six months, unless the number cannot be made up without them; the names so drawn, shall be specified in the precept to the Magistrate.

(Code of 1861—S. 336—Materially the same as that of 1872 Code.)

of persons returned, the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained:

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under Section 320.

(4) Where, under the proviso to sub-section (3), the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of Section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under Section 316.

Synopsis.

Other Topics.

All jurors available for all trials though double the number needed is to be summoned. See Note 2, Pt. 2.

Form of precept. See Schedule V, Form No. 32.

Murder case—Summon of less than 18 — Illegality. See Note 2.

Non-compliance—Effect. See Note 2, Pts. 6 and 7.

Normal procedure to summon for first day of sessions. See Note 2, Pt. 1.

Object of lots. See Note 5, Pt. 2.

Section not mandatory. See Note 2, Pt. 5.

1. Legislative changes.

1. There was no material difference between the corresponding Sections of the Codes of 1861 and 1872.

2. *Difference between the Codes of* 1872 *and* 1882 :—

The words "the Sessions Judge" and "for any such trial" were substituted respectively for the words "the Court" and "for any case about to be tried at such sessions," which occurred in the corresponding Section of the Code of 1872.

3. *Changes introduced in the Code of* 1898 :—

The words "seven days" were substituted for "three days" and the words "or the said special list" were added after the words "revised list."

4. *Amendment of* 1923 :—

The words "and including.....for the trial" were added at the end of sub-section 1.

Sub-sections 3 and 4 were newly added.

2. Scope and object of the Section.

This Section fixes the minimum number of jurors and assessors to be summoned by the Sessions Judge for trials in a session. The normal procedure contemplated is that all jurors or assessors should be summoned on *the first day*

Sec. 326 Notes 2—4

on which a criminal session commences, whatever may be the number of *trials* it may be proposed to hold in the course of that session.[1]

The total number of jurors or assessors so summoned are intended to be available for all the trials, though, in order to fix a minimum, it has been provided that the Judge is to summon at least double the number of jurors or assessors required for any particular trial to be held in the course of the session.[2]

The object of the Section in summoning a number of jurors or assessors is two-fold—*firstly* to ensure that there is no reason for suspicion that any of the jurors or assessors sitting on a particular trial has been planted on the Court by any person interested in the success or failure of the prosecution,[3] and *secondly* to leave a margin for those cases where any particular juror or jurors may claim exemption from being empanelled on the ground of ill health or some other reason.[4]

The Section is not, however, *mandatory*.[5] The use of the word "ordinarily" shows that it is neither illegal nor irregular to summon jurors or assessors only for a *particular trial* and not for the whole of the session or to summon less than eighteen persons for a murder trial so long as the Judge takes care to have summoned a sufficient number of persons to enable him to choose the requisite number of jurors or assessors from among them in the manner provided by law.[6] In *Emperor* v. *Ermanali*,[7] fourteen persons were summoned to act as jurors in a murder case. Nine of them appeared and were chosen by lot. It was held that the trial was not bad. "It is no part of the intention of the Legislature," said Rankin, C. J., "to have a large area of selection in the persons attending upon summons on the theory that the larger the number of effective names in the ballot, the greater the chance that the persons chosen will make good jurors."

Where, however, in a murder trial, less than eighteen persons are summoned and *less than* nine are chosen out of them, it cannot be said that it was *impracticable* to get the requisite number, namely nine, and consequently the jury is not a validly constituted one. *See* Note 4 to Section 274, *ante*.

3. Letter to be sent only by the Sessions Judge.

The duty of issuing a letter or precept imposed on the *Sessions Judge* by this Section cannot legally be performed by a Subordinate Judge in temporary charge of the current duties of the Court of Session.[1]

4. Assessor not summoned if can be chosen by th Sessions Judge to make up deficiency.

In the case of deficiency of *jurors* summoned or where a juror is objected to and the objection is allowed, the deficiency can be made up by choosing from

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Section 326—Note 2.

1. (1931) 1931 Pat 152 (153, 154): 1931 Cri Cas 392 : 10 Pat 107 : 32 Cri L Jour 797, *Bihari Mahton* v. *Emperor*.
   (1933) 1933 All 941 (944) : 56 All 210 : 1933 Cri Cas 1561 : 35 Cri L Jour 668. *Lala* v. *Emperor*.
   (1916) 1916 All 54 (56) : 17 Cri L Jour 17 (18), *Chutta* v. *Emperor*.
2. (1931) 1931 Pat 152 (153): 1931 Cri Cas 392 : 10 Pat 107 : 32 Cri L Jour 797, *Bihari Mahton* v. *Emperor*.
3. (1916) 1916 All 54 (56) : 17 Cri L Jour 17 (17), *Chutta* v. *Emperor*.
4. (1931) 1931 Pat 152 (153) : 1931 Cri Cas 392: 10 Pat 107 : 32 Cri L Jour 797, *Behari Mahton* v. *Emperor*.
5. (1933) 1933 All 941 (944) : 56 All 210 : 1933 Cri Cas 1561 : 35 Cri L Jour 668, *Lala* v. *Emperor*.
6. (1931) 1931 Pat 152 (154) : 1931 Cri Cas 392: 10 Pat 107 : 32 Cri L Jour 797, *Behari Mahton* v. *Emperor*.
7. (1930) 1930 Cal 212 (213, 215, 216): 1930 Cri Cas 212 : 57 Cal 1228 : 31 Cri L Jour 536, *Emperor* v. *Ermanali*. Overruling 33 Cal W N 1054 : 31 Cri L Jour 426 : 122 Ind Cas 558.

Note 3.

1. (1880) Ratanlal 148 (148).

persons present in Court (*see* Section 276, second proviso and Section 279). There is no such provision applicable to the case of assessors. The Sessions Judge has therefore no power to select any one to act as an assessor who has not been summoned under this Section.[1] Thus, where the Sessions Judge had requested the District Magistrate to summon five persons to attend as assessors but only one of these persons was present, whereupon the Nazir of the Court was directed by the Judge to act as an assessor, it was held that as the Nazir was neither a person on the list of assessors nor summoned to act as an assessor, the trial was illegal.[2]

Sec. 326 Notes 4—5

5. Names of persons to be drawn by lot.

An accused person has a right to claim to be tried, whether by a jury or with the aid of assessors chosen with strict regard to all the safeguards provided in the Code to secure perfect impartiality,[1] the object in view being to secure an impartial trial by rendering impossible any intentional selection of jurors or assessors to try a particular case.[2] Thus, in the interests alike of the jury or the assessors and the prisoner, it is desirable that the persons who are in fact to serve as jurymen or assessors should not be selected by the conscious choice of any one, whether it be the District Magistrate, the Judge or any other person.[3]

Sec. 327

Power to summon another set of jurors or assessors.

327.* The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in Section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole Session oppressive or whenever for other reasons such direction is found to be necessary.

Sec. 328

Form and contents of summons.

328.† Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

Synopsis.

Summons to juror or assessor. Note No. 1

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* (1882—S. 327; 1872—S. 410 and 1861—S. 338—Same.)

† (1882—S. 328; 1872—S. 409, Para. 1 and 1861—S. 337—Same.)

Note 4.

1. (1894) 1894 All W N 207 (207), *Empress* v. *Badri.*
2. (1910) 11 Cri L Jour 724 (725) : 13 Oudh Cas 337, *Khubsingh* v. *Emperor.*

Note 5.

1. (1902) 7 Cal W N 188 (192), *Brojendra Lal Sirkar* v. *Emperor.*
   [See also (1927) 1927 Cal 593 (595) : 28 Cri L Jour 615 : 54 Cal 1026, *Rahamat Sheikh* v. *Emperor.*]
2. (1902) 7 Cal W N 188 (192), *Brojendra Lal Sirkar* v. *Emperor.*
   (1927) 1927 Cal 787 (790) : 28 Cri L Jour 889, *Rosonali* v. *Emperor.*
   (1928) 1928 Cal 83 (85) : 55 Cal 371 : 29 Cri L Jour 437 (FB), *Kedarnath Mahto* v. *Emperor.*
   (1933) 1933 All 941 (944) : 56 All 210 : 1933 Cri Cas 1561 : 35 Cri L Jour 668, *Lala* v. *Emperor.*
3. (1930) 1930 Cal 212 (215) : 57 Cal 1228 : 31 Cri L Jour 536 : 1933 Cri Cas 212 (FB), *Emperor* v. *Ermanali.*
   (1894) 1894 All W N 207 (207), *Empress* v. *Badri.*

Sec. 328 Note 1

Other Topics.

Forms of summons. See Note 1. Mode of service of summons. See Note 1.

1. Summons to juror or assessor.

Forms of summons given in Schedule V, Nos. 32 and 33, are to be used under this Section. Service of summons is to be effected in the manner provided by Section 68 and the Sections following it.

Sec. 329

When Government or Railway servant may be excused.

329.* When any person summoned to serve as a juror or assessor is in the service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

Sec. 330

Court may excuse attendance of juror or assessor.

330.† (1) The Court of Session may for reasonable cause excuse any juror or assessor from attendance at any particular session.

Court may relieve special jurors from liability to serve again as jurors for twelve months.

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

(Sub-section 2 corresponds with Section 330-A of the Code of 1882, which was added to it by Act 13 of 1896.)

Sec. 331

List of jurors and assessors attending.

331.‡ (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.

(2) Such list shall be kept with the list of the jurors and assessors as revised under Section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this Section.

Sec. 332

Penalty for non-attendance of juror or assessor.

332.‖ (1) Any person summoned to attend as a juror or as an assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having ob-

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* (1882—S. 329 ; 1872—S. 411 and 1861—S. 339—Same.)

† (1882—S. 330 ; 1872—S. 412 and 1861—S. 340—Same.)

‡ (1882—S. 331 ; 1872—S. 413 and 1861—S. 341—Same.)

‖ (1882—S. 332 ; 1872—S. 414 and 1861—S. 354—*See* Note 1 under the Section.)

tained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

Synopsis.

Other Topics.

1. Legislative changes.

1. There was no material difference between the corresponding Sections of the Codes of 1861 and 1872.

2. *Changes made by the Code of* 1882 :—

The words "by order of the Court of Session" were newly added in the third paragraph of Section 414 of 1872 Code.

3. *Changes introduced in the Code of* 1898 :—

Clause 3 was newly inserted in this Code.

2. Failure to attend—Effect of.

See Note 2 to Section 315.

If an assessor has been absent for a long time from district *A* and has gone to reside in district *B*, so that he may be said to have almost ceased to be a resident of district *A*, he is not liable to serve as an assessor in that district under Section 319. Consequently he cannot be fined under this Section for non-attendances as an assessor in obedience to a summons served in district *A* of which he had no notice.[1]

3. "Shall be liable to fine."

The order of a Sessions Judge fining an assessor is not open to appeal.[1]

Section 332—Note 2.

1. (1931) 1931 Pat 160 (160) : 32 Cri L Jour 740 : 1931 Cri Cas 400, *Mohammad Ejaz Hussan Khan* v. *Emperor.*

Note 3.

1. (1867) 8 Suth W R Cri 83 (83), *Empress* v. *Gour Suran Dass.*

Sec. 332 Note 4

4. "For good cause shown."

The fact that an assessor was ill on the day on which he was summoned to act as such and that he had produced a medical certificate to that effect would be a good cause under this Section.[1]

L.—Special Provisions for High Courts.

Sec. 333

333.* At any stage of any trial before a High Court under this Code, before the return of the verdict, the Advocate-General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

Power of Advocate General to stay prosecution.

Synopsis.

Other Topics.

Consent of Court not needed. See Note 1.
No review of order under the Section. See Note 3, Pt. 2.
Nolle prosequi—When entered. See Note 2.

1. Scope of the Section.

The power given to the Advocate-General under this Section is the power of entering a *nolle prosequi* which is an entry on the record of a statement that the prosecutor or the plaintiff will proceed no further in his action or suit. The power does not depend on the consent of the Court, which a Public Prosecutor has to obtain when acting under Section 494, *infra*. Entering a *nolle prosequi* is one of the rights and privileges which an Advocate-General has by virtue of his appointment.[1]

2. The Advocate-General may not further prosecute.

A *nolle prosequi* is entered where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence, or where it is clear that an indictment is not sustainable against the defendant,[1] or questions of difficulty arise as to the jurisdiction of the Court.[1a] Thus, where, after a trial had commenced before *R* and a jury, *R* retired under Section 556 of the Code and was succeeded by *S*, and it was

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* (Code of 1882—S. 333—Same)

(Codes of 1872 and 1861—Nil.)

Note 4.

1. [See (1867) 8 Suth W R Cri 83 (83), *Empress* v. *Gour Suran Dass.*]

Section 333—Note 1.

1. (1932) 1932 Cal 699 (703) : 60 Cal 233 : 1932 Cri Cas 654 : 34 Cri L Jour 433, *Giribala Dasi* v. *Mader Gazi.*

Note 2.

1. (1931) 1931 Cal 607 (612) : 59 Cal 275 : 33 Cri L Jour 3 : 1931 Cri Cas 759, *Sher Singh* v. *Jitendranath.*
[See also (1914) 1914 Cal 901 (904) : 15 Cri L Jour 460 : 41 Cal 1072 (1091), *Emperor* v. *Nirmalkanta Roy.*]

1a (1904) 8 Cal W N 48*n* (48*n*), *Emperor* v. *Jotindranath Gui.*

objected that *S* and the jury had no jurisdiction, the Advocate-General was allowed to enter a *nolle prosequi*.[2] Similarly, where the jury gave a verdict in a case before the case for the defence was heard, the Advocate-General entered a *nolle prosequi* and the accused was discharged.[3]

3. An order of discharge is no bar to fresh proceedings.

An order of discharge under this Section is no bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a police-report or under Section 190 (c).[1] The *same* proceeding, however, in which *nolle prosequi* was entered, cannnot be *renewed*. Thus, where *A* and *B* were indicted before the Court, *B* being at that time an absconder, and *A* was discharged under this Section on the Advocate-General entering *nolle prosequi* against him, and subsequently when *B* was apprehended, the same proceeding was sought to be continued against both *A* and *B*, it was held that this could not be done.[2]

334.* For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

Time of holding sittings.

335.† (1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the Governor-General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Courts, may direct.

Place of holding sittings.

(2) But it may, from time to time, in the case of the High Court at Fort William with the consent of the Governor-General in Council, and in all other cases with the consent of the Local Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

(3) Such officer as the Chief Justice directs shall give notice beforehand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

Notice of sittings.

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* **(Code of 1882—S. 334**—Same.)

(Codes of 1872 and **1861**—Nil.)

† **(Code of 1882—S. 335**—Same.)

(Codes of 1872 and **1861**—Nil.)

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2. (1898) 2 Cal W N 481 (483), *Empress* v. *Khagendranath Banerjee.*
3. (1903) 7 Cal W N 31*n* (31*n*), *Emperor* v. *Olu Mahamed.*

Note 3.

1. (1912) 13 Cri L Jour 488 (488) : 40 Cal 71, *Emperor* v. *Sheikh Idoo.*
2. [But see (1925) 1925 Cal 902 (903) : 52 Cal 590 : 26 Cri L Jour 1397, *Emperor* v. *Jitendranath Bose*, which does not refer to 40 Cal 71.]

Sec. 336

336. The High Court may direct that all European British subjects and persons liable to be tried by it under Section 214, who have been committed for trial by it within certain specified districts or during certain specified periods of the year, shall be tried at the ordinary place of sitting of the Court, or direct that they shall be tried at a particular place named.

Place of trial of European British subjects.

336.* [*Repealed by Section 20 of Criminal Law Amendment Act, XII of 1923.*]

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

Sec. 337

337. (1) In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any Magistrate of the first class inquiring into the offence or, with the sanction of the District

Tender of pardon to accomplice.

337.† *(1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under Section 211 of the Indian Penal Code with impri-*

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* **(Code of 1882—S. 336—Same.)**

(Codes of 1872 and 1861—Nil.)

† **(Code of 1882—S. 337—Same as in 1898 Code.)**

(Code of 1872—S. 347.)

347. The Magistrate of the District, any Magistrate of the first class inquiring into the case, or with the sanction of the Magistrate of the District, any Magistrate duly empowered to commit to the Court of Session may, after recording his reason for so doing, tender a pardon to any one or more of the persons supposed to have been directly or indirectly concerned in, or privy to, any offence specified in column seven of the fourth Schedule hereto annexed as triable exclusively by the Court of Session, on condition of his or their making a full, true and fair disclosure of the whole of the circumstances, within his or their knowledge, relative to the crime committed, and every other person concerned in the perpetration thereof.

Magistrate may tender pardon to accomplice.

Any person accepting a tender of pardon under this Section shall be examined as a witness in the case, under the rules applicable to the examination of witnesses.

Such person, if not on bail, shall be detained in custody pending the termination of the trial.

A Magistrate having tendered a pardon under this Section, and examined the accused person, is precluded from trying the case himself.

Magistrate, any other Magistrate, may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof.

sonment which may extend to seven years, or any offence under any of the following Sections of the Indian Penal Code, namely Sections 216-A, 369, 401, 435 and 477-A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investiga-

Sec. 337

(Code of 1861—S. 209.)

Magistrate may tender a pardon in certain cases.

209. It shall be lawful for the Magistrate of the District or other Officer exercising the powers of a Magistrate, recording his reasons for so doing to tender a pardon to any one or more of the persons supposed to have been directly or indirectly concerned in or privy to any offence specified in column 7 of the Schedule annexed to this Act as triable by the Court of Session, on condition of his or their making a full, true and fair disclosure of the whole of the circumstances within his or their knowledge relative to the crime committed, and every other person concerned in the perpetration thereof. If any person shall accept a tender of pardon under this Section, he shall be examined as a witness in the case under the rules applicable to the examination of the witnesses. Such person, if not on bail, may, if the Magistrate or other Officer as aforesaid shall think proper, be detained in custody pending the termination of the trial.

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	tion, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.
	(1A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record :
	Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.
(2) Every person accepting a tender under this Section shall be examined as a witness in the case.	(2) Every person accepting a tender under this Section shall be examined as a witness in *the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.*
	(2A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.
(3) Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be.	(3) Such person, *unless he is already on bail*, shall be detained in custody until the termination of the trial.

(4) Every Magistrate, other than a Presidency Magistrate, who tenders a pardon under this Section, shall record his reasons for so doing, and when any Magistrate has made such tender and examined the person to whom it has been made, he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate.

(Omitted.)

Synopsis.

Other Topics.

Accessories after the fact. See Note 17, F.-N. (8).
Accomplice and spy. See Note 8, Pt. 5.
Accused's conduct as corroboration. See Note 17, F.-N. (16).
Addition of other offences—Immaterial. See Note 5, Pt. 2a.
Bail by superior Courts. See Note 19, F.-N. (1).
Blood in accused's house and his nails—Corroboration. See Note 17, F.-N. (16).
Circumstantial evidence. See Note 17, Pts. 15 and 16.
Confession of accused is corroboration. See Note 17, F.-N. (9).
Confessions of co-accused. See Note 17, Pt. 12 and F.-N. (8).
Corroboration by evidence of others taken prior to pardon. See Note 17, F.-N. (9).
Corroboration of accomplice's evidence. See Note 17, Pts. 1, 3 to 16.
Custody — Judicial and not police. See Note 19, Pt. 2.
Delegation not permissible. See Note 3, Pt. 3.
District Magistrate pardoning—Competent to try. See Note 18, F-N (1a).
Effect of invalid pardon. See Note 3, Pts. 5 and 6; Note. 6.
Entry of *nolle prosequi* and subsequent evidence. See Note 2, Pt. 5.
Examination after forfeiture of pardon. See Note 16, Pts. 4 and 5.
Explicable circumstances—No corroboration. See Note 17, F.-N. (15).
Evidence of a spy. See Note 17, F.-N. (1).
Evidence of tutored son of accomplice not corroborated. See Note 17, F.-N. (9).
Hearsay evidence inadmissible even for corroboration. See Note 17, F.-N. (9).
Illegal conditions of pardon. See Note 9, Pt. 2.
Informal statements at tender of pardon. See Notes 10 and 13.
Motive or animosities—Not corroboration. See Note 17, F.-N. (9).
No pardon to principal offender. See Note 2, Pt. 4.
Non-explanation of suspicious circumstances —Not corroboration. See Note 17 F.-N. (9).
Omission to record reasons for pardon. See Note 11.

Oral sanction—Only irregularity. See Note 3, Pt. 2.
Pardon accepted or refused—Procedure. See Note 10, Pt. 2.
Pardon and other offences. See Note 14, Pts. 1 to 3.
Persons bribing for release of wrongfully confined persons — Not accomplices. See Note 17, F.-N. (1).
Person helping disposal of murdered body—No accomplice. See Note 17, F.-N. (8).
Person not disclosing murder — Incredible. See Note 17, F.-N. (8).
Presence of accused before occurrence — No corroboration. See Note 17, F.-N. (14).
Prior statements of accomplice. See Note 17, Pt. 10.
Production of stolen property from place not in accused's possession — No corroboration. See Note 17, F.-N. (14).
Section no bar to trial under Ordinances — Commitment not needed. See Note 18, Pt. 3.
Statements of other accomplices. See Note 17, Pt. 11, F.-N. (8); Note 8, F.-N. (4).
Strict compliance with Section. See Note 2, Pt. 6.
Subsequent alteration of offence on result of case—Immaterial. See Note 5, Pt. 2.
Suspicion—No corroboration. See Note 17, F.-N. (9).
Witnesses and not partakers—Not accomplices. See Note 17, F.-N. (8).

1. Legislative changes.

Changes introduced by the Amendment of 1923 :—

1. In sub-section 1 :—
   (*a*) The words " or any offence . . . . . and 477-A " are new. *See* Note 5, *infra*.
   (*b*) The words " at any stage of the investigation or inquiry into, or trial of, the offence" are new. *See* Note 7, *infra*.
   (*c*) For the words " with the sanction of the District Magistrate, any other Magistrate," the proviso to sub-section 1 has been substituted. *See* Note 3, *infra*.
2. The words " and shall, on application made by the accused, furnish him with a copy of such record, " in sub-section 1-A and the proviso to sub-section 1-A, are new.
3. In sub-section 2, the words " in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any " have been substituted for the words " in the case." *See* Note 16, *infra*.
4. Sub-section 4 has been omitted and sub-section 2-A is new. *See* Note 18, *infra*.

2. Scope and object of the Section.

This Section empowers a Magistrate to tender pardon to a person who is supposed to have been directly or indirectly concerned in, or privy to, an offence under investigation or inquiry, on condition that he makes a full and true disclosure of all the circumstances within his knowledge in relation to the accused and to the offence. The object of tendering such conditional pardon to an accomplice in the crime is to secure the evidence of such a person ; and also to encourage him to give the fullest details in respect of the matter, so that points may be found in his evidence which may be capable of corroboration, especially in cases where it is otherwise impossible to establish the guilt of the accused from other evidence.[1] In the exercise, therefore, of the power to tender a pardon, the Magistrate should exercise a sound judicial discretion,[2] and proceed with great caution and on ample grounds ; and with a clear recognition of the risk which

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Section 337—Note 2.

1. (1888) 11 All 79 (90), *Queen-Empress* v. *Ganga Charan.*
   (1915) 1915 Nag 92 (93): 11 Nag L R 59: 16 Cri L Jour 417, *The Local Government* v. *Mulu.*
   (1922) 1922 Bom 177 (177): 46 Bom 120: 22 Cri L Jour 620, *In re Dagdu Bapu.*

2. [See (1872-1892) 1872-1892 Low Bur Rul 246 (248, 250), *In the matter of Nga Po Aung.*]

it necessarily involves of allowing an offender to escape just punishment at the expense of possibly innocent men.[3] It is thus a wrong exercise of discretion on the part of the Magistrate to tender pardon to a person who is the *principal* offender in order to obtain evidence against the other accused.[4]

The provisions of this Section do not however imply that the only method of obtaining the evidence of an accused person against his co-accused is by tendering a pardon to such person with all the conditions and safeguards mentioned in the Section. It is the right of the Crown at any stage to enter *nolle prosequi* (Sections 333, *ante* and 494, *infra*) and thereafter call such person as a witness for the Crown.[5] (*See* Note 16, *infra* and Section 342, *infra*.) But the police are not entitled to *abstain from charging* a person, against whom there is evidence, on the ground that his evidence as a witness is necessary in the case.[5a]

As special powers are conferred upon the Magistrate by the Section, he should exercise such powers in strict accordance with the provisions of the Section.[6]

3. Who can tender a pardon.

A *District* Magistrate has power to tender a pardon at any stage of the investigation, inquiry or trial, even though he himself may not be holding such inquiry or trial.[1] A Magistrate of the First Class, not being a District Magistrate, can tender a pardon only :

(*a*) in case the offence is under investigation, if he has jurisdiction in the place where the offence might be inquired into and tried, *and* if the sanction of the District Magistrate has been obtained therefor, or

(*b*) in case the offence is under inquiry or trial, if the case is pending inquiry or trial before him.

When pardon is to be tendered during the course of an enquiry or trial, it must be tendered by the District Magistrate. An *Additional* District Magistrate has no power to tender a pardon under such circumstances.[1a]

The mere absence of a *written* sanction of the District Magistrate, where it appears that in fact an oral sanction was given, is only an irregularity which, under Section 529, is not sufficient to vitiate the proceedings if it was obtained in good faith.[2]

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3. (1903) 1903 Pun Re Cr No. 4, p. (11), *Ghulam Muhammad* v. *Crown.*
(1866) 5 Suth W R Cr 80 (85), *Elahee Buksh, In re.*
(1866) 6 Suth W R Cr Letters 3 (3).

4. (1921) 1921 Pat 499 (501), *Sheobhajan Ahir* v. *Emperor.*
(1866) 5 Suth W R Cr 80 (85), *Elahee Buksh, In re.*

5. (1929) 1929 Cal 319 (321): 56 Cal 1023: 31 Cri L Jour 315, *Riman* v. *Emperor.*
(1923) 1923 All 91 (105): 45 All 226: 25 Cri L Jour 497, *Emperor* v. *Har Prasad Bharagava.*
(1900) 25 Bom 422 (428, 429), *Queen-Empress* v. *Hussein Ali.*
(1935) 1935 Bom 186 (188): 1935 Cri Cas 487 : 59 Bom 355 : 36 Cri L Jour 937, *Keshav Vasudev Kortiwar* v. *Emperor.*
[But see (1935) 1935 Cal 473 (474): 1935 Cri Cas 865 : 36 Cri L Jour 1248, *Abdul Majid* v. *Emperor.* S. 494 is not intended to be used by prosecution to get evidence of accomplice.]

5a (1935) 1935 Bom 186 (188): 1935 Cri Cas 487 : 59 Bom 355 : 36 Cri L Jour 937, *Keshav Vasudeo Kortiwar* v. *Emperor.* Where such improper course is adopted, the evidence of such witness is entitled to very little weight.

6. (1872-92) 1872-92 Low Bur Rul 246 (248, 250), *In the matter of Nga Po Aung.*
(1908) 8 Cri L Jour 445 (450) (All), *Sultan Khan* v. *Emperor.*

Note 3.

1. [See (1912) 13 Cri L Jour 33 (34): 5 Sind L R 174, *Emperor* v. *Andal.*]

1a (1935) 16 Lah 594 (600, 601), *Faquir Singh* v. *The Crown.*

2. (1908) 8 Cri L Jour 445 (451) (All), *Sultan Khan* v. *Emperor.*

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The tender of pardon being a judicial function, the Magistrate empowered to exercise such function cannot delegate it to a Police Officer or to a Subordinate Magistrate.[3] Where a Magistrate, not empowered by law to tender a pardon, erroneously in good faith tenders such pardon under this Section, the proceedings cannot be set aside on the ground of his not being so empowered [Section 529, Clause (g), *infra*]. But if a Magistrate, who has no *jurisdiction* in respect of such offence, tenders a pardon, such pardon is illegal and cannot be cured under Section 529.[4] The person to whom such illegal pardon is tendered continues to be an accused person and can be tried and convicted along with the other accused.[5] He cannot be examined as a witness (Section 342, *infra*), and if he has been examined, his evidence is inadmissible.[6]

4. Power of Local Governments to tender conditional pardon.

There is no provision in the Code conferring upon the Local Government a power to tender, to an accused person, a conditional pardon. Such pardon can be tendered only by the Magistrate and the Courts specified in Sections 337 and 338.[1] The Local Government has, however, power under S. 401, *infra*, to remit or suspend sentences passed against the accused.

As to the exercise of the Royal Prerogative of mercy, *see* Section 401, *infra*.

5. Offences in respect of which pardon may be tendered.

The jurisdiction to tender a pardon to an accomplice is strictly limited to such offences as are specifically mentioned in the Section itself.[1] It is determined with reference to the offence in respect of which the investigation is being made or the inquiry or trial is held, and is not affected in any manner by a subsequent alteration of the charge or offence or by the ultimate result of the investigation, inquiry or trial[2] or by the fact that there are also other offences alleged or charged against the accused.[2a] All that is necessary is that there should be an investigation or inquiry in progress relating to an offence referred to in the Section.[3] The words "triable exclusively by the High Court or a Court of Session" mean "shown in the second Schedule as so triable."[4] Before the amendment of 1923, conditional pardon could be granted *only* in cases of offences triable by a Court of Session.[5] The amended Section provides specifically for tender of pardon in respect of the several offences enumerated in the Section itself.

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3. (1872-92) 1872-92 Low Bur Rul 246 (248, 250), *In the matter of Nga Po Aung.*
   (1866) 6 Suth W R Cr Letters 5 (5).
4. (1897) 20 All 40 (41, 42), *Queen-Empress* v. *Chidda.*
5. (1897) 20 All 40 (41, 42), *Queen-Empress* v. *Chidda.*
6. (1872-92) 1872-92 Low Bur Rul 246 (248, 250), *In the matter of Nga Po Aung.*

Note 4.

1. (1906) 4 Cri L Jour 145 (148) : 33 Cal 1353, *Banu Singh* v. *Emperor.*
   (1906) 4 Cri L Jour 44 (45) (Cal), *Paban Singh* v. *Emperor.*

Note 5.

1. (1900-02) 1 Low Bur Rul 62 (62), *Queen-Empress* v. *Nga Po Sin.* Magistrate has no power under S. 337 to examine an accused person charged under the Gambling Act.
2. (1921) 22 Cri L Jour 676 (677) : 63 Ind Cas 612 (613) (Lah), *Sardara* v. *Emperor.*
   (1925) 1925 Sind 105 (108) : 19 Sind L R 183 : 25 Cri L Jour 1057, *Faizulla* v. *Emperor.*
   (1933) 1933 Pesh 3 (4) : 1933 Cri Cas 145 : 34 Cri L Jour 212, *Public Prosecutor, Peshawar* v. *Muqarrab.*
2a (1915) 1915 Lah 16 (21) : 1915 Pun Re Cr No. 17 : 16 Cri L Jour 354, *Balmokand* v. *Crown.*
   (1915) 1915 Sind 43 (45) : 9 Sind L R 43 : 16 Cri L Jour 632, *Harumal* v. *Emperor.*
3. (1925) 1925 Nag 337 (338) : 26 Cri L Jour 1115, *Ismail Panju* v. *Emperor.*
4. (1897) 1897 Pun Re Cr No. 3, page (4), *Bhallu Singh* v. *Queen-Empress.*
5. (1882) 1882 All W N 240 (240), *Empress* v. *Gopal.*
   [See (1902) 1902 Pun Re Cr No 12, page (33), *Nabi Bakhsh* v. *Emperor.*
   (1873) 1873 Pun Re Cr No. 7, page (7),

6. Effect of tendering pardon in other cases.

Where a pardon is tendered and accepted under this Section, the accused person ceases to be such from the moment the pardon is accepted and is to be treated as a witness thereafter. It is not necessary that the prosecution should be *withdrawn* in such cases.[1a]

Where a pardon is granted in respect of an offence *not specified* in the Section and the person to whom pardon is granted is examined as a witness, such evidence is inadmissible. The reason is that as the pardon is unauthorized, the person continues to be an accused person and no oath can be administered to him.[1] (*See* Section 342, *infra.*) Nor can such person be prosecuted for giving false evidence.[2]

7. Stage at which pardon can be tendered.

Before the amendment of 1923, the Magistrate could tender a pardon only in respect of the "offence under inquiry" and there was a conflict of opinion as to whether the word "inquiry" included also the stage of the investigation by the Police.[1] The amended Section has definitely set the conflict at rest by specifically providing that the pardon may be granted even at the stage of the investigation by the Police. The Magistrate has power to tender a pardon at *any* stage, *i. e.*, until he commits the accused under sub-section 2-A or discharges the accused.[1a] The mere fact that the case is adjourned on application under Section 526 does not deprive the Magistrate of his power of tendering a pardon.[2]

8. "Supposed to have been directly or indirectly concerned in, or privy to, the offence."

The expression "any person supposed to have been directly or indirectly concerned in, or privy to, the offence," is a wide one and is not necessarily confined to a person who has been charged with the offence or who has been sent

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In re a reference from Commissioner, Rawalpindi.
(1920) 1920 Lah 215 (216) : 1 Lah 102 : 21 Cri L Jour 599, *Mahandu* v. *Emperor.*
(1912) 13 Cri L Jour 33 (34) : 5 Sind L R 174, *Emperor* v. *Andal.*
(1893-1900) 1893-1900 Low Bur Rul 51 (51), *Queen Empress* v. *Nga Tha Hla.*
(1893-1900) 1893-1900 Low Bur Rul 642 (644), *Pat Tha U* v. *Queen-Empress.*
(1864) 3 Mad H C R App 2. S. 209 of the Code of 1861 did not contain the words "exclusively triable by Court of Session" and therefore a Magistrate was held competent to tender pardon in a case triable by Magistrate *concurrently* with Court of Session; but even in such cases he had to commit the case for trial to Court of Session.
[See (1866) 3 Mad H C R App 4.]
[But see (1872-1892) 1872-1892 Low Bur Rul 586 (587, 588), *Tha Dung* v. *Queen-Empress.*]

Note 6.

1a (1935) 16 Lah 594 (597), *Faquir Singh* v. *Crown.*

1. (1878-80) 2 All 260 (262), *Empress of India* v. *Asgher Ali.*
2. (1885) 10 Bom 190 (192), *Queen-Empress* v. *Dala Jiva.*
(1893-1900) 1893-1900 Low Bur Rul 51 (51), *Queen-Empress* v. *Nga Tha Hla.*

Note 7.

1. (1922) 1922 Bom 138 (139) : 46 Bom 61 : 22 Cri L Jour 728, *Emperor* v. *Moti Lal Hira Lal.* Inquiry does not include investigation by police.
(1912) 13 Cri L Jour 33 (34) : 5 Sind L R 174, *Emperor* v. *Andal.* Inquiry includes investigation by police.
(1923) 1923 Lah 270 (271) : 3 Lah 431 : 24 Cri L Jour 941, *Sher Muhammad* v. *Emperor.* Inquiry means everything done by a Magistrate whether the case is challaned or not.
(1897) 1897 Pun Re Cr No 3, page (4), *Emperor* v. *Bhollu Singh.* (Do.)

1a (1932) 1932 Sind 40 (41) : 33 Cri L Jour 906, *Haji Ali Muhammad* v. *Emperor.*
(1921) 22 Cri L Jour 255 (256) : 60 Ind Cas 607 (608) (Lah), *Mangu* v. *Emperor.* Magistrate could tender pardon even after framing the charge—Decided before 1923—No longer law.

2. (1927) 1927 All 90 (90) : 49 All 181 : 27 Cri L Jour 1369, *Bal Chand* v. *Emperor.*

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up by the Police for trial, as an accused person.[1] It is not necessary that he need exactly know what crime is being committed in all its details.[2] All that is requisite is that there should be the intention of assisting in the commission of the crime[3] and that the Magistrate should be *satisfied* that he himself took part in the crime to the extent that he admits and that he is in a position to give a true account as to what occurred.[4]

An accomplice is different from a "spy." An accomplice is a person who concurs fully in the criminal designs of his co-conspirators for a time and joins in the execution of those designs ; while a spy or informer does not concur in those designs but enters into the conspiracy as agent for the prosecution for the sole purpose of detecting and betraying it and of bringing the offenders to justice.[5]

The word "supposed" does not exclude a person who confesses the guilt and pleads guilty to the charge, but is yet unconvicted ; it merely excludes the person who has been *already convicted* of the offence.[6]

9. Condition of pardon.

It has been already seen in Note 2, *ante*, that the object of tendering a pardon is to encourage the approver to give the fullest details, so that points may be found in his evidence which may be capable of corroboration. The law therefore requires, not a cramped and constrained statement by the approver, but a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences as to which he gives evidence.[1]

It should however be borne in mind that the temptation to the accomplice to strain the truth should be as slight as possible and it is illegal to tender a pardon on condition that the prisoner should profess to have been present at the murder and to have personal knowledge of the circumstances under which the offence took place as alleged by the prosecution.[2] As to the effect of a breach of the conditions of pardon, *see* Section 339, *infra*.

10. Procedure in tendering pardon.

The tender of pardon should be made by the Magistrate directly and should not be made through any Police Officer.[1] The Magistrate should, at the time,

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Note 8.

1. (1912) 13 Cri L Jour 33 (34) : 5 Sind L R 174, *Emperor* v. *Andal*.
   (1923) 1923 Nag 248 (249) : 24 Cri L Jour 566, *Kashiram* v. *Emperor*.
2. (1920) 1920 Cal 980 (983) : 21 Cri L Jour 802, *Surya Kanta* v. *Emperor*.
   (1913) 9 Cr App Rep 232. Per Lord Chief Justice Isaacs.
3. (1920) 1920 Cal 980 (983) : 21 Cri L Jour 802, *Surya Kanta* v. *Emperor*. Per Shams-ul Luda, J.
4. (1923) 1923 Nag 248 (250, 251) : 24 Cri L Jour 566, *Kashiram* v. *Emperor*.
   (1933) 1933 Rang 199 (200) : 1933 Cri Cas 804 : 34 Cri L Jour 1255, *Yacoob* v. *Emperor*.
   (1924) 1924 Oudh 188 (188) : 24 Cri L Jour 799, *Sant Ram* v. *Emperor*. The statement of an alleged approver *who is not proved to have participated in the offence* is not admissible against the accused.
   [See (1909) 10 Cri L Jour 530 (532) : 4 Ind Cas 268 (269) (Bom), *Emperor* v. *Percy Henry Burn*.]
5. (1928) 1928 Lah 193 (194, 195) : 9 Lah 550 : 29 Cri L Jour 577, *Karim Bakash* v. *Emperor*.
   (1895) 19 Bom 363 (370), *Queen-Empress* v. *Javecharam*.
   (1910) 11 Cri L Jour 560 (564) : 38 Cal 96, *Emperor* v. *Chaturbhuj Sahu*.
   (1912) 13 Cri L Jour 609 (663) 16 Ind Cas 257 (Cal), *Pulin Behary Das* v. *Emperor*.
   (1928) 1928 Lah 647 (649) : 29 Cri L Jour 740, *Mangat Rai* v. *Emperor*.
6. (1884) 7 All 160 (163), *Queen-Empress* v. *Kallu*.
   (1895) Ratanlal 750 (752), *Queen-Empress* v. *Bhagya*.

Note 9.

1. (1889) 11 All 79 (87), *Queen-Empress* v. *Ganga Charan*.
   (1926) 1926 Pat 279 (281, 286) : 5 Pat 171 : 27 Cri L Jour 957, *Nilmadhab Chaudhury* v. *Emperor*.
2. (1892) Ratanlal 612 (614), *Queen-Empress* v. *Yakub*.

Note 10.

1. (1866) 6 Suth W R Cr Letters 5.

explain to the person to whom it is made all the conditions accompanying such tender of pardon and should also record his reasons for tendering the pardon (sub-section 1-A). If the person does not accept the conditions, the inquiry or trial will proceed as if no tender of pardon was made. If such person should accept the conditions, it is the duty of the Magistrate to examine him as a witness under the rules applicable for the examination of witnesses.[2] As to whether the Magistrate should record informal statements from the person at the time of tendering the pardon, *see* Note 13, *infra*.

11. Recording reasons for tendering pardon.

It has been seen already in Note 2, *ante*, that the Magistrate should tender a pardon to an accomplice only on ample grounds and in exceptional cases and that he should exercise a sound judicial discretion before taking such a step. Sub-section 1-A provides that it is his duty to record his reasons for so doing and that the accused is entitled to a copy thereof.[1] Where however the circumstances which preceded the grant of pardon provide by themselves sufficient grounds for the Magistrate's action and such circumstances appear on record, it is not necessary for the Magistrate to formally set out such circumstances in writing.[2] The recording of reasons is merely a matter relating to procedure and is not a condition precedent to the tender of pardon.[3] Thus, an omission to record the reasons amounts only to an irregularity and will not vitiate the trial, unless it is shown that it has, in fact, occasioned a failure of justice.[4] *See* Section 537, *infra*.

12. Accepting pardon.

A person can be said to accept a pardon tendered to him only when he *actively assents* to the conditions of the pardon and volunteers to make a statement with reference to the offence. Where he expresses complete ignorance and states that he is indifferent as to whether a pardon was granted or not, he cannot be said to accept a tender of pardon.[1]

13. Disclosure whether should be recorded at the time of the tender of pardon.

The Section does not contemplate that the approver should be asked to make a disclosure *at the time* of the tender of pardon, or that such a disclosure should be reduced to writing.[1] The Lahore High Court has however held that the approver should be examined under Section 164, that a statement made on a solemn affirmation should be taken from him under sub-section 2 of Section 164 in order to complete the investigation or inquiry and to ascertain on what points corroboration would be necessary, and that it would be extremely inconvenient and difficult to wait for the Magisterial inquiry for obtaining such disclosure.[2]

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2. (1870) 12 Suth W R Cr 80 (81), *The Queen* v. *Gogalu.*
(1900) 13 C P L R Cr 7 (8), *Empress* v. *Bodhan.*

Note 11.

1. (1897-1901) 1 Upp Bur Rul 81 (81), *Queen-Empress* v. *Nga Tun Baw.*
2. (1909) 10 Cri L Jour 32 (34) : 36 Cal 629, *Emperor* v. *Annada Charan Thakur.*
(1907) 5 Cri L Jour 142 (144) (Cal), *Deputy Legal Remembrancer* v. *Banu Singh.*
3. (1912) 13 Cri L Jour 588 (590) : 15 Ind Cas 1004 (All), *Emperor* v. *Shama Charan*
4. (1929) 1929 All 321 (322): 30 Cri L Jour 1157, *Emperor* v. *Dukhu.*
(1908) 8 Cri L Jour 445 (451) (All), *Sultan Khan* v. *Emperor.*
(1924) 1924 Lah 90 (90) : 25 Cri L Jour 174, *Emperor* v. *Waryam Singh.*
(1866) 1866 Pun Re Cr No. 113 p. (109), *Crown* v. *Mana Singh.*

Note 12.

1. (1924) 1924 All 564 (564) : 26 Cri L Jour 336, *Palati Rai* v. *Emperor.*

Note 13.

1. (1900) 13 C P L R Cr 7 (8), *Empress* v. *Bodhan.*
(1925) 1925 Rang 286 (286) : 3 Rang 224 : 26 Cri L Jour 1396, *Emperor* v. *Nga Bo Gyi.*
2. (1933) 1933 Lah 321 (322) : 1933 Cri Cas

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14. Effect of pardon.

A pardon tendered under this Section refers not only to the offence in respect of which it is tendered, but extends to all such offences also in connection with the same matter, as the approver has *necessarily* to disclose, in making a full and true disclosure of all the circumstances relating to such offence.[1] In *Queen-Empress* v. *Ganga Charan*,[2] Straight, J., observed as follows :—"While, on the one hand, the condition is a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, on the other, a non-compliance with it leaves him open for trial for the offence in respect of which the pardon was tendered, or any *other offence in connection with the same matter*. It must be borne in mind that, in countenancing these pardons to accomplices, the law does not invite a cramped and constrained statement by the approver; on the contrary it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences as to which he gives evidence, and when he has given his evidence, I do not think the question of how far it is to protect him, and what portion of it should not protect him ought to be treated in a narrow spirit." Where, however, the statement of the person to whom a pardon was tendered disclosed a *distinct* offence of dacoity which was committed one month prior to the offence in respect of which the pardon was tendered, it was held that the tender of pardon did not extend to such an offence.[3]

15. Forfeiture of pardon.—*See* Section 339, *infra*.

16. Examination of approver as witness—Sub-section 2.

Sub-section 2, as it stood before the amendment of 1923, provided that the person accepting a tender of pardon should be examined as a witness "in the case," and it was held in the undermentioned cases,[1] that the words "in the case" referred both to the Magisterial inquiry and to the Sessions trial and that therefore the approver ought to be examined in the Sessions trial notwithstanding he did not fulfil the conditions of pardon in the Magisterial inquiry. It was however held in other cases that if the approver should show an inclination to resile from his evidence before the committing Magistrate, the prosecution was not bound to examine him as a witness in the Sessions trial as his examination before the committing Magistrate is a sufficient compliance with the provisions of sub-section 2.[2] The amended Section now specifically provides that such person should be examined as a witness in the Magistrate's Court *and in the subsequent trial*, if any. Thus the prosecution is bound to examine him as a witness even where he shows an intention of retracting his former statements or of not testifying to the facts within

564 : 14 Lah 507 : 34 Cri L Jour 469, *Emperor* v. *Parma Nand*.
[See also (1928) 1928 Lah 320 (322) : 9 Lah 608 : 29 Cri L Jour 413, *Ram Nath* v. *Emperor*.]

Note 14.

1. (1888) 11 All 79 (87), *Queen-Empress* v. *Ganga Charan*.
(1921) 1921 All 234 (234) : 22 Cri L Jour 699, *Shiam Sunder* v. *Emperor*.
2. (1888) 11 All 79 (87), *Queen-Empress* v. *Ganga Charan*.
3. (1924) 1924 All 220 (222) : 46 All 236 : 25 Cri L Jour 956, *Sardara* v. *King-Emperor*.

Note 16.

1. (1894) 1894 Pun Re Cr No. 14, page (44), *Mamun* v. *Queen-Empress*.
(1890) 2 Weir 394 (394), *Kumarandy, In re*.
(1900) 27 Cal 137 (139). *Queen-Empress* v. *Natu*.
(1891) 1891 All W N 182 (183), *Queen-Empress* v. *Piari*.
(1908) 8 Cri L Jour 153 (153) : 31 Mad 272, *In re Arunachallam*.
[See also (1901) 25 Bom 675 (679), *Emperor* v. *Bala*.]
2. (1915) 1915 Cal 667 (668, 672, 673) : 42 Cal 856: 16 Cri L Jour 65, *Sashi Rajbanshi* v. *Emperor*.
(1901) 24 Mad 321 (324), *Queen-Empress* v. *Ramasamy*.

his knowledge,[3] and his non-examination is a serious irregularity which would render the trial illegal.[3a] But it has been held that if the pardon is *already* forfeited by non-compliance with the conditions of pardon, the prosecution is not bound to examine him, and that under these circumstances it is not even proper to put him as a witness just for the purpose of introducing his former retracted confession, as evidence in the case.[4] Such a statement is inadmissible under Section 288.[5]

17. Evidence of an accomplice—Credibility of.

In dealing with the question as to the weight to be attached to the evidence of an accomplice, it is necessary to consider the provisions of Section 133 of the Evidence Act, as also Illustration (b) to Section 114 of that Act. Section 133 of that Act provides as follows :

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Illustration (b) to Section 114 runs as follows :

"The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars."[1] The reasons underlying the presumption are:

(i) that an accomplice is likely to swear falsely in order to shift the blame on to others ;

(ii) that he being necessarily a man of bad character, his evidence is open to suspicion ; and

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3. (1931) 1931 Lah 102 (102, 103) : 1931 Cri Cas 166 : 32 Cri L Jour 1126, *Chet Singh* v. *Emperor.*
[See also (1927) 1927 Cal 680 (681) : 54 Cal 539 : 28 Cri L Jour 689, *Haji Ayub* v. *Emperor.*]

3a (1930) 1930 Lah 95 (96) : 1930 Cri Cas 111 : 11 Lah 230 : 31 Cri L Jour 111, *Mahla* v. *Emperor.*

4. (1934) 1934 Cal 636 (638, 639) : 1934 Cri Cas 929 : 61 Cal 399 : 35 Cri L Jour 1479, *Nayeb Shana* v. *Emperor.*

5. (1891) 1891 All W N 184 (185), *Queen-Empress* v. *Nagu.*

Note 17.

1. *See also the following cases:—*
(1886) 8 All 120 (138), *Queen-Empress* v. *Imdad Khan.*
(1913) 14 Cri L Jour 577 (586) : 36 Mad 501 : 40 Ind App 193 (P C), *Vaithinatha Pillai* v. *Emperor.*
(1926) 27 Cri L Jour 918 (920) : 96 Ind Cas 262 (Lah), *Jang Singh* v. *Emperor.*
(1919) 1919 All 327 (328) : 20 Cri L Jour 561, *Allauddin* v. *Emperor.*
(1926) 1926 All 705 (706) : 27 Cri L Jour 879, *Partab Singh* v. *Emperor.*
(1930) 1930 All 740 (741) : 1930 Cri Cas 996 : 32 Cri L Jour 141, *Paras Ram* v. *Emperor.*
(1896) Ratanlal 844 (846), *Queen-Empress* v. *Shidlingappa.*
(1885) 10 Bom 319 (326), *Queen-Empress* v. *Krishna Bhat.*
(1912) 13 Cri L Jour 542 (543) : 15 Ind Cas 814 (Bom), *Emperor* v. *Chotalal.*
(1900) 27 Cal 925 (927), *Akhoy Kumar* v. *Jagat Chunder.* Persons bribing for obtaining release of wrongfully confined persons are not accomplices and therefore their evidence may be accepted without corroboration.
(1918) 1918 Cal 72 (73) : 19 Cri L Jour 959, *Emperor* v. *Kabili Katoni.*
(1920) 1920 Cal 663 (665) : 32 Cal L Jour 204 (209) : 22 Cri L Jour 225, *Emperor* v. *Anant.*
(1932) 1932 Cal 377 (378) : 1932 Cri Cas 320 : 33 Cri L Jour 357, *Surandernath Goswami* v. *Emperor.*
(1866) 5 Suth W R Cr 59 (59, 60), *Queen* v. *Chutter Dhareesingh.*
See also the following cases:—
(1867) 8 Suth W R Cr 57 (58), *Queen* v. *Ram.*
(1868) 9 Suth W R Cr 28 (28, 29), *Queen* v. *Nunnoo.*
(1869) 12 Suth W R Cr 5 (5, 7), *Queen* v. *Chirag Ali.*
(1873) 19 Suth W R Cr 43 (43), *Queen* v. *Luchmee Pershad.*
(1873) 20 Suth W R Cr 19 (20), *The Queen* v. *Ramsodoy Chukerbutty.*
(1911) 12 Cri L Jour 5 (5) : 9 Ind Cas 39 (Lah), *Hira* v. *Crown.*
(1911) 12 Cri L Jour 35 (37) : 9 Ind Cas 232 (Lah), *Manna* v. *Emperor.*
(1912) 13 Cri L Jour 182 (182) : 13 Ind Cas 998 (Lah), *Ladkhan* v. *Emperor.*
(1916) 1916 Lah 390 (393) : 17 Cri L Jour 107, *Waryam Singh* v. *Emperor.*
(1916) 1916 Lah 339 (340) : 17 Cri L Jour 220, *Ghulam Rasul* v. *Emperor.*

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(iii) that the evidence given by an approver in the hope of pardon would necessarily be biassed in favour of the prosecution.[2]

The utmost caution is therefore necessary in considering the weight to be attached to such evidence and the presumption that an accomplice is unworthy of credit, unless corroborated in material particulars, has therefore become a rule of practice of almost universal application.[3] It is, however, possible in *exceptional*

(1924) 1924 Lah 235 (235) : 24 Cri L Jour 696, *Chaprolia* v. *Emperor.*
(1924) 1924 Lah 481 (482) : 25 Cri L Jour 979, *Khushi Muhammad* v. *Emperor.*
(1925) 1925 Lah 253 (254), *Nur Muhammad* v. *Emperor.*
(1925) 1925 Lah 397 (399) : 26 Cri L Jour 1335, *Nawab* v. *The Crown.*
(1926) 1926 Lah 439 (439) : 27 Cri L Jour 600, *Munshi* v. *Emperor.*
(1927) 1927 Lah 581 (589) : 28 Cri L Jour 625, *Barkati* v. *Emperor.*
(1932) 1932 Lah 557 (558) : 1932 Cri Cas 721 : 33 Cri L Jour 935, *Sangara Ram* v. *Emperor.*
(1933) 1933 Lah 838 (839) : 1933 Cri Cas 1111 : 34 Cri L Jour 1129, *Shib Dhan* v. *Emperor.*
(1933) 1933 Lah 987 (996) ; 1933 Cri Cas 1503 : 35 Cri L Jour 654, *Amrit Lal* v. *Emperor.*
(1934) 1934 Lah 21 (23) : 1934 Cri Cas 39 : 36 Cri L Jour 671, *Gujar Singh* v. *Emperor.*
(1934) 1934 Lah 346 (347) : 1934 Cri Cas 565 : 35 Cri L Jour 1046, *Mangal Singh* v. *Emperor.*
(1934) 1934 Lah 583 (585) : 1934 Cri Cas 914 : 35 Cri L Jour 752, *Bimal Pershad Jain* v. *Emperor.*
(1889) 12 Mad 196 (197) , *Queen-Empress* v. *Arumuga.*
(1909) 10 Cri L Jour 567, (568) : 4 Ind Cas 391 (Mad), *In re Muthan Papayya.*
(1911) 12 Cri L Jour 240 (240) : 10 Ind Cas 284 (Mad), *Nanzigadu* v. *Emperor*
(1911) 12 Cri L Jour 150 (155) : 9 Ind Cas 897 (Mad), *In re Vyasa Rao.*
(1914) 1914 Mad 323 (326) : 15 Cri L Jour 417, *Narayana Ayyar* v. *Emperor.*
(1912) 13 Cri L Jour 305 (313) : 35 Mad 247, *Emperor* v *Nilakanta.*
(1925) 1925 Oudh 158 (162) : 25 Cri L Jour 1162, *Surat Bahadur* v. *Emperor.* Evidence given by a spy who encourages a person to commit a crime is of no better value than that of an accomplice and cannot be accepted without corroboration.
(1925) 1925 Oudh 374 (375) : 27 Oudh Cas 385 : 26 Cri L Jour 1412, *Murli Brahman* v. *Emperor.*
(1931) 1931 Oudh 172 (176) : 1931 Cri Cas 444 : 32 Cri L Jour 860 : 6 Luck 668, *Bhaneshwari Pershad* v. *Emperor.* But evidence of spies associating with accused to entrap him does not require corroboration.
(1934) 1934 Pesh 11 (12) : 1934 Cri Cas 381 : 35 Cri L Jour 719, *Nizam Din* v. *Emperor.*
(1909) 10 Cri L Jour 355 (356, 357) : 5 Low Bur Rul 72, *Emperor* v *Nga Po.*
(1917) 1917 Low Bur 5 (7) : 19 Cri L Jour 42, *Pan Gang* v. *Emperor.*

2. (1901) 28 Cal 339 (343), *Kamala Prasad* v. *Sital Prasad.*
(1889) 14 Bom 115 (120), *Queen-Empress* v. *Maganlal and Motilal.*
(1911) 12 Cri L Jour 150 (159) : 9 Ind Cas 897 (Mad), *In re Vyasa Rao.*
(1916) 1916 Lah 32 (35) : 1917 Pun Re Cr No. 2 : 18 Cri L Jour 29, *Barkat Ali* v. *The Crown.*
(1924) 1924 Cal 701 (702) : 51 Cal 160 : 25 Cri L Jour 1000, *Emperor* v. *Jamaldi Fakir.*
(1889) 4 C P L R 1 (7) : *Empress* v. *Tantia Bhil.*
(1912) 13 Cri L Jour 305 (314) : 35 Mad 247, *Emperor* v. *Nilakanta.*
(1866) 5 Suth W R Cr 80 (85), *In re Ellahee Buksh.*
(1927) 1927 Lah 78 (79) : 28 Cri L Jour 193, *Chanan Singh* v. *Emperor.*
(1931) 1931 Lah 406 (407) : 1931 Cri Cas 646 : 32 Cri L Jour 1049, *Amar Nath* v. *Emperor.*

3. (1906) 4 Cri L Jour 145 (151) : 33 Cal 1353, *Banu Singh* v. *Emperor.*
(1927) 1927 Lah 581 (589) : 28 Cri L Jour 625 *Barkati* v. *Emperor.*
(1923) 24 Cri L Jour 723 (730) : 73 Ind Cas 963 (970) (Pat), *Madan* v. *Emperor.*
(1914) 1914 Mad 323 (326) : 15 Cri L Jour 417, *Narayana Ayyar* v *Emperor.*
(1866) 6 Suth W R Cr 77 (77), *Queen* v. *Reaz Ali.*
(1884) 7 All 160 (162, 163) *Queen-Empress* v. *Kallu.*
(1912) 13 Cri L Jour 767 (768) : 6 Sind L R 106, *Emperor* v. *Isardas Ganshamdas.*
(1924) 1924 Lah 357 (358), *Tota Singh* v. *Emperor.*
(1915) 1915 Cal 73 (74) : 15 Cri L Jour 438 (438), *Munessar Ahir* v. *Emperor.*
(1925) 1925 Oudh 1 (3) : 27 Oudh Cas 40 : 25 Cri L Jour 49, *Munna Lal* v. *Emperor.*
(1934) 1934 Oudh 90 (92) : 1934 Cri Cas 260 : 9 Luck 355 : 35 Cri L Jour 397, *Mahadeo Prasad Vishnu* v. *Emperor.*
(1931) 1931 Pat 105 (109, 110) : 1931 Cri Cas

cases and under *special* circumstances, such as those enumerated in Section 114 of the Evidence Act, Illustration (b), that the Court could, notwithstanding the above rule of prudence and caution, give credit to the accomplice's testimony against the accused, even without corroboration and in such cases Section 133 of the Evidence Act provides that a conviction is not illegal merely because it proceeds upon such uncorroborated testimony of an accomplice.[4] But, except in such special cases, it is the duty of the Court to require corroboration of the evidence

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233 : 32 Cri L Jour 383, *Kailash Missir* v. *Emperor.*

(1914) 1914 Oudh 176 (181) : 15 Cri L Jour 440, *Rustam Singh* v. *Emperor.*

(1928) 1928 Pat 630 (631) : 8 Pat 235 : 30 Cri L Jour 137, *Rattam Dhanuk* v. *Emperor.*

(1933) 1933 Oudh 265 (268) : 1933 Cri Cas 592 : 34 Cri L Jour 1009, *Ghirrao* v. *Emperor.*

(1929) 1929 P C 15 (18) (P C), *Macdonald* v. *Fred Latimer.*

(1890) 14 Bom 331 (336), *Queen-Empress* v. *Chagan Dayaram.*

(1935) 1935 All 132 (133, 134) : 1935 Cri Cas 185 : 36 Cri L Jour 617, *Abdul Salam* v. *Emperor.*

(1935) 1935 Cal 513 (517) : 1935 Cri Cas 889: 62 Cal 238 : 36 Cri L Jour 1115, (S B), *Emperor* v. *Nirmal Jiban Ghose.* Rule requiring corroboration though one of prudence has become equivalent to rule of law.

(1935) 1935 Cal 473 (475): 1935 Cri Cas 865: 36 Cri L Jour1248, *Abdul Majid* v. *Empepor.*

(1935) 36 Cri L Jour 1202 (1203) : 157 Ind Cas 626 (628) (Lah), *Ata Muhammad* v. *Emperor.* The rule which is one of prudence has acquired the sanctity of a rule of law.

(1925) 1925 Lah 268 (269) : 26 Cri L Jour 769, *Feroz Khan* v *Emperor.*

[See (1803) 2 Weir 796 (797), *Palavasam, In re.* Though this is the general rule, conviction on basis of uncorroborated testimony of accomplice need not necessarily be set aside.]

4. (1887) 9 All 528 (554), *Queen-Empress* v. *Gobardhan.*

(1866) 5 Suth W R Cr 80 (83, 91, 92), *In re Illahee Buksh.*

(1889) 14 Bom 115 (120), *Queen-Empress* v. *Magalal.* (*Per* Scott, J.)

(1904) 1 Cri L Jour 211 (214, 215) (All), *Abdul Karim* v. *Emperor.*

(1927) 1927 All 90 (91) : 49 All 181 : 27 Cri L Jour 1369, *Balchand* v. *Emperor.*

(1925) 1925 All 223 (226) : 47 All 39 : 27 Cri L Jour 836, *Abdul Wahab* v. *Emperor.*

(1898) 1898 All W N 28 (28), *Queen-Empress* v. *Tipru.*

(1907) 29 All 434 (440) : 5 Cri L Jour 360, *Emperor* v. *Keheri.*

(1910) 11 Cri L Jour 441 (441) : 7 Ind Cas 185 (All), *Balkaran* v. *Emperor.*

(1916) 1916 Bom 229 (233) : 17 Cri L Jour 256, *Govind* v. *Emperor.*

(1909) 10 Cri L Jour 433 (434) : 3 Ind Cas 963 (Bom), *Emperor* v. *Lallubhai Pranubhai.*

(1906) 3 Cri L Jour 452 (455) : 33 Cal 649, *Deonandan Pershad Singh* v. *Emperor.*

(1929) 1929 Cal 822 (824) : 1929 Cri Cas 669 : 31 Cri L Jour 809, *Emperor* v. *Mathews.*

(1873) 19 Suth W R Cri 48 (48), *The Queen* v. *Koa.*

(1871) 15 Suth W R Cri 37 (38) *Queen* v. *Mahima Chandra Das.*

(1870) 13 Suth W R Cri 24 (25), *In the matter of Rojoni Kant Bhoomick.*

(1866) 6 Suth W R Cri 91 (91), *Queen* v. *Ashruff Sheik.*

(1866) 5 Suth W R Cri 11 (12), *Queen* v. *Nyta Ram Mytee.*

(1931) 1931 Lah 178 (179) : 1931 Cri Cas 298 : 32 Cri L Jour 684, *Sher Jang* v. *Emperor.*

(1917) 1917 Lah 323 (327) : 1917 Pun Re Cri No 9: 18 Cri L Jour 536, *Ghulam Mohammad* v. *Emperor.*

(1911) 12 Cri L Jour 170 (174) : 9 Ind Cas 978 (Mad), *In re Talari Narayanaswami.*

(1911) 12 Cri L Jour 150 (159) : 9 Ind Cas 897 (Mad), *In re Vyasa Rao.*

(1904) 1 Cri L Jour 641 (656) : 27 Mad 271, *Ramaswamy Goundan* v. *Emperor.*

(1878) 1 Mad 394 (395), *Reg* v. *Ramasamy Padayachi.*

(1911) 12 Cri L Jour 132 (137) : 6 Low Bur Rul 4, *Nya Po Chit* v. *Emperor.*

(1921) 1921 Nag 39 (41) : 17 Nag L R 113 : 23 Cri L Jour 673, *Govinda* v. *Emperor.*

(1932) 1932 Oudh 11 (16) : 1932 Cri Cas 43 : 33 Cri L Jour 287, *Jaisingh* v. *Emperor.*

(1931) 1931 Pat 105 (109, 110) : 1931 Cri Cas 233 : 32 Cri L Jour 383, *Kailash Missir* v. *Emperor.*

(1933) 1933 Pat 500 (502, 503), *Emperor* v. *Wajid Sheikh.*

(1915) 1915 Lah 16 (21, 50) : 16 Cri L Jour 354 : 1915 Pun Re Cri No. 17, *Balmokand* v. *Emperor.*

(1916) 1916 Lah 32 (35) : 18 Cri L Jour 29 : 1917 Pun Re Cri No. 2, *Barkat Ali* v. *Emperor.*

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in material particulars before basing a conviction thereon,[5] and it is also the duty of the Judge to warn the jury of the danger of convicting an accused person merely on the strength of the accomplice's evidence.[6]

It is not necessary, however, that an accomplice should be corroborated as regards every portion of his statement and in all its details.[7] In determining the weight to be attached to such evidence and the amount of corroboration required in each particular case, the Court must exercise careful discrimination and consider all the surrounding circumstances including the character and antecedents of the accomplice, the extent of his complicity in the crime and the circumstances under which his evidence is tendered.[8] The evidence in corroboration should be satis-

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[See also (1930) 1930 Mad W N 169 (171), *In re Kuppuswamy Iyer.*]

5. (1912) 13 Cri L Jour 305 (315) : 35 Mad 247, *Emperor* v. *Nilakanta.*
(1929) 1929 Oudh 321 (326) : 1929 Cri Cas 143 : 30 Cri L Jour 922, *Lale* v. *Emperor.*
(1931) 1931 Cal 697 (702) : 1931 Cri Cas 977 : 33 Cri L Jour 19 (S B), *Ambica Charan Roy* v. *Emperor.* The Court's duty is not merely to record a conviction that is not illegal—The conviction should be properly based.
(1931) 1931 Lah 408 (410) : 1931 Cri Cas 648 : 32 Cri L Jour 818, *Indar Datt* v. *Emperor.*
(1929) 1929 Nag 233 (234) : 1929 Cri Cas 257 : 30 Cri L Jour 333, *Musa* v. *Emperor.*
(1927) 1927 Oudh 369 (378) : 2 Luck 631 : 29 Cri L Jour 129, *Ram Parsad* v. *Emperor.*
(1924) 1924 Rang 173 (174) : 1 Rang 609 : 25 Cri L Jour 381, *Maung Lay* v. *Emperor.*
(1925) 1925 Sind 105 (108) : 19 Sind L R 183 : 25 Cri L Jour 1057, *Faizulla* v. *Emperor.*

6. (1925) 133 L T 736 : 89 J P 175 : 41 T L R 635 : 28 Cox C C 47, *Rex* v. *Beebe.*
(1912) 13 Cri L Jour 305 (314) : 35 Mad 247, *Emperor* v. *Nilakanta.*
(1889) Ratanlal 466 (466), *Queen Empress* v. *Rama.*
(1896) Ratanlal 848 (849), *Queen Empress* v. *Dhondi bin Raoji.*
(1868) 10 Suth W R Cri 17 (17), *Queen* v. *Bykunt Nath Banerjee.*
(1924) 1924 Cal 701 (702) : 51 Cal 160 : 25 Cri L Jour 1000, *Emperor* v. *Jamaldi Fakir.*
(1886) 2 Weir 742 (744), *In re Alagappan Bali.*
(1868) 4 Mad H C R App 7 (7, 8).
(1928) 1928 Oudh 207 (208) : 29 Cri L Jour 311, *Mani Ram* v. *Emperor.*
(1928) 1928 Pat 630 (631) : 8 Pat 235 : 30 Cri L Jour 137, *Rattan Dhanuk* v. *Emperor.*

7. (1884) 15 Cox Cri Cas 318, *Reg.* v. *Ghalalghar.*
(1913) 14 Cri L Jour 225 (229) : 19 Ind Cas 321 (Bom), *Emperor* v. *Kuberappa.*
(1925) 1925 Cal 872 (874) : 52 Cal 595 : 26 Cri L Jour 1037, *Ledu Molla* v. *Emperor.*
(1869) 11 Suth W R Cri 21 (21), *Queen* v. *Kalla Chand Doss.*
(1912) 13 Cri L Jour 305 (315) : 35 Mad 247, *Emperor* v. *Nilakanta.*
(1892-1896) 1 Upp Bur Rul 148, *Saya Kye* v. *Queen Empress.*

8. (1929) 1929 Cal 822 (824) : 1929 Cri Cas 669: 31 Cri L Jour 809, *Emperor* v. *Mathews.*
(1929) 1929 Lah 850 (854) : 1929 Cri Cas 626 : 31 Cri L Jour 517, *Hakam Singh* v. *Emperor.*
(1933) 1933 Pat 96 (99) : 1933 Cri Cas 249 : 34 Cri L Jour 421, *Raghunath Pandey* v. *Emperor.*
(1886) 1886 All W N 65 (66), *Empress* v. *Kure.*
(1887) 9 All 528 (555), *Queen Empress* v. *Gobardhan.*
(1901) 26 Bom 193 (197), *Emperor* v. *Malhar Martand Kulkarni.*
(1933) 1933 Bom 24 (25) : 34 Cri L Jour 136, *Allisab Rajesab* v. *Emperor.* A person who has been convicted and sentenced on his own plea continues to be an accomplice and his evidence should be corroborated.
(1913) 14 Cri L Jour 225 (227) : 19 Ind Cas 321 (Bom), *Emperor* v. *Kuberappa.*
(1929) 1929 Bom 296 (302) : 1929 Cri Cas 114 : 53 Bom 479 : 31 Cri L Jour 65, *Emperor* v. *C. E. Ring.* The testimony of accomplices, who are victimised by police officer into offering them illegal gratification or have not willingly done so, require a much slighter degree of corroboration.
(1879) 4 Cal 483 (490, 496), *Empress* v. *Ashootosh.*
(1900) 27 Cal 144 (155), *Queen Empress* v. *Deodhar Singh.*
(1906) 3 Cri L Jour 452 (455) : 33 Cal 649, *Deonandan Prasad Singh* v. *Emperor.*
(1933) 1933 Cal 148 (149) : 1933 Cri Cas 225 : 34 Cri L Jour 675, *Sudam Chandra*

factory and reliable and should be derived from independent and unimpeachable sources or circumstances,[9] and not merely consist of earlier statements of the same

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Bag v. *Emperor*.

(1922) 1922 Lah 1 (22) : 3 Lah 144 : 23 Cri L Jour 513, *Mahant Narain Das* v. *Emperor*.

(1923) 1923 Lah 345 (346) : 24 Cri L Jour 618, *Jehana* v. *Emperor*. One who deposes that he only helped the accused in disposing of the body of the deceased after he was killed by the accused is no accomplice.

(1916) 1916 Lah 380 (383) : 17 Cri L Jour 97, *Bachinta* v. *Emperor*.

(1923) 1923 Lah 391 (392) : 25 Cri L Jour 264, *Nawab* v. *Crown*. When a person sees a murder committed and takes no means to disclose it, his evidence must be considered as no better than that of an accomplice.

(1921) 1921 Lah 267 (269) : 21 Cri L Jour 507, *Sunder Singh* v. *Crown*.

(1925) 1925 Lah 432 (434) : 6 Lah 183 : 26 Cri L Jour 1238, *Bahawala* v. *The Crown*.

(1894) 1894 Pun Re Cr No 14, page 42 (45), *Mamun* v. *Queen Empress*.

(1928) 1928 Lah 30 (32) : 28 Cri L Jour 564, *Wazir Chand* v. *Emperor*.

(1929) 1929 Lah 540 (542) : 31 Cri L Jour 50 : 1929 Cri Cas 87, *Hayatu* v. *Emperor*. Witnesses who are accessaries after the fact are in the same position as accomplices and their evidence requires corroboration.

(1931) 1931 Lah 178 (179) : 1931 Cri Cas 298 : 32 Cri L Jour 684, *Sher Jang* v. *Emperor*.

(1932) 1932 Lah 73 (75, 80) : 1932 Cri Cas 73 : 32 Cri L Jour 1036, *Nanak Chand* v. *Emperor*.

(1933) 1933 Lah 871 (875) : 35 Cri L Jour 137 : 1933 Cri Cas 1116, *Emperor* v. *Rai Singh Narain Singh*. Where approver's evidence is false as against one accused it should not be accepted against other accused.

(1903) 26 Mad 1 (8), *Emperor* v. *Edward William Smither*. Witnesses who took no part in the transaction but merely witnessed it are not 'accomplices.'

(1912) 13 Cri L Jour 305 (314, 315) : 35 Mad 247, *Emperor* v. *Nilakanta*.

(1913) 14 Cri L Jour 207 (207) : 19 Ind Cas 207 (Mad), *Killikyatara Bomma* v. *Emperor*.

(1929) 1929 Nag 215 (217) : 1929 Cri Cas 110 : 30 Cri L Jour 311, *Muhammad Usuf Khan* v. *Emperor*.

(1930) 1930 Nag 97 (104) : 1930 Cri Cas 305 : 31 Cri L Jour 153, *Daulat* v. *Emperor*.

(1932) 1932 Oudh 11 (15) : 1932 Cri Cas 43 : 33 Cri L Jour 287, *Jai Singh* v. *Emperor*. Evidence of the accomplice after the fact requires corroboration.

(1926) 1926 Pat 232 (235) : 5 Pat 63 : 27 Cri L Jour 484, *Jagwa Dhanuk* v. *Emperor*.

(1928) 1928 Pat 630 (631) : 8 Pat 235 : 30 Cri L Jour 137, *Rattan Dhanuk* v. *Emperor*.

(1897-1901) 1 Upp Bur Rul 173 (174), *Queen Empress* v. *Nga Tun Baw*.

(1924) 1924 Rang 173 (174) : 1 Rang 609 : 25 Cri L Jour 381, *Maung Lay* v. *Emperor*.

(1931) 1931 Rang 235 (242) : 1931 Cri Cas 875 : 9 Rang 404 : 33 Cri L Jour 205 (SB), *Aung Hla* v. *Emperor*.

(1913) 14 Cri L Jour 262 (265) : 6 Sind L R 195, *Ramchand Pitambardas* v. *Emperor*.

(1914) 1914 Sind 117 (118): 8 Sind L R 203 : 16 Cri L Jour 233, *Punhee Holu* v. *Emperor*.

(1925) 1925 Sind 295 (295) : 19 Sind L R 111 : 26 Cri L Jour 1028, *Emperor* v. *Sunderdas*.

(1928) 29 Cri L Jour 209 (210) : 107 Ind Cas 97 (Lah), *Naraina* v. *Emperor*.

[See also (1896) 23 Cal 361 (366), *Queen Empress* v. *Alimuddin*.

(1875) 24 Suth W R Cri 55 (56), *Queen* v. *Chando Chandalinee*. Evidence of accomplices after the fact requires corroboration.

(1894) 21 Cal 328 (336), *Queen Empress* v. *Ishan Chandra*. (Do.)]

9. (1904) 1 Cri L Jour 568 (572, 575), *Empress* v. *Baji Krishna*.

(1876) 1 Bom 475*n* (476*n*), *Reg* v. *Budhu Nanku*.

(1873) 19 Suth W R Cri 16 (21), *Queen* v. *Mohesh Biswas*.

(1910) 11 Cri L Jour 554 (555) : 13 Oudh Cas 243, *Hira Lal* v. *Emperor*.

(1912) 13 Cri L Jour 571 (574) : 15 Ind Cas 987 (Cal), *Lalan Mallik* v. *Emperor*.

(1907) 5 Cri L Jour 437 (437) (Lah). *Kalloo* v. *Crown*.

(1912) 13 Cri L Jour 424 (425, 426) : 1911 Upp Bur Rul 3rd Qr. 96. *Ahtat* v. *Emperor*. Hearsay evidence is inadmissible even to corroborate evidence of accomplice.

(1923) 1923 Lah 683 (683) : 25 Cri L Jour 495. *Saudagar Singh* v. *Emperor*.

(1878) 4 Cal 483 (490, 496) (FB)., *The Empress* v. *Ashootosh Chuckerbutty*. Such evidence should if believed be sufficient to base a conviction.

(1912) 13 Cri L Jour 283 (284) : 14 Ind Cas 667 (Cal). *Tufani Sheikh* v. *Emperor*. Sufficient motive is not corroboration.

(1925) 1925 Lah 605 (608) : 6 Lah 415 : 27 Cri L Jour 514. *Pratab Singh* v. *Emperor*. But confession of ac-

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accomplice[10] or statements or evidence of other accomplices[11] or confessions of co-accused.[12] It is not enough if the corroborative evidence is of a vague or general nature and relates merely to the circumstances of the occurrence or to the details

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cused himself is corroboration.

(1929) 1929 Lah 587 (588) : 1929 Cri Cas 149 : 31 Cri L Jour 91, *Mehr Singh* v. *Emperor*. Evidence of the son of the accomplice who repeated what he had been tutored to say is no corroboration.

(1932) 1932 Lah 298 (300) : 1932 Cri Cas 378 : 33 Cri L Jour 251, *Surjan Singh* v. *Emperor*. Approver's evidence may be corroborated by accused's own confession.

(1925) 1925 Lah 526 (527) : 26 Cri L Jour 875, *Jit Singh* v. *Emperor*. Motive is not corroborative evidence.

(1925) 1925 Oudh 295 (298) : 25 Cri L Jour 391, *Sheo Ambar* v. *Emperor*. Motive is not corroborative evidence.

(1932) 1932 Sind 100 (103) : 1932 Cri Cas 540 : 33 Cri L Jour 324, *Khairatiram* v. *Emperor*. The failure of the accused to explain a suspicious circumstance cannot be taken as corroboration of approver's story.

(1926) 1926 Cal 374 (376) : 26 Cri L Jour 1146. *Ibrahim, In re*, The evidence of a witness who supports approver is a corroboration even if the evidence was known to the police before the approver was examined by them.

(1931) 1931 Pat 105 (119) : 1931 Cri Cas 233 : 32 Cri L Jour 383, *Kailash Missir* v. *Emperor*. Suspicion however grave never amounts to legal corroboration.

(1921) 1921 Pat 406 (407). *Dhannu Beldar* v. *Emperor*. Motive or animosities is no corroborative evidence.

(1934) 1934 Lah 23 (24) : 1934 Cri Cas 41 : 35 Cri L Jour 352. *Jiwan Singh* v. *Emperor*. Motive is no corroborative evidence.

10. (1912) 13 Cri L Jour 305 (315) : 35 Mad 247, *Emperor* v. *Nilkanta*.

11. (1885) 8 All 306 (312), *Queen-Empress* v. *Ram Saran*.

(1876) 25 Suth W R Cri 43 (43), *Queen* v. *Baijoo Chowdhry*.

(1933) 1933 Cal 6 (8) : 1933 Cri Cas 26 : 34 Cri L Jour 23, *Kashem Ali* v. *Emperor*.

(1928) 1928 Cal 745 (747) : 30 Cri L Jour 586, *Latafat Hossain Biswas* v. *Emperor*.

(1934) 1934 Cal 678 (680) : 1934 Cri Cas 1045 : 35 Cri L Jour 1357 (FB), *Hafizuddi* v. *Emperor*.

(1934) 1934 Cal 719 (720) : 35 Cri L Jour 1335 (SB), *Sarat Chandra Dhupi* v. *Emperor*.

(1904) 1 Cri L Jour 211 (214, 215) (All.) *Abdul Karim* v. *Emperor*.

(1919) 1919 Lah 168 (169) : 1919 Pun Re Cri No. 20 : 20 Cri L Jour 191, *Sahara* v. *Emperor*.

(1929) 1929 Lah 850 (853) : 1929 Cri Cas 626 : 31 Cri L Jour 517, *Hakam Singh* v. *Emperor*.

(1933) 1933 Lah 946 (946) : 1933 Cri Cas 1409 : 35 Cri L Jour 79, *Parbhu* v. *Emperor*.

(1934) 1934 Lah 171 (173) : 1934 Cri Cas 349 : 36 Cri L Jour 491, *Ali Muhammad* v. *Emperor*.

(1929) 1929 Nag 215 (217) : 1929 Cri Cas 110 : 30 Cri L Jour 311, *Muhammad Usuf Khan* v. *Emperor*.

(1897-1901) 1 Upp Bur Rul 224 (226), *Queen-Empress* v. *Nga Ya Po*.

[See also (1933) 1933 Rang 116 (117): 1933 Cri Cas 641 : 34 Cri L Jour 929, *Nga Aung Pa* v *Emperor*.]

[But see (1935) 1935 Cal 513 (517) : 1935 Cri Cas 889 : 62 Cal 238 : 36 Cri L Jour 1115 (SB), *Emperor* v. *Nirmal Jiban Ghose*. Proposition that in no circumstances can the evidence of an accomplice corroborate the evidence of another dissented from, following 1931 Rang 235 : 9 Rang 404 : 1931 Cri Cas 875 : 33 Cri L Jour 205 (SB).—But it is the duty of the Court to scrutinise with care such corroboration.]

12. (1933) 1933 All 31 (36) : 1933 Cri Cas 42 : 55 All 91 : 34 Cri L Jour 489, *Nazir* v. *Emperor*.

(1913) 14 Cri L Jour 112 (113) : 18 Ind Cas 672, (All), *Debi Dayal* v. *Emperor*.

(1907) 5 Cri L Jour 360 (375) : 29 All 434, *Kehri* v. *Emperor*.

(1895) Ratanlal 750 (752), *Queen-Empress* v. *Bhagya*.

(1876) 1 Bom 475 (476), *Reg* v. *Budhu Nanku*.

(1884) 10 Cal 970 (974), *Queen-Empress* v. *Bipin Biswas*.

(1874) 21 Suth W R Cri 69 (71), *Queen* v. *Sadhu Mundul*.

(1873) 19 Suth W R Cri 68 (69), *Queen* v. *Udhan Bind*.

(1918) 1918 Lah 358 (359) : 19 Cri L Jour 439, *Gurdit Singh* v. *Emperor*.

(1921) 1921 Lah 215 (215) : 23 Cri L Jour 158, *Lala* v. *Emperor*.

(1922) 1922 Lah 1 (26) : 3 Lah 144 : 23 Cri L Jour 513, *Mahant Narain Das* v. *Emperor*.

(1923) 1923 Lah 76 (78) : 23 Cr L Jour 597, *Ahmad Nur* v. *Emperor*.

(1925) 1925 Lah 44 (45) : 26 Cri L Jour 412, *Shah Alim* v. *The Crown*.

(1931) 1931 Lah 408 (414) : 1931 Cri Cas

of the crime.[13] It should refer and relate distinctly to the complicity of the accused in such offence and also to the identity of each of the accused.[14]

648: 32 Cri L Jour 818, *Indar Datt* v. *Emperor*.
(1932) 1932 Lah 298 (300): 1932 Cri Cas 378: 33 Cri L Jour 251, *Surjan Singh* v. *Emperor*.
(1886) 2 Weir 742 (744), *In re Alagappan Bali*.
(1902) 25 Mad 143 (147), *Emperor* v. *Mohiuddin Saheb*.
(1925) 1925 Nag 78 (80): 25 Cri L Jour 1067, *Sheroo* v. *Emperor*.
(1924) 1924 Oudh 369 (371): 25 Cri L Jour 1207, *Parmeshwar* v. *Emperor*.
(1933) 1933 Oudh 355 (360): 1933 Cri Cas 976: 9 Luck 22: 35 Cri L Jour 273, *Beni Madho* v. *Emperor*.
[But see (1914) 1914 Bom 305 (311): 14 Cri L Jour 625: 38 Bom 156, *Gangappa* v. *Emperor*.
(1933) 1933 Rang 57 (58): 11 Rang 4: 1933 Cri Cas 452: 34 Cri L Jour 286, *Nga Nyein* v. *Emperor*. Only the care to be exercised in such cases should be great.
(1897-1901) 1897-1901 Upp Bur Rul 173 (174), *Queen-Empress* v. *Nga Tun Baw*.
(1874) 22 Suth W R Cri 38 (39), *Queen* v. *Mohun Banfor*.
(1935) 1935 Cal 513 (517): 1935 Cri Cas 889: 62 Cal 238: 36 Cri L Jour 1115 (S B), *Emperor* v. *Nirmal Jiban Ghose*. Following 1931 Rang 235: 1931 Cri Cas 875: 33 Cri L Jour 205: 9 Rang 404 (S B).]

13. (1927) 1927 Lah 581 (590): 28 Cri L Jour 625, *Barkati* v. *Emperor*.
(1917) 1917 Lah 317 (319): 18 Cri L Jour 696, *Nand Singh* v. *Emperor*.

14. (1866) 5 Suth W R Cr 80 (84), *Elahee Buksh, In re*.
(1916) 2 K B 658 (665): 86 L J (K B) 28: 115 L T 453: 80 J P 446, *King* v. *Basker Ville*.—Referred to in (1931) 1931 Mad 689 (691): 1931 Cri Cas 929: 54 Mad 931: 33 Cri L Jour 51, *Venkatasubba Reddi* v *Emperor*.
(1834) 6 C & P 595 (595), *R.* v. *Webb*.—Referred to in (1885) 8 All 306 (311, 313), *Queen-Empress* v. *Ram Saran*.
(1849) 3 Cox Cr C 526, *R.* v. *Mullins*.—Referred to in (1886) 8 All 509 (513), *Queen-Empress* v. *Baldeo*.
(1933) 1933 All 31 (36): 1933 Cri Cas 42: 55 All 91: 34 Cri L Jour 489, *Nazir* v. *Emperor*.
(1935) 1935 All 162 (167): 1935 Cri Cas 214: 36 Cri L Jour 684, *Bachcha Babu* v. *Emperor*.
(1876) Ratanlal 102 (105), *Reg* v. *Chatur*.
(1896) Ratanlal 840 (840), *Queen-Empress* v. *Dhondi bin Raoji*.
(1876) 1 Bom 475 (476), *Reg* v. *Budhu Nanku*.
(1885) 10 Bom 319 (327), *Queen-Empress* v. *Krishnabhat*.
(1904) 1 Cri L Jour 568 (572, 575) (Bom), *Emperor* v. *Baji Krishna*.
(1906) 3 Cri L Jour 33 (38) (Bom), *Emperor* v. *Srinivas*.
(1932) 1932 Bom 286 (288): 1932 Cri Cas 398: 56 Bom 172: 33 Cri L Jour 396, *Ganu Chandra Kashid* v *Emperor*.
(1865) 3 Suth W R Cr 8 (8), *Queen* v. *Issen*.
(1866) 5 Suth W R Cr 18 (18), *Queen* v. *Dwarka*.
(1867) 8 Suth W R Cr 19 (23), *Queen* v. *Nawab Jan*.
(1868) 10 Suth W R Cr 17 (17, 18), *Queen* v. *Bykunt Nath Banerjee*.
(1873) 19 Suth W R Cr 16 (21), *Queen* v. *Mohesh Biswas*.
(1874) 21 Suth W R Cr 69 (71), *Queen* v. *Sadhu Mundul*.
(1902) 29 Cal 782 (787), *Jamiruddi Massalli* v. *Emperor*
(1911) 12 Cri L Jour 286 (289): 38 Cal 559, *Emperor* v. *Moni Gopal Gupta*.
(1921) 22 Cri L Jour 676 (677): 63 Ind Cas 612 (613) (Lah), *Sardara* v. *Emperor*.
(1930) 1930 Cal 430 (432): 1930 Cri Cas 657: 31 Cri L Jour 1115, *Manohar Mandal* v. *Emperor*.
(1931) 1931 Cal 697 (702): 1931 Cri Cas 977: 33 Cri L Jour 19 (S B), *Ambica Charan Roy* v. *Emperor*.
(1902) 1902 Pun Re Cr No. 5, page 14 (16), *Wazir Khan* v. *Emperor*.
(1916) 1916 Lah 297 (297): 17 Cri L Jour 156, *Nikka* v *Crown*.
(1916) 1916 Lah 433 (437): 17 Cri L Jour 273, *Ram Singh* v. *Emperor*.
(1917) 1917 Lah 317 (319): 18 Cri L Jour 696, *Nand Singh* v. *Emperor*.
(1920) 1920 Lah 487 (488): 23 Cri L Jour 476, *Fatta* v. *Emperor*.
(1923) 1923 Lah 385 (386): 25 Cri L Jour 252, *Suleman* v. *Emperor*.
(1924) 1924 Lah 727 (728): 25 Cri L Jour 1347, *Hezra Singh* v. *Emperor*.
(1927) 1927 Lah 10 (10): 27 Cri L Jour 1294, *Kattu* v. *Emperor*.
(1927) 1927 Lah 581 (585): 28 Cri L Jour 625, *Barkati* v. *Emperor*.
(1929) 1929 Lah 680 (682, 684): 30 Cri L Jour 292, *Nathu* v. *Emperor*.
(1929) 1929 Lah 850 (854): 1929 Cri Cas 626: 31 Cri L Jour 517, *Hakam Singh* v. *Emperor*.
(1931) 1931 Lah 406 (407): 1931 Cri Cas 646: 32 Cri L Jour 1049, *Amar Nath* v. *Emperor*.
(1932) 1932 Lah 73 (75): 1932 Cri Cas 73: 32 Cri L Jour 1036, *Nanakchand* v. *Emperor*.
(1932) 1932 Lah 180 (181): 1932 Cri Cas 179: 33 Cri L Jour 414, *Gehna* v. *Emperor*.
(1932) 1932 Lah 204 (207). 1932 Cri Cas 248:

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It is not strictly necessary, however, that the corroboration should be afforded only by *direct* evidence—it may in certain cases be provided by circumstantial evidence.[15] But the circumstantial evidence should be such as would unmistakably lead to the inference of guilt and be reasonably inconsistent with the theory about the innocence of the accused.[16]

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33 Cri L Jour 242, *Ranbir Singh* v. *Emperor*.

(1933) 1933 Lah 294 (296): 1933 Cri Cas 394: 35 Cri L Jour 641, *Dalip Singh* v. *Emperor*.

(1935) 1935 All 132 (133): 1935 Cri Cas 185: 36 Cri L Jour 617, *Abdul Salam* v. *Emperor*.

(1934) 1934 Lah 873 (874): 1934 Cri Cas 1253: 15 Lah 491: 36 Cri L Jour 383, *Kanshi Ram* v. *Emperor*.

(1917) 1917 Lah 311 (155): 18 Cri L Jour 852, *Sahai Singh* v. *Emperor*.

(1911) 12 Cri L Jour 562 (563): 12 Ind Cas 650 (Mad), *Mure Venkata Reddi* v. *Iragakkagari Nagi Reddi*.

(1912) 13 Cri L Jour 305 (346): 35 Mad 247, *Emperor* v. *Nilakanta*.

(1929) 1929 Mad W N 698 (701, 706, 707), *Abboi Naidu* v. *Emperor*.

(1929) 1929 Mad W N 794 (795), *Sundaram* v. *Emperor*.

(1931) 1931 Mad 689 (690, 694, 696): 1931 Cri Cas 929: 54 Mad 931: 33 Cri L Jour 51, *Venkatasubba Reddi* v. *Emperor*.

(1929) 1929 Nag 222 (223, 224): 1929 Cri Cas 108: 30 Cri L Jour 331, *Lodya Mahar* v. *Emperor*.

(1930) 1930 Nag 97 (99, 100): 1930 Cri Cas 305: 31 Cri L Jour 153, *Daulat* v. *Emperor*.

(1910) 11 Cri L Jour 71 (75): 12 Oudh Cas 418, *Hubba* v. *Emperor*.

(1911) 12 Cri L Jour 537 (538): 12 Ind Cas 513 (Oudh), *Makbul Ahmad* v. *Emperor*.

(1929) 1929 Oudh 321 (326): 1929 Cri Cas 143: 30 Cri L Jour 922, *Lale* v. *Emperor*.

(1930) 1930 Oudh 455 (459): 1930 Cri Cas 1079: 32 Cri L Jour 162, *Bachchu* v. *Emperor*.

(1932) 1932 Oudh 11 (16): 1932 Cri Cas 43: 33 Cri L Jour 287, *Jai Singh* v. *Emperor*.

(1932) 1932 Oudh 317 (321): 1932 Cri Cas 872: 7 Luck 511: 33 Cri L Jour 920, *Emperor* v. *Maqbool Ahmad Khan*.

(1928) 1928 Pat 630 (631): 8 Pat 235: 30 Cri L Jour 137, *Rattan Dhanuk* v. *Emperor*.

(1930) 1930 Pat 164 (166): 1930 Cri Cas 260: 32 Cri L Jour 5, *Sheo Barhi* v. *Emperor*.

(1933) 1933 Pat 96 (99): 1933 Cri Cas 249: 34 Cri L Jour 421, *Raghunath Pandey* v. *Emperor*.

(1933) 1933 Pat 112 (113): 1933 Cri Cas 261: 34 Cri L Jour 476, *Dhaju Mandal* v. *Emperor*.

(1872-1892) 1872-1892 Low Bur Rul 322 (322), *Nga Shwe* v. *Queen Empress*.

(1928) 30 Cri L Jour 57 (61): 113 Ind Cas 73 (Cal), *Kailash Chandra Rishi* v. *Emperor*.

(1915) 1915 Lah 244 (246): 16 Cri L Jour 634 (636), *Uda* v. *Emperor*. An approver's testimony is not sufficiently corroborated by the production by accused of stolen property from a place not in possession of accused, as such evidence is easy to fabricate.

(1925) 1925 Lah 600 (601, 602): 26 Cri L Jour 1141, *Emperor* v. *Ram Karan*. Mere presence of accused *before* murder was committed does not connect accused with the crime.

(1908) 7 Cri L Jour 227 (229) (Lah), *Chet Singh* v. *The Crown*. Mere fact that accused was seen with dacoits does not corroborate participation in crime.

[But see (1923) 1923 Lah 666 (667): 25 Cri L Jour 520, *Emperor* v. *Darya Singh*.]

15. (1923) 1923 Lah 153 (155): 26 Cri L Jour 343, *Hakim* v. *Emperor*.

(1935) 1935 All 132 (133, 134): 1935 Cri Cas 185: 36 Cri L Jour 617, *Abdul Salam* v. *Emperor*.

(1923) 1923 Lah 335 (335): 25 Cri L Jour 234, *Khushal Singh* v. *The Crown*.

(1933) 1933 Lah 294 (296): 1933 Cri Cas 394: 35 Cri L Jour 641, *Dalip Singh* v. *Emperor*.

(1922) 1922 Nag 172 (173): 23 Cri L Jour 391, *Kisan* v. *Emperor*.

(1924) 1924 Oudh 314 (315): 27 Oudh Cas 29: 25 Cri L Jour 785, *Emperor* v. *Ram Charan*.

(1929) 1929 Oudh 321 (326): 1929 Cri Cas 143: 30 Cri L Jour 922, *Lale* v. *Emperor*.

(1930) 1930 Oudh 455 (459): 1930 Cri Cas 1079: 32 Cri L Jour 162, *Bachchu* v. *Emperor*.

(1928) 29 Cri L Jour 863 (864): 111 Ind Cas 447 (Lah), *Muhammad* v. *Emperor*.

(1933) 1933 Bom 482 (483): 1933 Cri Cas 1586: 58 Bom 40: 35 Cri L Jour 317, *Emperor* v. *Shanker Shet*. A circumstance cannot furnish corroboration of the story of the approver if it is by itself susceptible of innocent explanation.

(1935) 1935 All 132 (133, 134): 36 Cri L Jour 617: 1935 Cri Cas 185, *Abdul Salam* v. *Emperor*.

16. (1931) 32 Cri L Jour 1184 (1184): 134 Ind Cas 401 (Oudh), *Gaya Prasad* v. *Emperor*.

(1931) 1931 Cal 697 (702): 1931 Cri Cas 977: 33 Cri L Jour 19 (SB), *Ambica*

18. Commitment of accused.

Under sub-section 4 to the Section as it stood before 1923, the Magistrate (with the exception of the Presidency Magistrate), who had tendered a pardon to a person and had examined such person as a witness in the case, was precluded from trying the case himself even though the offence which the accused appeared to have committed might be triable by such Magistrate.[1] It was, however, held that there was no bar to *another Magistrate* competent to try the case from doing so.[1a] Sub-section 4 has now been omitted and a new sub-section 2-A has been added, by the amendment of 1923. Under the latter sub-section, where a pardon has been granted to a person and he has also been examined as a witness, then the Magistrate if he believes that a *prima facie* case against the other accused is established, should *commit such accused to the Sessions Court* or to the High Court, as the case may be, and has no power to try the case himself even if he is otherwise competent to do so.[2] Where however a Special Magistrate is empowered by Ordinance 11 of 1932 to try a case, he is not bound to commit the accused under sub-section 2-A for the reason that where the provisions of the Ordinance and those of the Code conflict, the provisions of the Ordinance are to prevail.[3]

Where pardon is tendered under the orders of the Local Government and not by a Magistrate acting *suo motu* under this Section, it is not necessary to

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Charan Roy v. *Emperor.*
(1923) 1923 Lah 389 (390) : 25 Cri L Jour 259, *Wadhawa Singh* v. *The Crown.*
(1925) 1925 Lah 426 (426) : 26 Cri L Jour 693, *Maula Dad* v. *Emperor.*
(1932) 1932 Lah 621 (622, 623) : 1932 Cri Cas 913 : 33 Cri L Jour 916 : 14 Lah 411, *Sher Singh* v. *Emperor.*
(1931) 1931 Mad 689 (690, 694, 696) : 1931 Cri Cas 929 : 54 Mad 391 : 33 Cri L Jour 51, *Venkatasubba Reddi* v. *Emperor.*
(1930) 1930 Oudh 353 (356) : 1930 Cri Cas 841 : 31 Cri L Jour 1210, *Hazari* v. *Emperor.*
(1915) 1915 Lah 244 (245, 246) : 16 Cri L Jour 634, *Uda* v. *Emperor.* Production of stolen property from a place not in the possession of accused is no corroboration.
(1928) 1928 Lah 681 (685) : 10 Lah 265 : 29 Cri L Jour 851, *Chatru Malik* v. *Emperor.* Accused's conduct may be considered in corroboration of approver's testimony.
(1919) 1 K B 431 (433) : 88 L J (K B) 551 : 120 L T 572 : 83 J P 123 : 26 Cox C C 387, *R.* v. *Marks Feigenbaum.* (Do.)
(1903) 2 Weir 809*n* (809*n*), *Narayanswami* v. *Emperor.* Corroboration by conduct of accused.
(1921) 1921 Lah 392 (394), *Ghulam Hassan* v. *Emperor.* Discovery of blood in convict's house and on accused's nails—And suspicious conduct—Corroborates accomplice.

Note 18.

1. (1893-1900) 1893-1900 Low Bur Rul 323 (323), *Nga Saw Wa* v. *Queen-Empress.*
(1906) 4 Cri L Jour 44 (45) (Cal), *Paban Singh* v. *Emperor.*
(1912) 13 Cri L Jour 33 (34) : 5 Sind L R 174, *Emperor* v. *Andal.*

1a (1898) 1898 Pun Re Cr No. 3, page 6 (8), *Queen-Empress* v. *Batera.* District Magistrate *sanctioning* a tender of pardon is not precluded from trying the case.
(1920) 1920 Lah 364 (365) : 1919 Pun Re Cr No. 30 : 21 Cri L Jour 306, *Akbar* v. *Emperor.*
(1922) 1922 Bom 138 (140) : 46 Bom 61 : 22 Cri L Jour 728, *Emperor* v. *Moti Lal Hira Lal.*

2. (1932) 1932 All 581 (582) : 1932 Cri Cas 699 : 33 Cri L Jour 802, *Emperor* v. *Raja Ram.*
(1935) 1935 Bom 70 (71) : 1935 Cri Cas 132 : 36 Cri L Jour 499, *Emperor* v. *Nana Amrita.*
(1929) 1929 Oudh 190 (192) : 4 Luck 679 : 30 Cri L Jour 567, *Bhagwan* v. *Emperor.*
(1925) 1925 Rang 207 (207) : 26 Cri L Jour 829, *Nga Kin* v. *Emperor.*
(1925) 1925 Nag 119 (119) : 25 Cri L Jour 1341, *Kishore* v. *King-Emperor.*
(1933) 1933 Pesh 3 (4) : 1933 Cri Cas 145 : 34 Cri L Jour 212, *Public Prosecutor* v. *Muqarrab.*
(1925) 1925 Lah 378 (378) : 26 Cri L Jour 549, *Jimun Shah* v. *Emperor.*
(1925) 1925 Oudh 472 (473) : 26 Cri L Jour 1216, *Emperor* v. *Peru.*

3. (1933) 1933 Cal 537 (538) : 1933 Cri Cas 893 : 60 Cal 652 : 34 Cri L Jour 1023, *Abdul Majid* v. *Emperor.*

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commit the case to the Court of Session.[4]

19. Detention of the approver in custody—Sub-section 3.

If the person to whom a pardon is tendered is *not already on bail*, he has to be detained in judicial custody until the termination of the trial; he cannot be released on bail under the provisions of Sections 497 and 498, *infra*.[1] The custody contemplated is judicial custody and is not the custody of the police.[2] The approver should be detained in such custody until the proceedings are terminated by a Magisterial order of discharge or until after the termination of the Sessions trial.[3]

There is no jurisdiction to order the detention of the approver till the expiration of the period of limitation for filing an appeal from the decision in the case. His detention can only be ordered till the termination of the trial.[4]

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338.* At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender a pardon on the same condition to such person.

Power to direct tender of pardon.

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* **(Code of 1882—S. 338**—Same.)

(Code of 1872—S. 348).

348. The High Court as a Court of Revision and the Court of Session after committal but before the commencement of a trial, may, with a view of obtaining on the trial the evidence of any person or persons supposed to have been directly or indirectly concerned in, or privy to, any such offence, instruct the committing Magistrate to tender a pardon on the same condition to such person or persons.

High Court or Court of Session may direct tender of pardon.

The Court of Session, in like manner and on the same condition, may, at any time before judgment is passed, with the view of obtaining on the trial the evidence of any person or persons supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon to such person or persons.

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4. (1935) 16 Lah 594 (596), *Faqir Singh* v. *Emperor*.

Note 19.

1. (1900) 13 C P L R Cri 7 (8), *Emperor* v. *Bodhan*.
   (1932) 1932 Sind 40 (41) : 33 Cri L Jour 906, *Haji Ali Muhammad* v. *Emperor*.
   (1927) 1927 Sind 173 (173, 174) : 28 Cri L Jour 439, *Muhammad Abdul Majid* v. *Emperor*. R. Bilaram, A. J. C., observed however that the restriction in S. 337, sub-section 3, does not deprive the power of the Sessions Court or the High Court to grant bail to the approver.
   [But see (1865) 3 Suth W R Cri L 17 (17). Decided under Code of 1861.]

2. (1932) 1932 Sind 40 (41) : 33 Cri L Jour 906, *Haji Ali Muhammad* v. *Emperor*.
   (1931) 1931 Lah 476 (478, 479) : 1931 Cri Cas 700 : 12 Lah 635 : 32 Cri L Jour 913, *In the matter of Khairati Ram*.
   (1931) 1931 Lah 480 (480) : 1931 Cri Cas 704 : 33 Cri L Jour 162, *Emperor* v. *Ranbir Singh*.
   (1931) 1931 Lah 473 (473) : 1931 Cri Cas 697 : 12 Lah 623 : 32 Cri L Jour 909, *Kundan Lal* v. *Emperor*.
   (1931) 1931 Lah 353 (356, 358) : 1931 Cri Cas 625 : 12 Lah 604 : 32 Cri L Jour 785, *Kundan Lal* v *Emperor*.
3. (1912) 13 Cri L Jour 842 (844) : 37 Bom 146, *Emperor* v. *Inliya Salabat Khan*.
4. (1935) 1935 Cal 545 (545, 546) : 1935 Cri Cas 937 : 62 Cal 430 : 36 Cri L Jour 1308, *Sultan Ahmad* v. *Emperor*.

Synopsis.

Other Topics.

Invalid pardon by Magistrate—Sessions Judge's pardon. See Note 1, Pt. 3.

Pardon by Sessions Judge at what stages. See Note 1, Pts. 1 and 2.

1. Scope of the Section.

Section 337 provides for tender of pardon to an accomplice during the stage of investigation or of inquiry into the offence by a Magistrate. This Section enables the Sessions Judge to tender, or direct the Magistrate or District Magistrate to tender, a pardon after the commitment of the case. He has power to tender a pardon or to direct the tender of pardon at *any* time before judgment is pronounced;[1] but he should not exercise such power after the evidence for the prosecution and of the defence has been taken and the opinion of the assessors has also been given.[2] Where the tender of pardon made by the Magistrate is found to be invalid, the Sessions Judge may make a valid tender of pardon under this Section.[3]

2. Offences in respect of which pardon may be tendered.

A pardon may be tendered under this Section in respect of any of the offences mentioned in Section 337, *ante*, after the case has been committed by the Magistrate under sub-section 2-A of that Section.

See Section 337 and the undermentioned cases.[1]

3. "Any person supposed to have been directly or indirectly concerned in, or privy to, such offence."

See Section 337 and the undermentioned cases.[1]

(Code of 1861—S. 210.)

When Sudder Court or Court of Session may direct a tender of pardon.

210. It shall be competent to a Court of Session at the time of trial, and also to the Sudder Court as a Court of reference, in cases tried with the aid of assessors, to instruct the Magistrate in like manner to tender a pardon to one or more persons supposed to have been directly or indirectly concerned in, or privy to, any such offence, with the view of obtaining his or their evidence on the trial.

Section 338—Note 1.

1. (1867) 7 Suth W R Cr 78 (114), *In the matter of Nistarinee Debia.* Under the Code of 1861 it was held that Sessions Judge could not tender a pardon before a trial.
2. (1884) 1884 All W N 147 (147), *Empress* v. *Hulia.*
3. (1882) 1882 All W N 241 (241), *Empress* v. *Kashia.*

Note 2.

1. (1884) 10 Cal 936 (937), *Queen-Empress* v. *Sadhee Kasal.* No longer law after the amendment of S. 337. *See* S. 337, *ante.*

(1882) 1882 All W N 240 (240), *Empress* v. *Gopal.* (Do.)

Note 3.

1. (1895) Ratanlal 750 (752), *Queen-Empress* v. *Bhagya.* The word "supposed" is intended to exclude the case of a man who has actually been convicted of the crime and not the case of a man who although admitted to be a party to the crime is unconvicted.

(1884) 7 All 160 (163), *Queen-Empress* v. *Kallu.* (Do.)

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339. (1) Where a pardon has been tendered under Section 337 or Section 338, and any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter.

Commitment of person to whom pardon has been tendered.

339.* (1) Where a pardon has been tendered under Section 337 or Section 338, and *the Public Prosecutor certifies that in his opinion* any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, *such person* may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter:

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case

Commitment of person to whom pardon has been tendered.

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* (Code of 1882—S. 339—Same.)

(Code of 1872—S. 349.)

349. When a pardon has been tendered under Section 347 or Section 348, if it appears to the Magistrate before the trial, or to the Court of Session before judgment has been passed, or to the High Court as a Court of reference or revision, that any person who has accepted such offer of pardon has not conformed to the conditions under which the pardon was tendered, either by wilfully concealing anything essential, or by giving false evidence, such Magistrate or Court may commit, or direct the commitment of, such person, for trial for the offence in respect of which the pardon was so tendered.

When Magistrate, Court of Session or High Court may direct commitment of person to whom pardon has been tendered.

The statement made by a person under pardon, which pardon has been withdrawn under this Section may be put in evidence against him.

(Code of 1861—S. 211.)

211. If it shall appear to a Court of Session at the time of trial, or to the Sudder Court as a Court of reference, that any person who shall have accepted an offer of pardon, has not conformed to the conditions under which the pardon was tendered, either by wilfully concealing anything essential, or by giving false evidence or information, it shall be competent to such Court to direct the commitment of such person for trial for the offence in respect of which the pardon was tendered.

When Sudder Court or Court of Session may direct the commitment of a person to whom a pardon may have been tendered.

it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been forfeited under this Section.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him *at such trial.*

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Synopsis.

Other Topics.

Application for sanction and not letter of reference. See Note 10, Pt. 2.
Approver's absconding. See Note 5, Pt. 2.
Approver's statements—Evidence in civil suit. See Note 9, Pt. 7.
Approver's statement — Evidence in prosecution for perjury. See Note 9, Pt. 6.
Approver's statements—Non-applicability of S. 24, Evidence Act. See Note 9, Pt. 1.
Certificate and sanction. See Note 10, F.-N. (2).
Certificate of Public Prosecutor not needed in cases already pending. See Note 2, Pt. 6.
Committal without certificate. See Note 2, Pt. 7.
Discharge of approver after termination of trial. See Note 7, Pt. 4.
Examination of approver not needed. See Note 9, Pt. 4 ; Note 10, Pt. 12.
Facts insufficient for forfeiture of pardon. See Note 4, Pts. 4 to 8.
Facts sufficient for forfeiture. See Note 4, Pts. 3, 9, 10 and 11.
Forfeiture of pardon—Which Court to decide. See Note 2, Pts. 1 to 5.
No duty of disclosure as to other offences. See Note 5, Pt. 3.
No prosecution of approver for other offences disclosed. See Note 6, Pt. 2.
Onus on prosecution to prove forfeiture. See Note 4, Pt. 3.
Pardon accepted but resiled from subsequently. See Note 3, Pt. 3.
Proof and explanation of approver's statements. See Note 9, Pt. 2.
Re-arrest of approver. See Note 7, Pt. 4.
Retracted statements—Corroboration needed. See Note 9, Pt. 5.
Sanction before prosecution. See Note 10, F.-N. (1).
Sanction of High Court — Discretion. See Note 10, Pts. 3, 4 and 8.
Sanction of High Court when granted. See Note 10, Pts. 6 and 10.
Sanction of High Court when refused. See Note 10, Pts. 7 and 9.
Strictest faith with approver. See Note 6, Pt. 1.
Sub-section (3) — Supplementary to Ss. 195 and 476. See Note 10, Pt. 11.
Want of sanction of High Court — Incurable. See Note 10, Pt. 1.
Withdrawal of pardon. See Note 4, Pts. 1 and 2.

1. Legislative changes.

1. *Changes introduced by the Code of* 1898 :—

In sub-section 2 the word "forfeited" has been substituted for the word "withdrawn." *See* Note 4, *infra.*

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2. *Changes introduced by the amendment of* 1923 :—

(*a*) In sub-section 1, the words "and the Public Prosecutor certifies that in his opinion" are new. *See* Note 2, *infra*.

(*b*) The proviso to sub-section 1 is new. *See* Note 7, *infra*.

2. The certificate of the Public Prosecutor.

Prior to the amendment of 1923, if the approver did not comply with the conditions of pardon, the Court before which his evidence was given, could only record its opinion to the effect that he had not complied with the conditions of the pardon and leave it to the District Magistrate to prosecute him if he thought fit to do so ; it could not itself *direct a prosecution*.[1] It was, however, held in the undermentioned cases[2] that a Sessions Judge before whom the evidence of the approver was given could himself order the approver to be committed to trial if he found that he did not comply with the conditions of the pardon. *See* also the undermentioned cases decided before the amendment of 1923.[3] These cases are no longer of any importance in view of the amendment of 1923, making the certificate of the Public Prosecutor, the sole basis for the prosecution of the approver for the original offence.[4] The Sessions Judge has thus no power to order the prosecution of the approver *suo motu*.[5] Where, however, proceedings had already been instituted against the approver under this Section before the date on which the amendment took effect, it was held that the certificate of the Public Prosecutor was not necessary.[6]

The certificate which is required as a condition precedent to the trial of an approver has to be filed before his *trial* commences in the *Court of Session*. It is not absolutely essential to file it in the *committing* Court and even if it is so, the absence of it is not fatal and the commitment can, in view of Section 532, *infra*, be accepted by the Court of Session.[7]

3. "Any person who has accepted such tender."

See Section 337, *ante*.

In a proceeding against the approver under this Section, it should first be

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Section 339—Note 2.

1. (1915) 1915 All 245 (246) : 37 All 331 : 16 Cri L Jour 483, *Emperor* v. *Gangua*.
   (1917) 1917 L B 143 (145) : 8 Low Bur Rul 447 : 17 Cri L Jour 337, *Emperor* v. *Nga Po Ket*.
2. (1920) 1920 Lah 222 (223) : 22 Cri L Jour 128, *Daulat* v. *Emperor*.
   (1924) 1924 Lah 568 (569) : 25 Cri L Jour 121, *Dil Bahadur* v. *Emperor*.
   (1920) 1920 Lah 376 (376) : 1 Lah 218 : 21 Cri L Jour 518, *Chanan Singh* v. *Emperor*.
3. (1897) 24 Cal 492 (493), *Queen Empress* v. *Maick Chandra Sarkar*. Only the authority, which granted pardon, has the right to withdraw it.
   (1900) 24 Mad 321 (325), *Queen Empress* v. *Ramasami*. (Do.)
   (1901) 1901 Pun Re Cr No. 19, page 49 (50), *Crown* v. *Manna Singh*. (Do.)
   (1898) 1898 Pun Re Cr No. 1, page 1 (2), *Mt. Taban* v. *Queen Empress*. (Do.)
   [But see (1901) 2 Pun L R 566 (567), *Emperor* v. *Abdu Shah*.
   (1895) 1895 All W N 163 (164), *Queen-Empress* v. *Bhola*. After trial, District Magistrate has no power to revoke the pardon and institute proceedings.]
4. (1925) 1925 Bom 135 (136, 137) : 26 Cri L Jour 469, *Emperor* v. *Maria Basappa*.
   (1925) 1925 Lah 15 (15) : 5 Lah 379 : 26 Cri L Jour 237, *Ali* v. *Emperor*. Even where approver was declared by the District Magistrate to have forfeited his pardon before amendment, certificate of Public Prosecutor essential, if proceedings are instituted after amendment.
   (1926) 27 Cri L Jour 940 (941) : 96 Ind Cas 396 (Lah), *Lal Shah* v. *Emperor*. (Do.)
5. (1925) 1925 Bom 135 (136, 137) : 26 Cri L Jour 469, *Emperor* v. *Maria Basappa*.
6. (1925) 1925 Nag 172 (173) : 25 Cri L Jour 1355, *Gangaram* v. *Emperor*.
7. (1935) 1935 Oudh 116 (117) : 36 Cri L Jour 377 : 1935 Cri Cas 206, *Emperor* v. *Sadanand*.
   (1925) 1925 Rang 219 (221) : 3 Rang 55 : 27 Cri L Jour 254, *Nga Wa Gyi* v. *Emperor*.

proved that the approver accepted the conditions of the pardon;[1] that is, that the conditions were fully explained to him, that he was free to accept or refuse the conditions and that he accepted the tender of pardon on a full understanding of such conditions.[2] It is also open to a person who has accepted a pardon in the first instance to resile from such acceptance and say that he may be tried in respect of the original offence in order that his character may be cleared. In such cases the provisions of this Section do not apply and he may be tried *jointly* with the other accused.[3]

4. Non-compliance with the conditions.

Prior to the Code of 1898, the Magistrate or the Sessions Judge had to *withdraw* the pardon tendered to an approver under Section 337 or Section 338 before the approver could be tried for the offence in respect of which the pardon was tendered.[1] Under the present Code, however, no such order is necessary and the only question, which the Court has to consider, before trying the approver for the original offence, is whether he has by some act or omission on his part failed to comply with the conditions of pardon.[2] It is the duty of the prosecution to establish that the approver has failed to comply with the conditions of the pardon,[2a] either,

(*a*) by wilfully concealing anything essential, or
(*b*) by wilfully giving false evidence.[3]

The mere fact that his alleged associates in crime, against whom he had given evidence, have been acquitted[4] or that the Sessions Judge or the Magistrate is of opinion, that he was not telling the truth[5] or that the facts stated by him are not probable[6], or the mere fact, that some discrepancies have been elicited from

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Note 3.

1. (1869) 12 Suth W R Cr 80 (81), *Queen* v. *Gogalao.*
   (1924) 1924 All 564 (564) : 26 Cri L Jour 336, *Palatt Rai* v. *Emperor.* A person to whom pardon is tendered and who expresses a complete ignorance and states, that he is indifferent whether a pardon is granted or not, is not a person accepting pardon and he cannot plead the pardon in bar.
2. (1893-1900) 1893-1900 Low Bur Rul 7 (8), *Nga Thin Nu* v. *Queen-Empress.*
3. (1924) 1924 Mad 391 (391) : 25 Cri L Jour 210, *Basireddy Narappa* v. *Emperor.*

Note 4.

1. [See (1882) 8 Cal 560 (567), *Empress* v. *Nabin Chundra Banikya.*]
2. (1901) 25 Bom 675 (679), *King-Emperor* v. *Bala.*
   (1922) 1922 Sind 31 (32) : 16 Sind L R 131 : 23 Cri L Jour 611, *Emperor* v. *Haji Jiand.*
   [See also (1919) 1919 Lah 449 (450) : 1918 Pun Re Cr No. 24 : 19 Cri L Jour 926, *Suraj Bhan* v. *Emperor.*
   (1917) 1917 All 316 (317) : 39 All 305 : 18 Cri L Jour 444, *Khaili* v. *Emperor.*]
2a (1935) 1935 Lah 799 (800) : 1935 Cri Cas 1067 : 37 Cri L Jour 79, *Dip Cand* v. *Emperor.* *Onus* of proving forfeiture is on prosecution.
3. (1909) 9 Cri L Jour 571 (575) : 32 Mad 173, *Kullan* v. *Emperor.*
   (1913) 14 Cri L Jour 401 (403) : 7 Low Bur Rul 1, *Nga To Gale* v. *Emperor.*
   (1915) 1915 Cal 397 (398) : 42 Cal 756 : 16 Cri L Jour 120, *Emperor* v. *Saber Akunji.*
   (1915) 1915 Cal 667 (673) : 42 Cal 856 : 16 Cri L Jour 65, *Sashi Rajbanshi* v. *Emperor.*
   (1902) 1902 Pun Re Cr No. 34 page 88, (91, 93), *Kanwar Singh* v. *Emperor.*
   (1904) 1 Cri L Jour 1082 (1087) : 1904 Pun Re Cr No. 31, *King-Emperor* v. *Kadu.*
   (1906) 3 Cri L Jour 342 (343) : 1905 Pun Re Cr No. 59, *Bahadur* v. *Emperor.*
   (1889) 1889 Pun Re Cr No. 6, page 40 (42), *Empress* v. *Musammat Miriama.*
   (1900) 3 Oudh Cas 245 (246), *Queen-Empress* v. *Debi.*
   (1930) 1930 Mad W N 773 (775), *Soliyan* v. *Emperor.*
   (1902) 1902 Pun Re Cr No. 24, page 69 (72), *Hargalal* v. *Emperor.*
   (1895) 1895 Pun Re Cr No. 15, page 47 (50), *Habibulla* v. *Empress.*
   (1926) 27 Cri L Jour 77 (79) : 91 Ind Cas 253 (Lah), *Ahmed* v. *Emperor.*
   [See also Note 5 *infra.*]
4. (1895) 1895 Pun Re Cr No. 15 page 47 (49), *Habibulla* v. *Empress.*
5. (1870) 14 Suth W R Cr 10 (10), *Queen* v. *Petambar Dhoobee.*
6. (1901) 3 Bom L R 489 (502), *King-Emperor* v. *Trimbaka.*

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him in cross-examination[7] or that there are certain inconsistencies in his evidence on immaterial points,[8] is not sufficient to show that the conditions of the pardon have not been complied with. Where, however, the approver wilfully introduces discrepancies into his deposition, in order that the Court may hold that he is not a reliable witness, he forfeits his pardon.[9]

It is not strictly necessary that the prosecution should have actually examined the approver as a witness, both before the Magistrate's Court and the Sessions Court, before proceedings are instituted against him for non-compliance with the conditions of pardon. It is enough if he is shown to have made a statement absolutely inconsistent with the statement that he made at the time the pardon was tendered to him.[10] Where the evidence given by an approver in the Sessions trial is not a compliance with the conditions of the pardon, the fact that he gave evidence in accordance with the conditions before the committing Magistrate does not save him from being proceeded against, under this Section.[11]

5. "Wilfully concealing anything essential."

The prosecution has to establish that certain essential facts were within the knowledge of the approver, and that he had wilfully concealed such facts.[1] The mere fact that the approver absconded at the time does not amount to a wilful concealment of anything essential within the meaning of the Section.[2]

As has been seen in Note 9 to Section 337, *ante*, it is the duty of the approver to make a thorough and complete disclosure of all facts within his knowledge bearing upon the offence or offences in respect of which he is giving evidence. Thus he is not bound, in fulfilment of the conditions of pardon, to make any disclosure relative to any offence which was not being inquired into at the time.[3]

6. Effect of pardon.

Where pardon is tendered to a person, on condition that he should make a true and full disclosure of the *whole* of the circumstances within his knowledge relative to the offence, it is a matter of utmost importance that the strictest faith should be kept with him.[1] Thus where a person is granted a pardon, and being under the impression that he has freed himself from the consequences of his incriminating statements, he makes a disclosure of his complicity in offences other than those in respect of which he was granted a pardon, it would be improper to institute proceedings against him in respect of such other offences.[2]

See also Notes to Section 337, *ante*.

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7. (1902) 1902 Pun Re Cr No. 34, page 88 (93), *Kunwar Singh* v. *Emperor*.
   (1926) 27 Cri L Jour 768 (768): 95 Ind Cas 288 (Oudh), *Emperor* v. *Jagannath*.
8. (1880) 12 Cal L R 226 (229), *Srinop* v. *Emperor*.
   (1935) 1935 Lah 799 (800): 37 Cri L Jour 79: 1935 Cri Cas 1067, *Dipchand* v. *Emperor*.
9. (1926) 27 Cri L Jour 77 (79): 91 Ind Cas 253 (Lah), *Ahmed* v. *Emperor*.
10. (1928) 1928 Lah 320 (323): 9 Lah 608: 29 Cri L Jour 413, *Ramnath* v. *Emperor*.
11. (1915) 1915 Nag 92 (94): 11 Nag L R 59: 16 Cri L Jour 417, *Local Government* v. *Mullu*.
    (1910) 11 Cri L Jour 254 (255): 33 Mad 514, *In re Alagirisamy Naicken*.

Note 5.

1. (1901) 3 Bom L R 489 (502), *King Emperor* v. *Trimbaka Dewji*.
   [See also cases cited in Note 4 footnote 3.]
2. (1916) 1916 Low Bur 111 (112): 8 Low Bur Rul 357: 17 Cri L Jour 391, *Maung Po Nla* v. *Emperor*.
3. (1919) 1919 Lah 449 (450): 1918 Pun Re Cr No. 24: 19 Cri L Jour 926, *Suraj Bhan* v. *Crown*.

Note 6.

1. (1902) 1902 Pun Re Cr No. 34, page (88), *Kanwar Singh* v. *Emperor*.
   (1930) 1930 Mad W N 773 (775), *Soliyan* v. *Emperor*.
2. (1926) 1926 Pat 279 (281, 287): 5 Pat 171:

7. Procedure at the trial—Joint trial.

Prior to the amendment of 1923, there was a conflict of opinion as to whether an approver, who had broken the conditions of pardon, could be tried for the offence for which he was tendered a pardon, along with the other accused, or whether his trial ought to be in a separate proceeding altogether. It was held in one set of cases, that there was no provision in the Code prohibiting a joint trial, and if an approver had been committed in time, it was not illegal to try him *jointly* with the other accused for the original offence.[1] It was however held in another set of cases, that the trial of the approver on the original charge ought to be in a separate proceeding altogether, which should commence *de novo* after the case, in which he had given evidence, had been fully heard and determined;[2] and that he should not be put into the dock after his evidence is given to be tried *jointly* along with the other accused.[2a] The proviso to sub-section 1 has been introduced by the amendment of 1923 which specifically provides that the approver should not be tried jointly with the other accused.[3]

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27 Cri L Jour 957, *Nilmadhab Chowdhury* v. *Emperor*.

Note 7.

1. (1898) 20 All 529 (530), *Queen-Empress* v. *Brij Narain Man*.
(1899) 1899 Pun Re Cr No. 5, page 13 (16), *Queen-Empress* v. *Mihan Singh*.
(1906) 4 Cri L Jour 142 (143): 29 All 24, *Emperor* v. *Budhan*.
(1908) 8 Cri L Jour 445 (450): 1908 All W N 259 (261), *Sultan* v. *Emperor*.
[See also (1901) 25 Bom 675 (679), *King-Emperor* v. *Bala and Narain*.
(1920) 1920 Lah 222 (223): 22 Cri L Jour 128, *Daulat* v. *Emepror*.]
2. (1907) 8 Cri L Jour 153 (153): 31 Mad 272, *In re Arunachallam*.
(1901) 24 Mad 321 (324), *Queen-Empress* v. *Ramasamy*.
(1892) 14 All 502 (507), *Queen-Empress* v. *Mulua*.
(1924) 1924 Mad 391 (391): 25 Cri L Jour 210, *Bassireddi Narappa* v. *Emperor*.
(1892) 15 Mad 352 (354), *Queen-Empress* v. *Rama Thevan*.
(1901) 3 Bom L R 489 (502, 503), *King-Emperor* v. *Trimbaka Dewji*. The approver was convicted on his own plea. But sentence was only postponed till after the trial of co-accused. *Held* procedure illegal.
(1903) 6 Oudh Cas 236 (237), *Chokhe* v. *King-Emperor*.
(1892) 14 All 336 (338, 339), *Queen-Empress* v. *Sudra*.
(1870) 14 Suth W R Cr 10 (10), *The Queen* v. *Pitambar Dhoobee*.
(1902) 4 Bom L R 826 (827), *Emperor* v. *Revappa*.
(1903) 1903 Pun Re Cr No. 4, page 11 (14), *Ghulam Mohamed* v. *Crown*.
(1900) 13 C P L R 123 (123), *Empress* v. *Pawan*.
(1881) 7 Cal L R 66 (67), *In the matter of Joyudee Paramanaick*.
(1922) 1922 Sind 31 (32): 16 Sind L R 131: 23 Cri L Jour 611, *Crown* v. *Haji Jind*.
(1900) 27 Cal 137 (139), *Queen-Empress* v. *Natu*.
2a (1892) 14 All 502 (507), *Queen-Empress* v. *Mulua*.
(1908) 7 Cri L Jour 245 (249): 1907-09 Upp Bur Rul Cr. P. C. 7, *Nga Po Hnan* v. *Emperor*.
(1882) 1882 All W N 31 (32), *Empress* v. *Samcharan*.
(1892) 15 Mad 352 (354), *Queen-Empress* v. *Ram Thewan*. The approver should be duly committed before a Sessions Judge can take cognizance of the case.
(1891) 1891 All W N 182 (183), *Queen-Empress* v. *Piari*. The committing Magistrate cannot withdraw pardon and commit the approver along with the other accused.
(1894) 22 Cal 50 (70, 71), *Queen-Empress* v. *Jagat Chandra*.
(1873) 19 Suth W R Cri 43 (43), *Queen* v. *Bipro Doss*. A formal order of committal is necessary before a Sessions Judge can take cognizance of a case.
(1877) Ratanlal 119 (119), *Queen-Empress* v. *Kushya*. (Do.)
(1865) 4 Suth W R Cri L 4 (4), *Re Doda*. (Do.)
(1893-1900) 1893-1900 Low Bur Rul 536 (537), *Nga Aung Burin* v. *Queen-Empress*. The Court of Session cannot take cognizance of a case unless the approver had been duly committed by a Magistrate.
(1931) 1931 Oudh 113 (114): 1931 Cri Cas 273: 32 Cri L Jour 91: 6 Luck 386, *Ram Lotan* v. *Emperor*. Joint committal of approver along with other accused illegal.
3. (1935) 1935 Oudh 226 (228): 35 Cri L Jour 889: 1935 Cri Cas 336, *Chauhan* v. *Emperor*.

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Until the termination of the trial in which the approver has given evidence, he has to be in judicial custody unless he had already been admitted to bail (*See* sub-section 3 to S. 337, *ante*). At the termination of the trial, however, he should be discharged by the Court which tries the case. But the Crown may re-arrest him and proceed against him for the offence in respect of which he was granted a conditional pardon, if so advised.[4] That is, as has been seen in Note 2 already, if the Public Prosecutor certifies that the approver had failed to comply with the conditions of the pardon. In such proceedings the approver is entitled to plead the tender of pardon and the compliance of the conditions thereof in bar of the trial for the original offence, and the Court has to decide and give its finding as to that plea. *See* Section 339-A, *infra* and the undermentioned cases.[5]

8. Plea of pardon in bar.—*See* Section 339-A, *infra*.

9. Use of statements made by the approver—Sub-section 2.

Sub-section 2 provides that any statement made by a person who has accepted a tender of pardon may be used in evidence against him in case he is proceeded against under this Section for non-compliance with the conditions of the pardon. Thus, the admissibility of such a statement is not affected by Section 24 of the Evidence Act, which applies only to "*confessions*" made by an *accused* person.[1] Before, however, the statement is used in the trial against him, it is necessary that it should be properly proved, that it should be put to the approver and that he should be asked if he desired to offer any explanations thereon.[2]

Sub-section 2 is wide enough to include the disclosure made by the approver before the Magistrate, at the time of the tender of pardon to him.[3] *See* Notes to Section 337, *ante*.

It is not absolutely necessary that the approver should have been examined as a witness as provided under Section 337, sub-section 2 before any statements made

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4. (1910) 11 Cri L Jour 702 (703, 704) : 37 Cal 845, *Emperor* v. *Abani Bhushan*.
(1922) 1922 Sind 31 (32): 16 Sind L R 131: 33 Cri L Jour 611, *Emperor* v. *Haji Jind*.
(1899) 23 Bom 493 (494), *Queen-Empress* v. *Bhan*.
(1909) 10 Cri L Jour 418 (419): 5 Nag L R 134, *Emperor* v. *Mohan*.

5. (1906) 4 Cri L Jour 346 (354): 30 Bom 611, *Emperor* v. *Kothia*. Notwithstanding its withdrawal or declaration of forfeiture by a Magistrate or Judge — Decided before amendment of 1923.
(1922) 1922 Bom 177 (177): 46 Bom 120: 22 Cri L Jour 620, *Re Dagdoo*.
(1889) 11 All 79 (91), *Queen-Empress* v. *Ganga Charan*.
(1915) 1915 All 245 (246): 37 All 331: 16 Cri L Jour 483, *Makhdoom Baksh Shah* v. *Hashim Ali*.
(1920) 1920 Lah 376 (376): 1 Lah 218: 21 Cri L Jour 518, *Channan Singh* v. *Crown*.
(1911) 12 Cri L Jour 326 (326): 7 Nag L R 65, *Emperor* v. *Kachri*.

Note 9.

1. (1882) 8 Cal 560 (568), *Empress* v. *Nobin Chandra*.
(1915) 1915 Nag 92 (95): 16 Cri L Jour 417 (420): 11 Nag L R 59, *Local Government* v. *Mulu*.
(1920) 1920 Bom 270 (280) : 22 Cri L Jour 68 (F B), *Emperor* v. *Cunna*. (Shah, J., *contra*.)
(1933) 1933 Lah 910 (912): 35 Cri L Jour 168: 1933 Cri Cas 1297, *Anup Singh* v. *Emperor*.
(1897) 1897 Pun Re Cr No. 3, page 4 (6), *Bhallu* v. *Queen-Empress*.
(1871) 8 Bom H C R 103 (107), *Reg* v. *Alibhli Mitha*.
[But see (1928) 1928 Lah 320 (322) : 9 Lah 608 : 29 Cri L Jour 413, *Ram Nath* v. *Emperor*.
(1867) 8 Suth W R Cr 53 (54), *Queen* v. *Radanath Dosadh*. Decided under Code of 1861 which contained no provision corresponding to sub-section 2.
(1867) 8 Suth W R Cr L 14 (14), *Re Pudunth*. (Do.)]

2. (1925) 1925 Nag 172 (173) : 25 Cri L Jour 1355, *Gangaram* v. *Emperor*.

3. (1925) 1925 Nag 172 (173) : 25 Cri L Jour 1355, *Gangaram* v. *Emperor*.
(1928) 1928 Lah 320 (322) : 9 Lah 608 : 29 Cri L Jour 413, *Ram Nath* v. *Emperor*.

by him are used in evidence against him.[4] Though the statement or deposition of the approver is not strictly a confession, it is in the nature of a confession, and the Court should, in case it is retracted, require that the facts contained therein should be corroborated by extrinsic evidence before convicting the approver thereon.[5]

Sub-section 2 does not bar the use of the statements made by the approver, in an inquiry into the offence of perjury against the approver,[6] or in a civil suit for damages brought against him by the complainant.[7]

10. Prosecution for perjury—Sanction of the High Court.

Under sub-section 3, it is essential that the prosecution should obtain the sanction of the High Court before proceeding against the approver for giving *false evidence*, and if such sanction is not obtained before the institution of the proceedings, the defect affects the jurisdiction of the Court and cannot be cured under Section 537.[1] The application for sanction to prosecute the approver should be made on behalf of the Crown by a regular application to the High Court, and a letter of *reference* by the Sessions Judge is not sufficient.[2]

The discretion vested in the High Court to sanction the prosecution of the approver for perjury should be exercised with extreme caution.[3] The necessity for obtaining the previous sanction of the High Court shows that the mere fact that the approver makes two inconsistent statements cannot be a justification for directing his prosecution.[4] The High Court before granting a sanctiou should carefully consider all the circumstances in the case and decide the cardinal ques-

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[But see (1922) 1922 Bom 138 (144): 46 Bom 61 : 22 Cri L Jour 728, *Emperor* v. *Motilal.*]

4. (1906) 3 Cri L Jour 55 (69, 70) : 1905 Pun Re Cr No. 41 (F B), *Suba* v. *Emperor.*
(1908) 7 Cri L Jour 245 (249) : 1907-09 Upp Bur R Cr. P. C. 7, *Nga Po Hnan* v. *Emperor.*
[But see (1908) 8 Cri L Jour 153 (153) : 31 Mad 272, *In re Arunachallam.*]

5. (1934) 1934 Pesh 46 (46) : 35 Cri L Jour 1242 : 1934 Cri Cas 882, *Faqir Shah* v. *Emperor.*
(1915) 1915 Lah 307 (308): 16 Cri L Jour 815, *Khushi* v. *Emperor.*
(1930) 1930 Nag 259 (260) : 31 Cri L Jour 661 : 1930 Cri Cas 835, *Sheikh Shafi* v. *Emperor.*

6. (1912) 13 Cri L Jour 33 (35) : 5 Sind L R 174, *Emperor* v. *Andal.*

7. (1909) 4 Ind Cas 523 (526) (Cal), *Keshab Nath Bhattacharya* v. *Maniruddin Sarkar.*

Note 10.

1. (1884) 1884 Pun Re Cr No. 42, page 92 (96), *Mt. Sharina* v. *Empress.*
(1904) 1 Cri L Jour 1021 (1022) : 2 Low Bur R 302, *Emperor* v. *Htuktalwe.*
(1900) 27 Cal 137 (139), *Queen-Empress* v. *Nathu.*
(1886) 10 Bom 190 (193), *Queen-Empress* v. *Dala Jiva.* The sanction under sub-section (3) to prosecute for false evidence, must be obtained before and not after the commencement of the prosecution.

2. (1908) 9 Cri L Jour 283 (284) : 32 Mad 47, *The Emperor* v. *Madiga Nallavadu.*
(1893) 1893 All W N 13 (14), *In re, the application of the Magistrate of Basti.*
(1897) 24 Cal 492 (493), *Queen-Empress* v. *Manicka Chandra Sarkar.*
(1904) 1 Cri L Jour 793 (793) : 1904 Pun Re Cri 10, *Crown* v. *Bulaka Singh.*
(1912) 13 Cri L Jour 451 (451) : 15 Ind Cas 83 (Lah), *Emperor* v. *Raja.*
(1929) 1929 Oudh 527 (527) : 1929 Cri Cas 625 : 5 Luck 452 : 31 Cri L Jour 204, *Emperor* v. *Ghasitey. Held* sanction could be granted only if a certificate from Public Prosecutor is produced —It is submitted that such a condition is not imposed by the Section itself.

3. (1934) 1934 All 43 (45) : 1934 Cri Cas 74 : 56 All 288 : 35 Cri L Jour 444, *Emperor* v. *Mathura.*

4. (1934) 1934 All 43 (45) : 1934 Cri Cas 74 : 56 All 288 : 35 Cri L Jour 444, *Emperor* v. *Mathura.*
(1914) 15 Cri L Jour 76 (77) : 22 Ind Cas 428 (All), *Emperor* v. *Bodha.*
(1925) 1925 Rang 286 (286) : 3 Rang 224 : 26 Cri L Jour 1396, *Emperor* v. *Nga Bo Gyi.* Statement at the time of tender of pardon cannot form the basis for perjury.
[But see (1933) 1933 Lah 868 (869) : 35 Cri L Jour 111 : 1933 Cri Cas 1113, *Emperor* v. *Hussaina.* Unless it is established that one of the statements was made under undue influence.]

Sec. 339 Note 10

tion whether the *previous* statement or confession was true and voluntary.[5] If it is of opinion that such *previous* statement is true on the facts before it, then his subsequent statement ought to be false, and in such cases, it is not only desirable but also expedient to sanction the prosecution.[6] If, however, the first statement or confession is not true, but that his later statement is the true one, then the inference may be drawn that the first statement or confession was obtained by threat or inducement and in such cases, it would be undesirable to sanction the prosecution.[7] The High Court has also a discretion in cases where the approver is induced to make certain statements in connexion with a capital charge, to allow him every possible *locus paenitentiae* in respect of such a statement.[8] Where the approver is proceeded against for the original offence itself in respect of which he was tendered a pardon, it is not proper to sanction his prosecution for perjury.[9] Such sanction should be granted only in case it appears to the High Court that a conviction for the original offence is unlikely for any reason, or that even on a conviction on the original charge, the sentence that could be passed would be too light in the circumstances of the case.[10]

Sub-section 3 merely imposes an additional condition to the institution of a prosecution for perjury and does not have the effect of overriding the provisions of Section 476, *infra*. Thus even where the sanction of the High Court is obtained, the prosecution could be instituted only in accordance with the provisions of Sections 195 and 476.[11] The High Court may grant sanction for prosecution on the strength of a statement made by the approver, which is *prima facie* false; it is not necessary that the approver should have been examined as a witness in the case as required by Section 337, sub-section 2, *ante*.[12]

Sec. 339-A

Procedure in trial of person under Section 339.

339-A. *(1) The Court trying under Section 339 a person who has accepted a tender of pardon shall—*

(a) if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under Section 271, sub-section (1), and

(b) if the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken, ask the accused

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5. (1934) 1934 All 43 (45) : 1934 Cri Cas 74 : 56 All 288 : 35 Cri L Jour 444, *Emperor* v. *Mathura.*
[See also (1933) 1933 Lah 868 (869) : 1933 Cri Cas 1113 : 35 Cri L Jour 111, *Emperor* v. *Hussaina.*]

6. (1934) 1934 All 43 (45) : 1934 Cri Cas 74 : 56 All 288 : 35 Cri L Jour 444, *Emperor* v. *Mathura.*
(1924) 1924 Lah 90 (91) : 25 Cri L Jour 174, *Emperor* v. *Waryam.*
[See also (1929) 1929 All 321 (322) : 30 Cri L Jour 1157, *Emperor* v. *Dukhu.*]

7. (1934) 1934 All 43 (45) : 1934 Cri Cas 74 : 56 All 288 : 35 Cri L Jour 444, *Emperor* v. *Mathura.*
(1932) 1932 Lah 307 (308) : 33 Cri L Jour 485 : 1932 Cri Cas 421, *Emperor* v. *Jairam Singh.*

8. (1914) 15 Cri L Jour 76 (77) : 22 Ind Cas 428 (All), *Emperor* v. *Bodha.*
(1924) 1924 Lah 90 (91) : 25 Cri L Jour 174, *Emperor* v. *Waryam Singh.*
[See also (1929) 1929 All 321 (322) : 30 Cri L Jour 1157, *Emperor* v. *Dukhu.*]

9. (1932) 1932 Lah 307 (308) : 33 Cri L Jour 485 : 1932 Cri Cas 421, *Emperor* v. *Jairam Singh.*

10. (1927) 1927 Nag 189 (191) : 23 Nag L R 35 : 28 Cri L Jour 645, *Local Government* v. *Gambhir Bhujua.*

11. (1927) 1927 Nag 189 (192) : 23 Nag L R 35 : 28 Cri L Jour 645, *Local Government* v. *Gambhir Bhujua.*

12. (1913) 14 Cri L Jour 64 (64) : 18 Ind Cas 352 (Lah), *Emperor* v. *Raja.*
(1906) 3 Cri L Jour 55 (58) : 1905 Pun Re Cr No. 41, *Suba* v. *Emperor.*

whether he pleads that he has complied with the conditions on which the tender of the pardon was made.

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors or the Magistrate, as the case may be, shall, before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.

Synopsis.

Other Topics.

Duty of Court to explain. See Note 2, Pt. 2.

Finding as to pardon essential. See Note 3, Pt. 4.

Magistrate's finding against plea—Immaterial. See Note 2, Pt. 3.

Plea of pardon as preliminary issue. See Note 3, Pts. 1 to 3.

Plea of pardon—Jury to decide. See Note 3, Pt. 5.

Strict compliance with Section. See Note 2, Pt. 1.

1. Legislative changes.

This Section has been newly introduced by the Amending Act of 1923.

See Note 3, *infra*.

2. Plea of pardon.

The procedure laid down under this Section should be strictly followed.[1] It is the duty of the Court to explain the provisions of this Section clearly to the accused and to tell him that he is entitled to plead that he has complied with the conditions of the pardon.[2] The mere fact that the accused raised such a plea before the committing Magistrate and that the Magistrate had given his finding on such a plea, does not absolve the Sessions Judge from the duty cast upon him under this Section of asking the accused if he pleads compliance with the conditions of the pardon.[3]

3. Procedure under this Section.

Before the introduction of this Section in 1923, it was held that where the approver raised a plea that he had complied with the conditions of the pardon, it was the duty of the Court to decide and give a finding on that issue first, before trying him for the offence in respect of which the pardon was tendered.[1] Such a course necessarily led to complications inasmuch as, in deciding the preliminary issue, the Court had very often to investigate into the facts of the case and to pre-

Section 339-A—Note 2.

1. (1929) 1929 Oudh 256 (256): 30 Cri L Jour 559, *Itwari* v. *Emperor*.
   (1925) 1925 Lah 15 (15): 5 Lah 379: 26 Cri L Jour 237, *Ali* v. *Emperor*.
2. (1925) 1925 Lah 15 (15): 5 Lah 379: 26 Cri L Jour 237, *Ali* v. *Emperor*.
   (1929) 1929 Oudh 256 (256): 30 Cri L Jour 559, *Itwari* v. *Emperor*.
3. (1929) 1929 Oudh 256 (256): 30 Cri L Jour 559, *Itwari* v. *Emperor*.
   (1916) 1916 Mad 290 (290): 16 Cri L Jour 234 (235), *In re Madiga Pothugadu*.
   (1915) 1915 Cal 667 (673): 16 Cri L Jour 65 (71): 42 Cal 856, *Sashi Rajbanshi* v. *Emperor*.

Note 3.

1. (1906) 3 Cri L Jour 342 (343): 1905 Pun Re Cr No 59, *Bahadur* v. *Emperor*.
   (1917) 1917 Low Bur 143 (145): 17 Cri L Jour 337 (338): 8 Low Bur Rul 447, *Emperor* v. *Nga Po Ket*.

Sec. 339-A Note 3

judge it on the merits.[2] These cases are no longer of any importance in view of this Section which provides specifically for the procedure to be adopted in such cases.[3] Under this Section, the accused should be asked at the very commencement of the proceedings, whether he pleads compliance with the conditions of the pardon. The Court has to record such a plea in case he so pleads and to *proceed with the trial.* In the course of the trial, however, and before judgment is pronounced, the Court should decide the question whether the accused has complied with the conditions of the pardon. If it is found, that he has so complied with them, the Court has to pass at once a judgment of acquittal, whatever its finding may be as to the guilt of the accused in respect of the offence.[4] It is for the *Crown* to prove that the pardon has been forfeited by the approver.[4a]

In a case triable by the jury, the question whether the accused has complied with the conditions of the pardon should be left to the jury to be decided, like any other question of fact in the case.[5]

Sec. 340

340. Every person accused before any Criminal Court may of right be defended by a pleader.

Right of accused to be defended.

340.* *(1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.*

Right of person against whom proceedings are instituted to be defended and his competency to be a witness.

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* **(Code of 1882—S. 340**—Same as that of 1898 Code.)

(Code of 1872—S. 186, paras. 1 and 2.)

186. Every person charged before any Criminal Court with an offence may of right be defended by any barrister or attorney of a High Court, or by any pleader duly qualified under the provisions of Act No. XX of 1865, or any other law in force for the time being relating to pleaders.

Right of accused to be defended.

Any such person may, with the permission of the Court (but not otherwise), employ any mukhtar or other person, not being a barrister, attorney or pleader, to assist him in his defence.

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(Code of 1861—S. 432.)

432. Every person charged before any Criminal Court with an offence may of right be defended by Counsel or authorized agent.

Right of accused to be defended by Counsel.

(1909) 9 Cri L Jour 571 (575): 32 Mad 173, *Kallan* v. *Emperor.*
(1913) 14 Cri L Jour 401 (403): 7 Low Bur Rul 1, *Nga To Gale* v. *Emperor.*
(1902) 1902 Pun Re Cr No. 34, page 88 (93), *Kunwar* v. *Emperor.*

2. [See the Reports of the Select Committee, 1922.]
[See also (1910) 11 Cri L Jour 254 (255): 33 Mad 514, *In re, Alagiriswamy Naicken.*
(1933) 1933 Lah 910 (911): 35 Cri L Jour 168: 1933 Cri Cas 1297, *Anup Singh* v. *Emperor.*]

3. (1933) 1933 Lah 910 (911): 35 Cri L Jour 168: 1933 Cri Cas 1297, *Anup Singh* v. *Emperor.*

4. [See (1933) 1933 Lah 910 (912): 35 Cri L Jour 168: 1933 Cri Cas 1297, *Anup Singh* v. *Emperor.*]

4a (1935) 1935 Lah 799 (800): 37 Cri L Jour 79: 1935 Cri Cas 1067, *Dipchand* v. *Emperor.*

5. (1910) 11 Cri L Jour 254 (255): 33 Mad 514, *In re Alagiriswamy Naicken.*

(2) Any person against whom proceedings are instituted in any such Court under Section 107, or under Chapter X, Chapter XI, Chapter XII or Chapter XXXVI or under Section 552, may offer himself as a witness in such proceedings.

Synopsis.

Other Topics.

Accused person — Meaning of. See Note 1, Pts. 1 to 7.
Agents of the accused—Whether can appear. See Note 11, Pt. 3.
Limiting of arguments—Power of. See Note 7, Pt. 5.
Memorandum of appearance. See Note 10, Pt. 6.
"Pleader"—Whether includes persons other than legal practitioners. See Note 11, Pts. 3 to 7.
Pleader—Interview with accused to be allowed. See Note 6, Pt. 3.
Written arguments. See Note 7, Pts. 8 and 9.

1. Scope.

The old Section which read "Every person accused before any criminal Court may of right be defended by a pleader" gave rise to speculation as to the scope of the word "accused." Some decisions favoured a wide interpretation of the word so as to cover any person over whom a Magistrate or other Court exercises jurisdiction.[1] Conformably with this interpretation the Section was held to apply to persons against whom proceedings were instituted under Chapter VIII[2] and Chapter XI.[3] Other decisions however regarded the above definition as too wide and confined the word "accused" only to those persons who were accused of an offence.[4] In conformity with this view the Section was held inapplicable to persons concerned in proceedings under Division C of

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Section 340—Note 1.

1. (1892) 16 Bom 661 (668), *Queen* v. *Mona Puna.*
(1899) 21 All 107 (109), *Queen* v. *Mutasaddi Lal.*
(1901) 3 Bom L R 437 (440), *Emperor* v. *Aunya.*
(1903-1904) 2 Low Bur Rul 80 (84), *Ebrahim* v. *Emperor.*
(1909) 9 Cri L Jour 36 (37) : 36 Cal 163, *Bhom Lal Chowdhury* v. *R. F. Hopcroft.*

2. (1896) 23 Cal 493 (494), *Jhoja Singh* v. *Empress.*
(1900) 4 Cal W N 797 (798), *Abinash Malakar* v. *Empress.*
(1903) 25 All 375 (377), *Nakhi Lal Jha* v. *Emperor.*
(1900) 1900 Pun Re Cri No. 15, page (36), *Crown* v. *Ida.*
(1879) 4 Cal L R 452 (454), *Buroda Kant Roy* v. *Korimudi Moonshee.*

3. (1933) 1933 Lah 145 (146) : 34 Cri L Jour 616 : 1933 Cri Cas 267, *Jurub Ali Khan* v. *Shromani Gurdwara Parbandhan Committee.*

4. (1905) 2 Cri L Jour 575 (576) (Cal), *Hiranand Ojha* v. *Emperor.*
(1925) 1925 Cal 822 (822, 824, 827, 830) : 52 Cal 721 : 26 Cri L Jour 1194, *Narendra Chandra Rudra Pal* v. *Sabarali Bhuiya.*
(1927) 1927 Cal 509 (511) : 54 Cal 532 : 28 Cri L Jour 407, *Krishen Doyal Jalan* v. *Corporation of Calcutta.*

Sec. 340 Notes 1—2

Chapter 8.[5] It was also doubted whether pleaders could appear in proceedings under Section 62 of the Code of 1861, corresponding to Section 144 of the present Code.[6]

These questions are now set at rest by the recent amendment to the Section whereby it has been expressly made applicable not only to persons accused of an offence but to any person against whom proceedings are instituted under the Code in any criminal Court.[7]

The Section is confined in terms to persons *against* whom proceedings are taken. But even complainants have been held to have the legal right to be represented by counsel; of course when Government takes up the prosecution the officer acting on behalf of the Government will take the lead.[8] The Crown is entitled as of right to be heard by counsel or pleader in support of each prosecution whether in an original or appellate Court.[9]

2. "Proceedings .... under this Code."

Proceedings under Chapter X are criminal proceedings.[1] An application by the Police for remand falls under Section 167 of the Code and can be held to be a proceeding instituted under the Code in a criminal Court. Therefore at least from the moment (after the 24 hours of arrest) that the accused appears before the Court, his right to be defended begins. Hence access to him by his legal advisers should be allowed, irrespective of whether a charge sheet has been sent up or not.[2]

Both before and after the amendment, it has been held that a person with regard to whom a preliminary enquiry under Section 202 is being held is not entitled by any rule of law to intervene.[3] But he may watch the proceedings which means, not merely as an on-looker but instructing legal practitioners to watch the case on his behalf, with the leave of the Court, to assist the Court in making the investigation.[4]

A civil Court making an enquiry under Section 476 does not thereby become a criminal Court and Section 340 will not apply to such proceedings. But the general practice is to hear pleaders on behalf of persons in civil and criminal matters and to secure their assistance as *amicus curiae* even when parties have

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5. (1910) 11 Cri L Jour 501 (502) : 4 Sind L R 49, *Emperor* v. *Jawakali.*
6. (1872) 17 Suth W R Cri 37 (38), *Sheikh Laloo* v. *Adam Sircar.*
7. (1926) 1926 Bom 551 (553) : 50 Bom 741 : 27 Cri L Jour 1169, *In re Llewelyn Evans.*
8. (1925) 1925 All 301 (302) : 26 Cri L Jour 734, *Tufail Ahmad* v. *Emperor.*
   (1870) 14 Suth W R Cri 23 (23), *Chandi Charan Chatterjee* v. *Chandra Kumar Ghose.*
   (1870) 1870 Pun Re Cri No. 30, page 47 (47), *Crown* v. *Biharee.*
   [But see (1886) 1886 Pun Re Cri No. 29, page (72), *Akbar* v, *Empress.*
   (1871) 8 Bom H C A C 202 (204), *Bindachari* v. *Dracup.*]
9. (1871) 8 Bom H C R 204 (Note).

Note 2.

1. (1916) 1916 Mad 970 (970) : 16 Cri L Jour 349 (350) : 39 Mad 537, *Nissankara Rao Subbayya* v. *Coola Ramayya.*
2. (1926) 1926 Bom 551 (555) : 50 Bom 741 : 27 Cri L Jour 1169, *In re Llewelyn Evans.*
   (1932) 1932 Lah 13 (14) : 12 Lah 211 : 1932 Cri Cas 23 : 32 Cri L Jour 1022, *Amolak Ram* v. *Emperor.*
   (1931) 1931 Lah 99 (100) : 12 Lah 435 : 1931 Cri Cas 163 : 33 Cri L Jour 180, *Balkrishna* v. *Emperor.*
   (1930) 1930 Lah 945 (946) : 12 Lah 16 : 1930 Cri Cas 1041 : 32 Cri L Jour 339, *Sundar Singh* v. *Emperor.*
3. (1913) 40 Cal 444 (451) : 14 Cri L Jour 57, *Bhim Lal Shah* v. *Bisa Singh.*
   (1911) 11 Ind Cas 311 (312) : 38 Cal 880, *Golap Jan* v. *Bholanath.*
   (1920) 25 Cal W N 12*n* (12*n*), *Baul* v. *Junior S. I.*
   (1926) 1926 Sind 188 (189) : 20 Sind L R 43 : 27 Cri L Jour 494, *Atmaram Udhodas* v. *Topandus.*
   (1908) 8 Cri L Jour 20 (23) : 4 Nag L R 81, *Sheikh Chand* v. *Mahomed Hanif.*
4. (1911) 12 Cri L Jour 207 (208) : 10 Ind Cas 33 (Cal), *Sheikh Akbar* v. *E. F. Prance.*

no right to be heard either in person or by pleader.[5]

In a case decided before the amendment, it was observed that accused persons are not entitled to be represented before public officers in the absence of express statutory provision and that they are not entitled to be represented when being dealt with under Chapters 28 and 29 of the Code.[6]

3. Appellate and Revisional Courts.

The Section has been held to be as applicable to an appellate Court as to the Court in which the charge was originally brought, an appeal being to all intents and purposes a trial.[1] This was doubted in an earlier case (under the Code of 1861) but even there it was conceded that though this Section might not apply, the appellant's right to be represented by an authorised agent was recognised by Section 417 and Section 419 of the Code corresponding to Sections 419 and 423 respectively of the present Code.[2]

The right of persons to appear personally or by pleader before Courts exercising powers of revision is expressly excluded by Section 440.[3]

4. "May of right be defended."

The accused is entitled to be represented by a pleader.[1] Where this right is denied, a re-trial will be ordered.[2] It is necessary that notice of the date fixed for hearing should be given to the accused; for, otherwise the right given under this Section cannot be exercised by him.[2a] Full opportunity should be afforded to the accused to get proper legal advice and assistance before he is called upon to cross-examine the prosecution witnesses.[3] It will not be giving him a reasonable time, to ask him immediately after the framing of the charge to cross-examine the prosecution witnesses.[4] If the accused has had no sufficient opportunity before the commencement of the proceedings to engage a pleader, the proper course is for the Magistrate to proceed with the examination-in-chief of the prosecution witnesses and then give the accused an opportunity of engaging a pleader by adjourning the case for a reasonable period, what is a proper period being a question for reasonable decision in each case.[5] It must also be remembered, however, that the services of a counsel are necessary even when witnesses are examined-in-chief, not only to check leading questions but to prevent irrelevant evidence being recorded.[6]

5. (1911) 12 Cri L Jour 231 (232) : 10 Ind Cas 740 (All), *Ram Nihore Umar* v. *Emperor*.
6. (1910) 11 Cri L Jour 501 (502) : 4 Sind L R 49, *Emperor* v. *Tawakali*.

Note 3.

1. (1870) 1870 Pun Re Cr No 31, page (49), *Crown* v. *Fuzl*.
   (1905) 9 Cal W N 285*n*, *Hira Lal Bose* v. *Emperor*. Refusal to postpone hearing of appeal despite there being reasonable ground for postponement—Appeal ordered to be reheard.
2. (1870) Ratanlal 29 (29), *Reg* v. *Bechar Pitamber*.
3. (1911) 12 Cri L Jour 231 (232) : 10 Ind Cas 33 (All), *Ram Nihore Umar* v. *Emperor*.
   (1876) 1 Bom 64 (65), *Reg* v. *Devama*.

Note 4.

1. (1900) 27 Cal 656 (658), *Nakhi Lal Jha* v. *Queen*.
   (1925) 1925 All 285 (285) : 47 All 147 : 26 Cri L Jour 575, *Pita* v. *Emperor*.
2. (1877) 1877 Pun Re Cr No 9, page (23), *Nank* v. *Crown*.

2a (1903) 25 All 375 (377), *Nakhi Lal Jha* v. *Emperor*.

3. (1916) 1916 Mad 933 (934) : 16 Cri L Jour 786, *In re Rangasami Padayachi*.
   (1916) 1916 Mad 142 (143) : 16 Cri L Jour 334, *In re, Murugesa Naidu*. Adjournment, for obtaining copies of depositions of prosecution witnesses, refused—*Held*, accused was prejudiced and conviction should be set aside.
4. (1916) 1916 Mad 933 (934) : 16 Cri L Jour 786, *In re, Rangasami Padayachi*.
5. (1925) 1925 All 285 (285) : 47 All 147 : 26 Cri L Jour 575, *Pita* v. *Emperor*.
   (1916) 1916 Lah 445 (445) : 17 Cri L Jour 278 (279), *Sher Singh* v. *Emperor*.
6. (1925) 1925 Mad 1153 (1154) : 27 Cri L Jour 33, *Mannargan* v. *Emperor*.

Sec. 340 Notes 4—5

A Magistrate exercises jurisdiction with material irregularity when he holds a trial at a place where the accused are totally incapable of making a proper defence and are deprived of the opportunity of being represented by a pleader.[7] Where a Magistrate held Court on a Sunday, it was held that, though holding Court on a Sunday, was in itself not an illegality, yet the effect having been to prejudice the accused and deprive him of the right given to him under Section 340, the conviction should be set aside.[8] A conviction was however allowed to stand, where, though the action of a Magistrate in accelerating a case had resulted in depriving the accused of the services of his senior counsel, the accused had nevertheless not been prejudiced thereby.[9]

An appellant is entitled to be heard through his pleader[10] and a Judge contravenes the provisions of the Code in deciding an appeal without hearing counsel and on such a date as to make it physically impossible for the counsel to attend, when the Judge had before him a petition from the accused's counsel praying to be heard.[11]

When a person is not defended, the Magistrate or Judge ought, in the interests of justice, to test the accuracy of statements of witnesses by questions in the nature of cross-examination,[12] and in the cases of ignorant individuals accused of technical offences, to assist them in putting up obvious defensive pleas.[13]

5. Accused's right while in custody.

The Section not only contemplates that the accused should be defended by pleader at the time proceedings are actually going on, but also implies that he shall have a reasonable opportunity, if in custody, of getting into communication with his pleader and preparing for his defence.[1] So, when accused is on remand, he has a right to have access to legal adviser subject to such legitimate restrictions as may be necessary to prevent interference with the course of investigation.[2] A remand is a process of Court and it would be an abuse of that process if the police were to take advantage of it to prevent the accused from having access to his legal advisers. The High Court could, therefore, interfere under Section 561-A to prevent such abuse.[3]

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7. (1918) 1918 Pat 197 (198): 19 Cri L Jour 249: 3 Pat L Jour 147, *Mewa Lal* v. *Emperor*.
8. (1915) 1915 Bom 254 (255): 16 Cri L Jour 752, *Baban Dand* v. *Emperor*.
   (1930) 1930 Nag 255 (257): 31 Cri L Jour 705: 1930 Cri Cas 831, *Girdhari* v. *Emperor*.
   [See also (1925) 1925 Pat 772 (782): 4 Pat 646: 26 Cri L Jour 1441, *King Emperor* v. *Akhileswar Prasad*. Court not to sit beyond the prescribed hours, except with the consent of the pleaders on both sides.]
9. (1898) 1898 Pun Re Cr No 14, page (33), *Karan Din* v. *Empress*.
10. (1909) 9 Cri L Jour 189 (190) (Cal), *Rajkumar Singha* v. *Tincowri Mazumdar*.
11. (1870) 1870 Pun Re Cr No 31, page (49), *Fuzl* v. *Crown*.
12. (1885) 7 All 160 (162), *Queen* v. *Kallu*.
13. (1930) 1930 Rang 349 (350): 32 Cri L Jour 206: 1930 Cri Cas 1177, *Ali Hossein* v. *Emperor*.

Note 5.

1. (1926) 1926 Bom 551 (553, 554): 50 Bom 741: 27 Cri L Jour 1169, *In re, Llewelyn Evans*.
   (1935) 1935 Lah 230 (244): 35 Cri L Jour 1180: 1935 Cri Cas 396, *Jahangiri Lal* v. *Emperor*. These rules cannot be evaded by removing him to a place so that nobody knows where he is and his relations and friends cannot communicate with him and legal assistance cannot be availed of. The matter is really reduced to a farce if interviews are allowed only after a confession has been recorded.
2. (1930) 1930 Lah 945 (947): 12 Lah 16: 1930 Cri Cas 1041: 32 Cri L Jour 339, *Sunder Singh* v. *Emperor*.
   (1932) 1932 Lah 13 (14): 12 Lah 211: 1932 Cri Cas 23: 32 Cri L Jour 1022, *Amolak Ram* v. *Emperor*.
3. (1926) 1926 Bom 551 (553): 50 Bom 741: 27 Cri L Jour 1169, *In re Llewelyn Evans*.

Where the accused were arrested and placed in custody and then suddenly called upon to conduct their case without any opportunity having been given to them of obtaining legal assistance, the procedure was held to be irregular.[4]

Pending his trial, a police officer was put under certain restraints by his superior officers which hampered him in arranging for his defence. It was held, that full opportunity should be given to the under-trial officer to consult his legal advisers and that all reasonable facilities should be afforded to him for the conduct of his defence.[5] While it is beyond the province of the High Court to interfere with the discipline of the police force, or the exercise by the superior officers of their lawful powers, it is nevertheless bound to satisfy itself that the conditions under which the accused is being tried do not hamper him in his defence.[6]

Although sufficient means should be adopted to prevent under-trial prisoners from escaping when holding an interview with their vakils, police or other persons should not be placed sufficiently near to overhear their conversation.[7]

6. Choice of pleader.

Prisoners are to have the fullest opportunity to execute *vakalatnamas* to whomsoever they please.[1]

An accused person has a right to be defended by a pleader of his choice and a Magistrate has no right to tell him to engage another pleader as the one he had engaged did not know how to behave.[2] The Magistrate is bound to afford the accused and his friends every opportunity of making his defence and should not personally interpose between them. He is not justified in refusing the pleader an interview with the accused or a seat in Court.[3] A Judge cannot, however, be said to act contrary to Section 340 by interfering in a dispute between a counsel assigned for the defence and another counsel who is asked to associate himself with the former and in deciding that the defence should be conducted by the former.[4]

7. Arguments.

A Court is bound to hear arguments offered at any criminal trial or proceeding.[1] It is not a question of indulgence but of right, as it is an elementary principle of law that no order ought to be made to a man's prejudice without hearing him.[2] Refusal to hear arguments is not a mere irregularity but an illegality.[3]

4. (1920) 1920 All 268 (269) : 42 All 646 : 22 Cri L Jour 228, *Rajbansi* v. *Emperor.*
(1919) 1919 Cal 156 (156) : 20 Cri L Jour 230, *Harihar Roy* v. *Emperor.*
(1932) 1932 Cal 285 (286) : 58 Cal 1132 : 1932 Cri Cas 153 : 33 Cri L Jour 15, *Ram Gopal Adhikari* v. *Emperor.*

6. (1919) 1919 Cal 383 (385) : 20 Cri L Jour 675, *Harihar Roy* v. *Emperor.*

7. (1871) 8 Bom H C R Cr 126 (157). *Reg* v. *Kashinath.*
(1930) 1930 Lah 945 (947) : 12 Lah 16 : 1930 Cri Cas 1041 : 32 Cri L Jour 339, *Sundar Singh* v. *Emperor.*
(1935) 1935 Cal 101 (102) : 62 Cal 384 : 1935 Cri Cas 95 : 36 Cri L Jour 615, *Sudhasindhu Dey* v. *Emperor.* But the professional privilege of advocates can only be upheld if they honourably bear in mind that they are officers of the Court and do not lend themselves in any way to act as go-betweens to facilitate improper communications with other undetected criminal associates of the accused.

Note 6.

1. (1862-1865) 1 Bom H C R Cr 16 (16), *In re Sheikh Dadabai.*
(1862) 1 Mad H C R 4 (4), *Queen* v. *Vaiyapuri Goundan.*
2. (1896) Ratanlal 861 (863), *In re James Fritzerald.*
3. (1899) 1 Bom L R 856 (856), *Queen* v. *Wasudev Hari Chapekar.*
(1893) 21 Cal 642 (662), *Queen* v. *Sagal Samba.*
4. (1929) 1929 Cal 1 (6) : 30 Cri L Jour 494, *Kazi Bazlur Rahman* v. *Emperor.*

Note 7.

1. (1925) 1925 All 282 (283): 26 Cri L Jour 810, *Malik* v. *Emperor*
(1925) 1925 Oudh 228 (229) : 27 Oudh Cas 323 : 25 Cri L Jour 1380, *Baij Nath Sah* v. *Emperor.*
2. (1904) 1 Cri L Jour 760 (761) (Bom), *Emperor* v. *Iboo.*
3. (1928) 1928 Mad 1234 (1235) : 29 Cri L Jour 1082, *Muthukaruppa Servai* v. *Em-*

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But where the pleaders do not attend on the day fixed for hearing arguments, the Court can pronounce judgment without hearing them[4] and a Magistrate may cut short an argument which has proceeded for an inordinate length of time.[5] Where a Court witness was examined after the close of both parties' case and arguments, and the Magistrate was not requested to hear further arguments, it was held that no objection could be entertained in revision.[6]

Where a counsel is entitled to be heard, he is entitled generally to be heard by an *oral* address and not by a *written* speech.[7] The practice of allowing counsel to file memoranda of arguments has been held to be improper, especially so when they are taken behind the back of one of the parties.[8] Not hearing counsel, but requiring him to file a written argument, is, however, not an illegality but an irregularity which may be waived.[9] Where a counsel on behalf of his client is entitled to be last heard in the matter, he cannot be deprived of the right[10] but the violation of the right is only an irregularity which may be cured by Section 537.[11] Writing of judgment during the arguments is irregular, but curable under Section 537.[12]

8. Citing accused's counsel as witness.

It is very reprehensible for the prosecution to call as a witness, in the course of the proceeding, a counsel who is actually defending an accused person. It not only affects the proper conduct of the defence but gives a handle to the prosecution to prevent a counsel who is acquainted with the facts of the case from conducting the defence. If the prosecution wants to call the defence counsel as a witness. sufficient notice ought to be given to the accused to enable him to engage a competent counsel.[1] Where the accused's counsel is cited as a witness the rule as to exclusion of witnesses from the Court will not apply to him for it would conflict with the provisions of Section 340.[2]

It is desirable that counsel do not appear in cases where it is probable their evidence would be material.[3] No self-respecting counsel would like to conduct a case for the defence after having been called as a witness for the prosecution.[4] The real objection is not to his giving evidence (because he is a competent witness) but to his continuing as a counsel in the case in which he knows he is likely to be

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peror.

4. (1923) 1923 Nag 208 (208): 23 Cri L Jour 752, *Nyajukhan* v. *Emperor.*
5. (1908) 7 Cri L Jour 146 (153): 35 Cal 243, *Chintoman Singh* v. *Emperor.*
6. (1924) 1924 Cal 980 (980): 25 Cri L Jour 1107, *Abdul Jabbar Munshi* v. *Mafizuddi Sarkar.*
7. (1928) 1928 Bom 557 (558): 53 Bom 119 : 30 Cri L Jour 185, *Vinayak Lakshman Bhatkhande* v. *Emperor.*
8. (1928) 1928 Mad 1130 (1131): 29 Cri L Jour 929 (929), *Venkayya* v. *Emperor.*
   (1928) 1928 Bom 557 (559): 53 Bom 119 : 30 Cri L Jour 185, *Vinayak Lakshman* v. *Emperor.*
9. (1926) 1926 Sind 194 (198) : 21 Sind L R 293 : 27 Cri L Jour 711, *M. H. Crowder* v. *L. A. Morrison.* If notes of arguments are accepted, they should form part of the record.
10. (1928) 1928 Bom 557 (559): 53 Bom 119 : 30 Cri L Jour 185. *Vinayak Laxman Bhatkhande* v. *Emperor.*
   (1906) 11 Cal W N 43 Notes (43), *Promoda* v. *Emperor.*
11. (1928) 1928 Bom 557 (559) : 53 Bom 119 : 30 Cri L Jour 185, *Vinayak Laxman Bhatkhande* v, *Emperor.*
12. (1893) 21 Cal 121 (128), *Damu Senapati* v. *Sridhar Rajwar.*

Note 8.

1. (1925) 1925 Mad 1153 (1154) : 27 Cri L Jour 33, *Mannarjan* v. *Emperor.*
2. (1921) 1921 Mad 424 (424) : 44 Mad 916 : 28 Cri L Jour 588, *In re Vemureddi Babureddi.*
3. (1916) 1916 Mad 5 (7), *Lodd Govindass Krishna Dass* v. *Rukmani Bai.*
   (1925) 1925 Sind 99 (101) : 18 Sind L R 30 : 25 Cri L Jour 571, *R. Ghadially* v. *Emperor.*
   (1927) 1927 Pat 61 (79) : 5 Pat 777, *Chandreshwar Prasad* v. *Bisheshwar Pratab.*
4. (1925) 1925 Mad 1153 (1155) : 27 Cri L Jour 33, *Mannarjan* v. *Emperor.*

examined as a witness.[5]

A pleader who is himself interested in a case ought not to appear for the accused, as he is prone to allow himself to be swayed by his own feeling.[6]

9. Court and pleader.

A Magistrate should not conduct himself unpleasantly towards persons brought before him for trial or their legal advisers;[1] and it is highly improper for the Court or for persons in charge of the prosecution to intimidate either the accused or the pleaders appearing for them.[2]

A Magistrate has no right to ask a pleader to sit down in the middle of his cross-examination because he was asking irrelevant questions. He could only rule out the questions as irrelevant. He cannot refuse to allow the pleader to cross-examine witnesses or permit him to do so only on condition of his apologising for his previous contumacious behaviour.[3] It is improper to suspend a pleader before the close of a case, as grave injustice might be done to the clients by depriving them of his services.[3a]

Advocates have ample discretion in the conduct of the case of which they are in charge and Courts cannot fetter their discretion by insisting that their case should be put to this witness or that.[4] As a rule, the Court should leave witnesses to the pleaders to be dealt with.[5]

A pleader has a general authority to act in the interests of his client in the manner he thinks best; he cannot be charged with misconduct if he writes out petitions without asking the client and asks or advises him to present the same.[6]

As to the authority of a pleader or counsel to make admissions on behalf of his client in criminal cases, *see* the undermentioned decisions.[6a]

While Judges should be careful not to offer discourtesy or insult to the professional gentlemen who appear before them, counsel should also recognise their responsibility and their duties towards the Court and to the public and should endeavour by their conduct to prevent any unpleasantness, and to avoid provoking the Court to offer discourtesy.[7]

Some latitude should be allowed to a member of the bar insisting, in the conduct of his case, upon his question being taken down or his objections being noted, where the Court thinks the question inadmissible or the objections untenable. There ought to be a spirit of give and take between the Bench and the Bar in such matters.[7a]

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5. (1914) 1914 Cal 396 (427) : 40 Cal 898 (SB), *D. Weston* v. *Peary Mohun Das.*
6. (1933) 1933 Rang 34 (34) : 34 Cri L Jour 466 : 1933 Cri Cas 287, *In re U. A. Higher Grade pleader of Taoungoo.*

Note 9.

1. (1871) 8 Bom H C R Cri 126 (157), *Reg* v. *Kashinath.*
2. (1901) 3 Bom L R 562 (563), *Emperor* v. *Bajya Anandrao.*
   (1919) 1919 Pat 515 (517) : 20 Cri L Jour 566, *Mahomed Mian* v. *Emperor.*
3. (1896) Ratanlal 861 (863), *In re James Fitzgerald.*
3a (1884) 10 Cal 256 (260, 264), *In re Kristo Lall Nag.*
4. (1919) 1919 Pat 515 (516) : 20 Cri L Jour 566, *Mahomed Mian* v. *Emperor.*
5. (1924) 1924 Oudh 371 (372) : 27 Oudh Cas 246 : 25 Cri L Jour 1226, *Janki* v. *Thakur Sheo Narain Singh.*
6. (1913) 14 Cri L Jour 438 (439) : 20 Ind Cas 598 (Oudh), *Satgur Prasad* v. *Emperor.*
6a (1928) 1928 Bom 241 (242) : 52 Bom 686 : 29 Cri L Jour 990, *Bansilal Gangaram Vani* v. *Emperor.* Pleader's admission is binding on the party.
   (1920) 1920 All 99 (101) : 21 Cri L Jour 777, *Sheo Narain Singh* v. *Emperor.* It is better in a capital case not to take admissions from defence counsel. The more prudent course is to have every fact strictly proved on the record.
7. (1917) 1917 Pat 437 (440) : 18 Cri L Jour 670 (671), *Nibaran Chandra Chatterji* v. *Emperor.*
7a (1904) 1 Cri L Jour 612 (613) (Bom), *In re Dattatraya Venkatesh Belvi.*

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It is improper to one and the same counsel to appear for two accused having conflicting defences.[8]

It is not the duty of an advocate to approach the trial Judge and apprise him that in his opinion the man whose fate has been entrusted to his care has no defence to make. His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence of which he is charged.[9]

10. "Pleader."

The word "pleader" means and includes a pleader, muktear, advocate, vakil and attorney of a High Court authorised by law to practise in any Court [*see* Section 4, Clause (*r*).] Rule 10 of the appellate side rules of the Bombay High Court debars advocates who are not advocates on the original side from appearing, pleading or acting for any suit or in the High Court in any matter of ordinary original jurisdiction, civil or criminal. Hence advocates on the appellate side do not come within the definition of pleader *quoad* the High Court Sessions.[1]

The question whether a vakil can act for a party in a criminal appeal from the original side of the High Court or whether the appearance can be only by an attorney depends upon the rules of that Court and is not concluded by anything in this Code.[2] A Munsif's Court pleader comes within the category of "authorised pleader."[3] But a person who is licensed to appear only in certain districts cannot be said to be authorised to practise in a Court beyond those limits. But it is in the discretion of the Magistrate to permit him to appear for an accused person. The discretion should, however, be exercised judicially and sparingly.[4]

A Magistrate has no power to forbid a duly qualified pleader to appear.[5] No *vakalat* is necessary when an authorised pleader appears in defence of an accused person either at the original trial or in an appeal. A memorandum of appearance is sufficient.[6] Even this has been held to be unnecessary when the party also is present.[7]

District Judges have no power to forbid legal practitioners from practising pending renewal of their certificates. Any such orders must proceed from the High Court.[8]

11. Muktears and other persons.

Under the Code of 1861, an accused was entitled to be defended by a muktear[1] or authorised agent.[2]

The law now relative to this right is contained in Section 340 read with Section 4 (*r*) of the Code. Every person accused before a criminal Court may of right be defended by a pleader, and "pleader" (before the recent amendment)

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8. (1890) 1890 Pun Re Cri No. 13, p. (25), *Hira* v. *Lal Singh.*
9. (1924) 1924 Cal 257 (268, 269) : 25 Cri L Jour 817 (FB), *Emperor* v. *Barendra Kumar Ghose.*

Note 10.

1. (1934) 1934 Bom 70 (71) : 1934 Cri Cas 302 : 58 Bom 456 (FB). *Philip N. Godinho, In re.*
2. (1928) 1928 Cal 675 (678) : 55 Cal 858 : 29 Cri L Jour 1022, *Satya Narain Mohata* v. *Emperor.*
3. (1879) 2 Weir 402.
4. (1918) 1918 Upp Bur 56 (56) : 2 Upp Bur R 121 : 18 Cri L Jour 365, *W. Calogreedy, In re.*
5. (1869) Ratanlal 25 (25), *Reg.* v. *Dajee Mansukhram.*
6. (1874) 2 Weir 402 (402).
   (1926) 1926 Pat 296 (298) : 27 Cri L Jour 666, *Subda Santal* v. *Emperor.*
   (1924) 1924 Mad 192 (192) : 25 Cri L Jour 73, *Manikonda Lingayya* v. *Emperor.*
7. (1909) 9 Cri L Jour 305 (306) : 1 Ind Cas 546 (Mad), *In re Manirama Reddi.*
8. (1931) 1931 Mad 688 (688) : 54 Mad 574 : 1931 Cri Cas 960, *In re Gopala Menon.*

Note 11.

1. (1881) 6 Bom 14 (15), *Imperatrix* v. *Shivram Gundo.*
2. (1862) Ratanlal 1 (2), *Reg* v. *Ramachandra.*

included muktears and other persons, only if they had the Court's permission to appear.[3] The recent amendment of 1923 has done away with the necessity for permission so far as muktears are concerned. As regards other persons, the provision regarding permission still holds good. An estate manager may be a pleader provided he has the permission of the Court to plead.[4] A Prosecuting Inspector may, with the Court's permission, defend an accused person.[5] In the undermentioned case, third class advocates in Burma would appear to have required permission to plead and act in a Sessions Court.[6] In a Madras case it was held that any person authorised by the accused may present an appeal on his behalf.[6a]

Though prior to the amendment muktears required the Court's permission to constitute them pleaders in a particular case, it was held that it would rarely be a wise discretion on the part of the Court to refuse permission to a muktear to appear for the defence as it would be depriving parties of legal aid which they can frequently obtain at a moderate cost.[7]

The practice of permitting private vakils to defend parties is not illegal as it is left to the discretion of the Magistrate to hear such agents or not.[8]

The discretion must be exercised in respect of each case individually and a general order prohibiting a person from appearing in any case in any Court or Courts is illegal.[9] If a person is aggrieved by the refusal of a Magistrate to allow him to appear in a particular case he may move the High Court in revision.[10] But when the case is ended, it would be useless to proceed with a revision petition in respect of the order refusing permission ; the accused may, however, take it as a ground of appeal that he has been deprived of legal assistance.[11]

12. Sub-section 2.

It was assumed in the undermentioned case[1] that the class of persons specified in this sub-section were *accused* persons and it was held that the Legislature removed, in the case of this particular class of persons, a disability which ordinarily attached to accused persons. According to another view the new sub-section does not remove the restraint from any class of accused persons, but only makes it clear that the persons mentioned therein are not *really accused persons* to whom the restriction against being put on oath would apply.[2]

Even prior to this amendment it was held that the following persons were competent witnesses and that the restriction in Clause 4 of Section 342 did not apply to them :

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3. (1911) 12 Cri L Jour 111 (111) : 38 Cal 488, *Ishan Chandra Bhat* v. *Emperor.*
(1886) Ratanlal 314 (314), *In re Venkatesh.*
(1908) 7 Cri L Jour 21 (22) : 30 All 66, *In re Anant Ram.*
(1911) 12 Cri L Jour 118 (118) : 4 Sind L R 195, *Topanmall Sethmall* v. *Emperor.*
4. (1926) 1926 Bom 218 (222) : 50 Bom 250 : 27 Cri L Jour 440, *Dorabshah Bomanji Dubash* v. *Emperor.*
5. (1930) 1930 Nag 150 (151) : 26 Nag L R 172 : 1930 Cri Cas 506 : 31 Cri L Jour 419, *Emperor* v. *Chotekhan.*
6. (1872-1892) 1872-1892 Low Bur Rul 260, *In re W. Calogreedy.*
6a (1876-78) 1 Mad 304 (304), *In re Subba Aitala.*
7. (1911) 12 Cri L Jour 111 (112) : 38 Cal 488, *Ishan Chandra Bhat* v. *Emperor.*
8. (1874) 7 Mad H C R App 37 (37).
9. (1923) 1923 Mad 183 (184), *R. Nagaswami Iyer, In re.*
(1902) 12 Mad L Jour 354 (354), *In re Krishnamachariar.*
(1875) 2 Weir 400 (401).
(1911) 12 Cri L Jour 111 (111) : 38 Cal 488, *Ishan Chandra Bhat* v. *Emperor.*
Muktears.
(1870) 14 Suth W R Cri Cir 5 (5).
(1864) 1 Suth W R Cri 34 (34), *Empress* v. *Sham Chand Chowdry.*
10. (1923) 1923 Mad 183 (183), *In re Nagaswami Iyer.*
11. (1923) 1923 Mad 484 (485), *In re Atakuri Saravayya.*

Note 12.

1. (1925) 1925 Cal 822 (828) : 52 Cal 721 : 26 Cri L Jour 1194, *Narendra Chandra Rudra Pal* v *Sabarali Bhaiya.*
2. (1927) 1927 Cal 509 (511) : 54 Cal 532 : 28 Cri L Jour 407, *Krishen Doyal Jalan*

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1. Persons against whom an order of maintenance is sought under Section 488.[3]
2. Parties proceeded against under Section 145[4] and a party to proceedings under Section 133.[5]
3. As regards persons proceeded against under Section 488, in a case decided after the amendment, it was held that by the omission of the word "accused" in sub-section 9 of Section 488, the Legislature intended that such persons should no longer be looked upon as accused persons.[6]

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341.* If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Procedure where accused does not understand proceedings.

Synopsis.

Other Topics.

1. Scope.

The provisions of this Section do not apply to a person who is of *unsound mind*. They apply to persons who are unable to understand the proceedings from deafness or dumbness or ignorance of the language of the country or other similar cause. Where the inability to understand the proceedings is due to unsoundness

* (1882—S. 341; 1872—S. 186, Para 3 and 1861—Nil.)

v. *Corporation of Calcutta*.

3. (1895) 18 All 107 (108), *Hira Lal* v. *Sahebjan*.
   (1889) 16 Cal 781 (787), *Nur Mahomed* v. *Bismullajan*.
4. (1925) 1925 Oudh 286 (286): 26 Cri L Jour 70, *Mohammad Ayub* v. *Sarfaraz Ahmad*.
5. (1905) 2 Cri L Jour 575 (577) (Cal), *Hiranand Ojha* v. *Emperor*.
6. (1925) 1925 Cal 339 (339): 25 Cri L Jour 1091, *Bachai Kalwar* v. *Jamuna Kalwarin*.

of mind the procedure to be followed is that provided for in Chapter 34.[1] Where a Magistrate found an accused to be of poor wits and wanting in apprehension of the serious consequences of his acts and incapable of understanding anything, the High Court directed that the Magistrate should hold an enquiry into the question whether the accused was a lunatic at the time of the trial or at the time he committed the act, that if he found that he was not a lunatic at either of those times he should proceed under Section 341 and that if he convicted the accused he should report the case to the High Court.[2] The fact that the accused is deaf and dumb does not *per se* justify a reference under Section 341. He must also be *unable to understand* the proceedings.[3]

2. Duties and powers of Court other than the High Court.

If the Magistrate is of opinion that the accused cannot be made to understand the proceedings, he should nevertheless proceed with the enquiry for trial till the end and if it results in a conviction or committal, the proceedings should be forwarded to the High Court with a report as to the circumstances of the case.[1]

He should not proceed to pass sentence on the accused, but having convicted him, should stay proceedings and report the matter to the High Court for orders.[2] Neither is he empowered to pass an order under Section 562 of the Code.[3]

The view being that it is impossible for a deaf mute to have lived to maturity without being able to communicate with his relatives, High Courts have insisted on Magistrates attempting to find out whether the accused (if he is deaf and dumb) has any friends or relatives who are accustomed to communicate with him, his antecedents and ordinary mode of life and the manner in which he was communicated with in the ordinary affairs of life. The Magistrate should attempt to get into communication with the accused with the assistance of his relatives.[4] The omission to attempt to communicate with the accused is clearly wrong; where there was such a failure and the High Court was not able to say that the accused were not prejudiced, the conviction was set aside.[5] If no failure of justice is, however, occasioned, the High Court may decline to interfere with the conviction.[6]

Summary procedure is not suitable to the case of accused who cannot be

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Section 341—Note 1.

1. (1881) 5 Bom 262 (263), *Empress* v. *Husen.*
   (1895) Ratanlal 832 (833), *Queen-Empress* v. *Khasima.*
2. (1912) 13 Cri L Jour 24 (24): 13 Ind Cas 216 (Mad), *In re, Adala Yerrivadu.*
3. (1927) 1927 Lah 799 (799): 28 Cri L Jour 656, *Emperor* v. *Gunga.*
   (1929) 1929 Lah 840 (840): 1929 Cri Cas 568: 10 Lah 566: 29 Cri L Jour 1104, *Alla Dia* v. *Emperor.*
   (1893) 6 C P L R Cr 38 (38), *Empress* v. *Mulchand Pemraj.*
   (1901) 3 Bom L R 371 (371), *Emperor* v. *Dada Mahadu.*
   (1882) Ratanlal 180 (181), *Queen-Empress* v. *Trikam.*
   (1873) 19 Suth W R Cr 37 (37), *Doobri Hulwai* v. *A Dumb person.*
   (1926) 27 Cri L Jour 1097 (1097): 97 Ind Cas 361 (All), *Emperor* v. *Barhma Singh.*
   (1904) 1 All L Jour 273*n* (273*n*), *Jai Narain* v. *Emperor.* S. 341 does not apply where the accused does, and can be made to, understand the proceedings by signs.

Note 2.

1. (1897) Ratanlal 879 (879), *In re A Dumb Man.*
   (1875) 2 Weir 403 (404).
   (1902) 4 Bom L R 825 (825), *In re A Deaf and Dumb Man.*
2. (1889) 1889 Pun Re Cr No. 37, page (140), *Empress* v. *Gahna.*
   (1911) 12 Cri L Jour 386 (387): 1 Upp Bur Rul 57, *Emperor* v. *Nga San Myin.*
3. (1912) 13 Cri L Jour 248 (248): 14 Ind Cas 600 (Mad), *Addala Yerrivadu* v. *The District Magistrate of Vizagapatam.*
4. (1906) 4 Cri L Jour 444 (445) (Bom), *In re A Deaf and Dumb Man.*
   (1911) 12 Cri L Jour 386 (387): 1 Upp Bur Rul 57, *Emperor* v. *Nga San Myin.*
5. (1870-71) 6 Mad H C R App 7 (7).
6. (1870) 2 Weir 402 (403).

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made to understand the proceedings.[7]

3. Proceedings shall be forwarded to the High Court.

There should be a conviction or committal before a reference is made to the High Court.[1] If a reference is made before a conviction or committal, the record will be returned to the trying Magistrate to be reported by him only if he convicts or commits the accused.[2]

In submitting a case to the High Court under this Section, the Magistrate must state his view of the conduct of the accused in the commission of the offence, his previous history and habits. There must also be a finding whether the accused was capable of understanding and did, in fact, understand the nature of the proceedings and the purport of the evidence given by the witnesses;[3] the report should also state the reason for the Magistrate's holding that the accused did not understand the proceedings, what means were used to make him understand them, and the reason why such means were unsuccessful.[4]

4. High Court—"Shall pass such orders as it thinks fit."

The High Court has, in a case reported under this Section, full discretion to do whatever the circumstances of the case require. Although the prisoner had not been able to understand the proceedings and therefore those proceedings had not, according to the principles of English common law, constituted a fair and proper trial,[1a] yet, under special circumstances, if the High Court should think fit it might treat them as amounting to a sufficient trial and pass sentence according to the facts which seem to be established in the course of and as a result of those proceedings.[1]

The unrestricted powers vested in the High Court in dealing with cases under this Section warrant its ordering that the accused be confined in a suitable place of safe custody under the orders of the Local Government.[2] In serious cases, it is usually the practice to refer the matter to the Local Government.[2a] In the case of minor offences the accused is sometimes discharged.[3] Thus, an accused, who was deaf and dumb from birth and of limited understanding, committed housebreaking. The High Court finding that sheer hunger had driven him to commit the

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7. (1906) 4 Cri L Jour 444 (445) (Bom), *In re A Deaf and Dumb Man.*

Note 3.

1. (1897) Ratanlal 879 (879), *In re A Dumb Man.*
   (1882) Ratanlal 180 (180), *Queen-Empress* v. *Trikam.*
   (1900) 27 Cal 368 (369), *Empress* v. *Somir Bowra* alias *Somir Baba.*
   (1896) Ratanlal 836 (836), *In re A Dumb Man.*
2. (1881) 1881 All W N 15 (15), *Empress* v. *Mathuria.*
3. (1891) Ratanlal 696 (697), *Queen-Empress* v. *Reubin Samuel.*
   (1897) Ratanlal 879 (879), *In re A Dumb Man.*
4. (1897) Ratanlal 836 (836), *In re A Dumb Man.*
   (1896) 9 C P L R Cr 38 (39), *Empress* v. *Konda.*

Note 4.

1a (1935) 1935 Mad W N 1287 (1288), *Public Prosecutor, Madras, In re.* No real trial can be held where the accused cannot understand the proceedings.

1. (1874) 22 Suth W R Cr 35 (36), *Dwarka Nath Haldar* v. *Noder Chand Kamte.*
   (1900) 27 Cal 368 (369), *Empress* v. *Somir Bowra* alias *Somir Baba.*
   (1911) 12 Cri L Jour 386 (388) : 1 Upp Bur Rul 57, *Emperor* v. *Nga San Myin.*
2. (1889) 1889 Pun Re Cr No. 37, page (140), *Empress* v. *Gahna.*
   (1911) 12 Cri L Jour 613 (614) : 1911 Pun Re Cr No. 13, *Emperor* v. *Dost Muhammad.*
   (1881) 5 Bom 262 (263), *Empress* v. *Husen.* [See also (1935) 1935 Mad W N 1287 (1288), *In re Public Prosecutor, Madras.* Accused unable to understand proceedings—His detention in custody during pleasure of Local Government was ordered instead of his trial being ordered to proceed.]

2a [See (1935) 1935 Oudh 414 (415) : 1935 Cri Cas 984 : 36 Cri L Jour 880, *Emperor* v. *Ram Manohar.*]

3. (1920) 1920 Lah 333 (334) : 1 Lah 260 : 21

offence and that he had never been in arrest before, recommended that he should be made over to the father.[4] In another case, when the accused was convicted on his own confession, indicated by signs, of an attempt to commit suicide, the High Court, in passing sentence of one day's imprisonment, held that the unhappy condition of the unfortunate man must weigh very largely in his favour in considering what course ought to be taken.[5]

The High Court may also cause notice of the reference to be served on the accused so as to afford him another opportunity of being heard in the matter of the charge.[6]

When a case of a person unable to understand the proceedings is committed to the Sessions and the proceedings are submitted to the High Court, the law does not contemplate that the Sessions trial shall necessarily take place. It leaves it to the High Court to determine this after considering whether any benefit will be likely to result, especially to the accused by such trial.[7]

5. Criminal responsibility of deaf mutes.

Though great caution and diligence are necessary in the trial of a deaf mute, yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act, he is liable to be punished.[1]

In modern practice, want of speech and hearing does not necessarily imply mental deficiency. If the accused's mind is sound, his inability to hear and speak does not excuse him from criminal liability.[2]

In the undermentioned case, the accused, who was charged with murder, was not punished as an ordinary offender, but kept in detention pending orders from the Local Government, because, in addition to being unable to understand the proceedings, he was found to have been incapable, *by reason of unsoundness of mind*, from knowing that he was doing wrong;[3] and in other cases, when the accused's infirmity led to his acquittal of the offence of theft, because it was the impossibility of his being made to understand the proceedings that prevented the High Court from determining whether he knew the nature of the act committed or whether he acted with dishonest intention;[4] the High Court declined to draw any presumption against an accused for the recent possession by him of stolen property, because his infirmity prevented him from offering any explanation he might have for such possession.[5]

In dealing with a deaf and dumb person it is essential for a Magistrate, before convicting him and submitting his case to the High Court, to record a finding to the effect that he had sufficient intelligence to understand the criminal character of his act.[6]

Cri L Jour 621, *Emperor* v. *Rahman*. *Deaf and Dumb—Accused.*

(1885) 1885 Pun Re Cr No. 34, page (78), *Atu Ram* v. *Empress*.

4. (1875) 7 N W P H C R 131 (132), *Queen* v. *Ganga*.

5. (1923) 1923 Bom 194 (194): 25 Cri L Jour 660, *Emperor* v. *Khashaba Tatyai Lawand*.

6. (1874) 22 Suth W R Cr 35 (36), *Queen* v. *Bowka Hari*.

7. (1900) 27 Cal 368 (370), *Empress* v. *Somir Bowra* alias *Somir Baba*. Sessions trial dispensed with, accused being insane at the time of offence.

Note 5.

1. (1917) 1917 Bom 288 (288): 18 Cri L Jour 143 (143): 40 Bom 598, *Emperor* v.

2. (1911) 12 Cri R Jour 386 (388): 1 Upp Bur Rul 57, *Emperor* v. *Nga San Myin*.
(1874) 22 Suth W R Cr 72 (72), *Queen* v. *Boroka*.
(1881) 1881 All W N 54 (54), *Empress* v. *Mathuria*.

3. (1900) 27 Cal 368 (370), *Empress* v. *Somir Bowra* alias *Somir Baba*.

4. (1874) 22 Suth W R Cr 35 (35), *Queen* v. *Bowka Hari*.
(1902) 4 Bom L R 296 (296), *King-Emperor* v. *Monya*.

5. (1915) 1915 Mad 50 (50): 15 Cri L Jour 578 (579), *In re, Oomayan*.

6. (1930) 1930 Lah 64 (64): 30 Cri L Jour 948: 1930 Cri Cas 32, *Emperor* v. *Gunga*.

Sec. 342

342.* (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

Power to examine the accused.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or

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* **(Code of 1882—S. 342—Same.)**

(Code of 1872—Ss. 193, 250, 342, 343 and 345.)

193. The Magistrate may from time to time, at any stage of the inquiry and without previously warning the accused person, examine him, and put such questions to him as he considers necessary.

Examination of accused.

The accused person shall not render himself liable to punishment for refusal to answer such questions, or for giving false answers to them but the Magistrate shall draw such inference as may to him seem just from such refusal.

Explanation:—The answer given by an accused person may be put in evidence against him, not only in the case under inquiry, but also in trials for any other offences which his replies may tend to show he has committed.

250. The Court may from time to time, at any stage of the trial, examine the accused person, and shall question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

Examination of accused.

Of the examination of accused persons.

342. In all inquiries and trials, a Criminal Court may from time to time and at any stage of the proceedings, put any questions to the accused person which such Court may think proper.

Accused may be questioned.

343. The accused person shall not be liable to any punishment for refusing to answer, or for answering falsely, questions asked under Section 342, but the Court shall draw such inference as seems just from such refusal.

Accused not punishable for refusal to answer.

345. No oath or affirmation shall be administered to the accused person.

Accused not to be sworn.

(Code of 1861—Ss. 202, 204 and 373.)

202. It shall be in the discretion of the Magistrate, from time to time, at any stage of the enquiry, to examine the accused person, and to put such questions to him as he may consider necessary. It shall be in the option of the accused person to answer such questions.

Examination of defendant.

204. No oath or affirmation shall be administered to the accused person.

Accused person not to be sworn.

373. The Court, at the close of the evidence on behalf of the accused person if any evidence is adduced on his behalf, or otherwise at the close of the case for the prosecution, may put any question to the accused person which it may think proper. It shall be in the option of the accused person to answer such question.

When accused person may be examined.

against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed. Sec. 342

(4) No oath shall be administered to the accused.

Synopsis.

Other Topics.

Accused—Not in a different trial. See Note 31, Pts. 3 to 7.
Accused not on trial. See Note 31, Pts. 8 to 12.
Accused without pardon—Incompetent witness. See Note 31, F-N (1).
Additional evidence. See Note 9, Pts. 15 and 18.
Affidavit of accused. See Note 31, F-N (1) and (6).
After amendment of charges. See Note 9, Pts. 17 and 18.
After confession, not accused. See Note 31, Pt. 15a.
After conviction, not accused. See Note 31, Pts. 14 and 15.
After Court-witness. See Note 9, Pts. 16 and 18.
After re-call of prosecution witnesses. See Note 9, Pts. 8 to 14 and 18.
After withdrawal, not accused. See Note 31, Pt. 16.
Alternative or inconsistent defences. See Note 29, Pts. 3 and 4.
Appeal—Continuation of case. See Note 31, Pt. 17.
Bombay Gambling Act, 1887. See Note 31, Pts. 19 and 20.
Careful questioning. See Note 15, Pt. 5a.
Circumstantial evidence and explanation. See Note 23, Pt. 2.
Concerted statements of co-accused. See Note 28, F-N (1).
Contradictory statements of accused. See Note 23, F-N (10).
Counsel's advice not to answer. See Note 21, F-N (1).
Cross-examination of accused. See Note 14, Pt. 6 ; Note 35, Pt. 10.
Defence how far to explain. See Note 29, Pts. 5a and 6 ; Note 23, Pt. 6.
Defence not to aid prosecution. See Note 29, Pt. 5.
Effect of oath to accused. See Note 31, F-N (1) and (2).
Effect of Section 289. See Note 20, Pt. 4.

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Effect of Section 209. See Note 19, Pts. (1) and (2).
Examination after defence let in. See Note 9, Pt. 13a ; Note 35, F-N (1).
Examination after further cross-examination. See Note 9, Pts. 8 to 18 ; Note 10 and Note 35, F-N (1).
Examination before process — Illegal. See Note 31, Pt. 18.
Examination by police patel. See Note 21, F-N (6).
Examination before trial begins. See Note 35, Pt. 14.
Examination in cross-case. See Note 32 ; Note 15, F-N (2).
Examination in warrant cases. See Note 3, F-N (3).
Examination of accused as if approver. See Note 14, F-N (6).
Examination of accused not to aid prosecution. See Note 14, Pts. 7 and 8.
Examination under first part and under second part — Discretionary and mandatory. See Note 2, Pts. 6 and 7 ; Note 9, Pts. 1 to 3 and Note 35.
Evidence of co-accused in joint trials. See Note 31, F-N (1) and (3).
False answers — No offence. See Note 22 ; Note 31, F-N (1), (3), (6).
Illegal discharge—Still accused. See Note 31, Pt. 13a and F-N (13).
Illegal pardon—Still accused. See Note 31, Pt. 13.
Inapplicability to summons cases. See Note 3 ; Note 3, F-N (3) ; Note 14, F-N (3) and Note 35, F-N (1).
Joint statements of accused. See Note 35, F-N (1).
Long composite questions. See Note 15, Pt. 8.
Maintenance case is summons case. See Note 7, F-N (1).
"No addition to statement before Magistrate." See Note 15, Pts. 2 and 3.
No compulsion for confession. See Note 14, F-N (6) and (7).
No examination before committal. See Note 19 ; Note 1, F-N (1).
No examination if no evidence against accused. See Note 14, Pts. 3 and 4 ; Note 3, F-N (4) and Note 35, F-N (10).
No inquisitorial proceedings against accused. See Note 14, Pt. 6 ; Note 21, Pt. 3 and Note 32, F-N (1).
No lengthy examination if counsel appears. See Note 15, F-N (4).
Non-compliance—Effect. See Note 35 ; Note 15, F-N (2).
Not in answer to questions — Not protected. See Note 31, F-N (6).
Oath before Coroner. See Note 31, F-N (2).
Object of examination. See Note 2, Pt. 4 ; Note 14, Pts. 1, 2, 11.
Order under Section 488— No conviction. See Note 7, F-N (1).
Pardon by Government subsequent to trial — Still accused. See Note 31, Pt. 13b.
Personal examination of accused. See Note 17.
Petty cases and technical offences. See Note 35, Pts. 8 and 9.
Prior convictions—Questions. See Note 14, Pt. 9.
Proceedings under L. P. Act—Quasi-criminal. See Note 32-A, F-N (2).
Prosecution instructing for examination of accused—Improper. See Note 12, Pt. 2.
Questions and not statements of accused. See Note 2, Pt. 8 ; Note 18 ; Note 21, Pt. 7 and Note 35, F-N (1).
Record of evidence in maintenance cases. See Note 3, F-N (3).
Record of refusal to answer. See Note 21, Pt. 4.
Refusal to answer—No offence. See Note 21, Pt. 6.
Refusal to give handwriting — Adverse inference drawn. See Note 30, Pt. 3.
Revision. See Note 35, Pt. 13.
Section 164 statement. See Note 16.
Statement not to be used against others. See Note 23, Pt. 12 ; Note 27.
Statement of accused to be taken as a whole. See Note 23, Pt. 9.
Time of questioning accused. See Note 31 ; Note 9 ; Note 9, F-N (2), (4) and (16) ; Note 14, F-N (3) ; Note 35, F-N (1).

1. Legislative changes.

Under the Code of 1861, it was not *incumbent* on the Magistrate to examine the accused whether before or after the close of the prosecution case.[1] It was in the discretion of the Court to do so or not.[2] In the Code of 1872 the discretionary

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Section 342—Note 1.

1. (1865) 2 Suth W R Cri 50 (50), *Queen* v. *Hurnath*. Examination before committal not necessary.
(1865) 2 Suth W R Cri L 11 (12) (Do.)
2. (1925) 1925 Cal 361 (363) : 52 Cal 522 : 26 Cri L Jour 631, *Debendra Narain Singh* v. *Narendra Narain Singh*.
(1863) 1 Mad H C R 199 (200), *Ex parte Virabhadra Gaud*.
(1868) 10 Suth W R Cri 25 (25), *Queen* v. *Shama Sunker*.
(1871) 16 Suth W R Cri 21 (22), *In re Dinoo Roy*.
(1873) 19 Suth W R Cri 49 (50), *Nilmonee Singh Deo Bahadoor* v. *Boma Churn Roy*.
(1864) 3 Mad H C R App 2 (3).
[See also (1866) 1866 Pun Re Cr No. 57, page 64 (65), *Azeem* v. *Crown*.]
[But see (1868) 9 Suth W R Cri 62

nature of the examination was retained so far as enquiries and trials other than Sessions trials, were concerned. So far as Sessions trials were concerned, such examination was made compulsory.[3] In the Code of 1882, the purpose of the examination was set forth in the Section.

2. Scope of the Section.

This Section provides for the examination by the Court of accused persons, and except under the circumstances and restrictions set forth in this Section, an accused person is incapable of being examined by the Court.[1]

The Section is based on the principle involved in the maxim *audi alteram partem*, namely that no one should be condemned unheard,[2] and the accused should be heard not merely on what is *prima facie proved* against him but on every circumstance appearing in evidence against him.[3]

The Section does not purport to be only in the interest of the accused ; its object is to enable the accused to explain any circumstances appearing against him in the evidence; the intention of the provision is for the furtherance of justice and to enable the Court to decide the question of the guilt of the accused.[4] The result of the examination may be beneficial to the accused but it may equally be injurious to him.[5]

The Section consists of two parts, the first part giving a *discretion* to the Court[6] and the second part being *mandatory*.[7] At *any* stage of the inquiry or trial, the Court *may* put such questions to the accused as it considers necessary for the purpose specified in the Section. After the prosecution witnesses have been examined and before the accused is called on for his defence, the Court *shall* question generally on the case for the said purpose.

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(63), *Queen* v. *Bissessur Sein.*]

3. (1925) 1925 Cal 361 (364) : 52 Cal 522 : 26 Cri L Jour 631, *Debendra Narain Singh* v. *Narendra Narain Singh.*

Note 2.

1. (1897) 19 All 200 (201), *In the matter of the Petition of Barkat.*
2. (1909) 9 Cri L Jour 56 (58) : 4 Nag L R 163, *Emperor* v. *Kissan Yessu.*
   (1929) 1929 Sind 5 (6): 23 Sind L R 1: 29 Cri L Jour 932, *Allah Dito* v. *Emperor.*
   (1933) 1933 Sind 49 (52) : 1933 Cri Cas 175 : 34 Cri L Jour 591, *Ibrahim* v. *Emperor.*
3. (1909) 9 Cri L Jour 56 (58) : 4 Nag L R 163, *Emperor* v. *Kissan Yessu.*
4. (1934) 1934 All 693 (694) : 1934 Cri Cas 866: 35 Cri L Jour 879, *Ishwar Das* v. *Bhagwan Das*
   (1904) 1 Cri L Jour 854 (858) : 17 C P L R 113, *Emperor* v. *Katay Kisan.*
   (1925) 1925 Cal 361 (365) : 52 Cal 522 : 26 Cri L Jour 631, *Debendra Narain Singh* v. *Narendra Narain Singh.*
5. (1909) 9 Cri L Jour 56 (58) : 4 Nag L R 163, *Emperor* v. *Kissan Yessu.*
6. (1920) 1920 Pat 471 (477) : 5 Pat L Jour 430: 21 Cri L Jour 705, *Raghu Bhumji* v. *Emperor.*
   (1925) 1925 Pat 723 (725) : 26 Cri L Jour 927, *Rameshar Singh* v. *Emperor.*
   (1921) 1921 Sind 131 (132) : 16 Sind L R 201 : 25 Cri L Jour 191, *Dinu* v. *Emperor.*
   [See (1924) 1924 Bom 334 (335) : 25 Cri L Jour 1127, *Emperor* v. *Narayan Sayanna Kamathi.*]
7. (1930) 31 Cri L Jour 613 (614) : 124 Ind Cas 70 (Cal), *Moyzuddin Mean* v. *Emperor.*
   (1923) 1923 Cal 196 (198) : 50 Cal 223 : 24 Cri L Jour 198, *Mazahur Ali* v. *Emperor.*
   (1925) 1925 Cal 361 (363) : 52 Cal 522 : 26 Cri L Jour 631, *Debendra Narain Singh* v. *Narendra Narain Singh.*
   (1926) 1926 Cal 537 (538) : 27 Cri L Jour 406, *Mahomed Rafique* v. *King-Emperor.*
   (1928) 29 Cri L Jour 382 (383) : 108 Ind Cas 381 (Lah), *Baz Khan* v *Empreror.*
   (1918) 1918 Lah 348 (348) : 1918 Pun Re Cr No. 1 : 19 Cri L Jour 280, *Ghulla* v. *Emperor.*
   (1922) 1922 Lah 45 (46) : 23 Cri L Jour 154, *Haji Muhammad Baksh* v. *Emperor.*
   (1926) 1926 Lah 551 (552) : 7 Lah 564 : 27 Cri L Jour 1007, *Lachhman Singh* v. *Emperor.*
   (1931) 1931 Lah 153 (154) : 32 Cri L Jour 708 : 1931 Cri Cas 265, *Bhim Sen Sacnar* v. *Emperor.*
   (1934) 1934 Pat 330 (334) : 35 Cri L Jour 1322 : 1934 Cri Cas 722, *Shyama Charan Barthuar* v. *Emperor.*
   (1927) 1927 Rang 19 (19) : 4 Rang 361 : 27

Sec. 342 Notes 2—3

The power to question the accused in regard to the evidence which has been given must be distinguished from the power to record statements which the accused may offer to make; the Court can only properly question the accused under the conditions named in the Section, but it may record statements offered by the accused and to such statements this Section does not apply.[8]

3. Applicability to summons cases and summary trials.

The High Court of Madras has held that this Section does not apply to summons cases and that consequently it is not *obligatory* on the Court to examine the accused though it may be desirable to do so.[1] The ground on which the decision proceeds is that in summons cases there is no procedure for *calling upon the accused for his defence* as in Sessions cases and warrant cases (Sections 289, 256) but only for *hearing the accused* and that this Section, which requires the Court to examine the accused *before the accused is called on for his defence* has no application to such cases. A Full Bench of the High Court of Rangoon has also come to the same conclusion on the additional ground that the words in Section 245 namely "if he thinks fit" give a *discretion* to the Court to examine the accused or not and that such discretion is incompatible with the imperative provisions of this Section.[2] The general trend of opinion of all the other Courts is, however, that this Section applies equally to summons as well as to warrant cases[3] and that the words "if he thinks fit" in Section 245, have reference to cases in which the Magistrate is prepared to acquit the accused even on a consideration of the

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Cri L Jour 1364, *King-Emperor* v. *Nga Po Byn.*

(1927) 1927 Sind 175 (176) : 21 Sind L R 331 : 28 Cri L Jour 417, *Motankhan* v. *Emperor.*

(1934) 1934 All 735 (738) : 36 Cri L Jour 33: 1934 Cri Cas 936, *Raghubar Dayal* v. *Emperor.*

8. (1884) 1884 All W N 84 (84), *Empress* v. *Chattar Singh.*

Note 3.

1. (1924) 1924 Mad 15 (17) : 46 Mad 758 : 24 Cri L Jour 833 (F B), *Ponnuswami Odayar* v. *Ramaswami Thathan.*

2. (1931) 1931 Rang 244 (246) : 1931 Cri Cas 884 : 9 Rang 506 : 32 Cri L Jour 1190 (F B), *Emperor* v. *Nga La Gyi.*

The following cases are, in view of the above Full Bench Ruling, no longer good law :—

(1904) 1 Cri L Jour 737 (737) : 2 Low Bur Rul 239, *King-Emperor* v. *Kyan Baw.*

(1897-1901) 1 Upp Bur Rul 82 (82).

3. (1923) 1923 Rang 135 (135) : 25 Cri L Jour 684, *Mg. Shwe Kyi* v. *King-Emperor.*

(1926) 1926 All 358 (358) : 27 Cri L Jour 405, *Khacho Mal* v. *Emperor.*

(1926) 1926 Lah 667 (668) : 27 Cri L Jour 1000, *Demello* v. *Mrs. Demello.*

(1926) 1926 Nag 300 (300) : 22 Nag L R 65 : 27 Cri L Jour 632, *Bhagwan* v. *Emperor.*

(1935) 1935 All 217 (218) : 36 Cri L Jour 1290 : 1935 Cri Cas 260, *Sia Ram* v. *Emperor.*

(1922) 1922 Bom 290 (292) : 46 Bom 441 : 23 Cri L Jour 45, *Gulabjab* v. *Emperor.*

(1926) 1926 Bom 57 (61) : 50 Bom 34 : 27 Cri L Jour 165, *B. N. Gamadia* v. *Emperor.*

(1931) 1931 Bom 195 (197) : 32 Cri L Jour 719 : 1931 Cri Cas 339 (F B), *Emperor* v. *Janardhan Kashinath Abhyankar.*

(1914) 1914 Cal 663 (663) : 41 Cal 743 : 15 Cri L Jour 190, *Mahommed Hossein* v. *Emperor.* In all warrant cases accused must be examined.

(1923) 1923 Cal 164 (164) : 49 Cal 1075 : 24 Cri L Jour 3, *Gulzari Lal* v. *Emperor.*

(1927) 1927 Cal 250 (253) : 54 Cal 286 : 28 Cri L Jour 297, *Bechu Lal Kayastha* v. *Injured Lady.*

(1922) 1922 Lah 45 (46) : 23 Cri L Jour 154, *Haji Muhammad Baksh* v. *Emperor.*

(1931) 1931 Lah 153 (154) : 32 Cri L Jour 708 : 1931 Cri Cas 265, *Bhim Sen Sacnar* v. *Emperor.*

(1921) 1921 Pat 11 (12) : 6 Pat L Jour 174 : 22 Cri L Jour 427, *Gulam Rasul* v. *King-Emperor.*

(1926) 1926 Sind 1 (3) : 20 Sind L R 34 : 26 Cri L Jour 1554, *Emperor* v. *Nabu.*

(1926) 1926 Sind 281 (282) : 19 Sind L R 121 : 27 Cri L Jour 1290, *The Crown* v. *Pario.*

[See also (1921) 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor* v. *Rustomji Mancherji.*]

[But see (1927) 1927 Lah 268 (269) : 28 Cri L Jour 480, *Kale Khan* v. *Emperor.* Not applicable to summons cases.

prosecution evidence as it stands without calling on the accused for his defence and without hearing him.[4]

The Section applies also to *summary trials*, whether of summons cases[5] or of warrant cases[6] and the Court is bound to examine the accused under this Section, though by virtue of the provisions in sub-section 4 of Section 364, the Court need not make a record of such examination in the manner provided by Section 364.[6a] The High Court of Madras[7] and the Chief Court of Lower Burmah[8] have taken a contrary view.

4. Applicability to trials before Presidency Magistrates.

Presidency Magistrates are not relieved from the obligation of questioning the accused generally under this Section. The words "if any" in Section 370, Clause (f), cannot be properly held as modifying the provisions of this Section as regards Presidency Magistrates.[1]

5. Applicability to proceeding under Chapter VIII.

A person proceeded against under Chapter VIII of the Code (Security Proceedings) is not a person *accused* of any act or omission punishable by law and this Section has no application to such cases.[1]

6. Applicability to proceeding under S. 363 of the Calcutta Municipal Act.

A person proceeded against under Section 363 of the Calcutta Municipal Act

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(1927) 1927 Lah 435 (435): 28 Cri L Jour 478, *Sikandar Khan* v. *Baland Khan*. In maintenance cases evidence is recorded in the manner prescribed in S. 335, Criminal P. C., for summons cases—S. 342 is not applicable to summons cases.]

4. (1921) 1921 Bom 374 (375): 45 Bom 672: 22 Cri L Jour 17, *G. S. Fernandes* v. *Emperor*.
(1926) 1926 All 358 (358): 27 Cri L Jour 405, *Kachoo Mal* v. *Emperor*.
(1868) 10 Suth W R Cr 25 (25), *Queen* v. *Shama Shunker Biswas and Shama Churn Bose*. When the Magistrate thinks that the evidence for the prosecution does not disclose any proper subject of criminal charge against the prisoner, no examination should be made.
(1927) 1927 Cal 250 (252): 54 Cal 286: 28 Cri L Jour 297, *Babu Lal Kayasthech* v. *Injured Lady*.
(1926) 1926 Nag 300 (300): 22 Nag L R 65: 27 Cri L Jour 632, *Bhagwan* v. *Emperor*.
(1921) 1921 Pat 11 (12): 22 Cri L Jour 427, *Ghulam Rasul* v. *King-Emperor*.
(1926) 1926 Sind 1 (2): 20 Sind L R 34: 26 Cri L Jour 1554, *Emperor* v. *Nabu*. [See (1933) 1933 All 690 (695): 55 All 1040: 34 Cri L Jour 967: 1933 Cri Cas 1202, *S. H. Jabwala* v. *Emperor*.]

5. (1934) 1934 Lah 96 (96): 15 Lah 60: 35 Cri L Jour 1394: 1934 Cri Cas 175, *Karam Din* v. *Emperor*.
(1931) 1931 Lah 153 (154): 32 Cri L Jour 708: 1931 Cri Cas 265, *Bhim Sen Sacnar* v. *Emperor*.
(1922) 1922 Pat 296 (297): 23 Cri L Jour 440, *Parmeshwar Lal Mitter* v. *Emperor*.
(1930) 31 Cri L Jour 613 (614): 124 Ind Cas 70 (Cal), *Moyzuddin Mean* v. *Emperor*.
(1927) 1927 Pat 369 (370): 6 Pat 504: 28 Cri L Jour 1037, *Parsotim Das* v. *King-Emperor*.
(1936) 1936 Oudh 16 (17): 36 Cri L Jour 1303 (1303), *Emperor* v. *Karna Sankar*.
(1935) 1935 All 217 (218): 1935 Cri Cas 260: 36 Cri L Jour 1290 (1291), *Sia Ram* v. *Emperor*.

6. (1914) 1914 Cal 663 (663): 41 Cal 743: 15 Cri L Jour 190, *Mahommed Hossein* v. *Emperor*.
(1935) 1935 Sind 193 (193): 1935 Cri Cas 1047, *Devjimal* v. *Emperor*.

6a (1935) 1935 Sind 193 (193): 1935 Cri Cas 1047, *Devjimal* v. *Emperor*.
[See (1935) 1935 All 217 (218): 1935 Cri Cas 260: 36 Cri L Jour 1290 (1291), *Sia Ram* v. *Emperor*.

7. (1924) 1924 Mad 30 (31): 46 Mad 766: 24 Cri L Jour 847, *Dharam Singh* v. *Emperor*.

8. (1893-1900) 1893-1900 Low Bur Rul 638.

Note 4.

1. (1921) 1921 Bom 374 (375): 45 Bom 672: 22 Cri L Jour 17, *G. S. Fernandes* v. *Emperor*.

Note 5.

1. (1924) 1924 Cal 392 (393): 50 Cal 985: 25 Cri L Jour 1085, *Binode Behari Nath* v. *Emperor*.
(1933) 1933 Sind 49 (53): 34 Cri L Jour 591: 1933 Cri Cas 175, *Ibrahim* v. *Emperor*. (*Per* Mehta, A. J. C.).

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is not an *accused* person and this Section has no application to such cases.[1]

7. Applicability of Section to proceeding under Section 488.

A proceeding against a person under Section 488 is of a civil nature and the person proceeded against is not an *accused* person. This Section, which applies to proceedings against accused persons, cannot therefore apply to proceedings under Section 488.[1]

8. Applicability to proceeding under Section 476 of the Code.

Proceedings in the enquiries under Section 476 of the Code are judicial proceedings and the person against whom they are directed are in the position of accused persons and Section 342 applies to such cases.[1]

9. When questions should be put.

The putting of questions under the first part of the Section is discretionary and may be done *at any stage* of the inquiry or trial.[1] The examination of the accused generally on the case under the second part of the Section which is mandatory, must be *after* the close of the prosecution case and *before* the accused is called on for his defence.[2] The examination under the first part of the Section

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Note 6.

1. (1927) 1927 Cal 509 (511): 54 Cal 532: 28 Cri L Jour 407, *Krishen Doyal Jalan* v. *Corporation of Calcutta.*

Note 7.

1. (1928) 1928 Bom 347 (348): 52 Bom 768: 29 Cri L Jour 1051, *In re Vithaldas Burabhai,*
(1929) 1929 Lah 32 (33): 10 Lah 406: 29 Cri L Jour 1002, *Mehr Khan* v. *Bakat Bhari.*
(1932) 1932 Cal 488 (489): 33 Cri L Jour 640: 1932 Cri Cas 480, *Mr. A. J. Raspin* v. *Mrs. Raspin.* (Quære).
[See also (1892) 16 Mad 234 (234), *Ponnammal, In re.* Order under S. 488 is not a conviction for an offence.
(1927) 1927 Lah 435 (435): 28 Cri L Jour 478, *Shadi Khan* v. *Mt. Gul Begam.* The ground on which Section held not applicable was that it is a *summons case* to which Section was held not applicable.
(1926) 1926 Lah 667 (668): 27 Cri L Jour 1000, *Demello* v. *Mrs. Demello.* Section was held applicable to summons case and therefore applicable to proceedings under S. 488. Whether person proceeded against was "accused" was not adverted to.]

Note 8.

1. (1917) 1917 Low Bur 137 (139): 17 Cri L Jour 316, *Maung Po Nyun* v. *Muthu Kurupen Chetty.*

Note 9.

1. [See cases cited in Note 2, Foot-note (6).]
[See also (1925) 1925 Pat 723 (725): 26 Cri L Jour 927, *Rameshar Singh* v. *Emperor.*]
2. (1904) 1 All L Jour 208*n* (208*n*).
(1927) 1927 All 475 (476): 49 All 551 : 28 Cri L Jour 399, *Sudaman* v. *Emperor* Accused should be questioned just before he enters on his defence.
(1928) 1928 All 222 (227): 30 Cri L Jour 530, *Emperor* v. *Jhabbar Mal.*
(1886) Ratanlal 227 (228), *Queen-Empress* v. *Bava Chela.*
(1891) Ratanlal 581 (582), *Queen-Empress* v. *Dhamba.*
(1892) Ratanlal 625 (625), *Queen-Empress* v. *Manchi.*
(1894) Ratanlal 710 (713), *Queen-Empress* v. *Abdul Razak.*
(1907) 9 Bom L R 356 (358), *Emperor* v. *Savalya Atma Pastya.*
(1908) 7 Cri L Jour 194 (195) (Bom), *Emperor* v. *Harischandra Talcherkar.*
(1915) 1915 Bom 221 (221): 16 Cri L Jour 765, *Basappa Ningappa* v. *Emperor.*
(1924) 1924 Bom 334 (335): 25 Cri L Jour 1127 *Emperor* v. *Narayan Sayanna Kamathi.*
(1929) 1929 Bom 447 (448): 31 Cri L Jour 402: 1929 Cri Cas 559, *Emperor* v. *Genu Gopal.*
(1881) 10 Cal L R 54 (55), *In the matter of Abdul Gufoor.*
(1930) 31 Cri L Jour 613 (614): 124 Ind Cas 70 (Cal), *Moyzuddin Mean* v. *Emperor.*
(1919) 1919 Cal 696 (700): 46 Cal 411 : 20 Cri L Jour 24, *Ali Poong Chinaman* v. *Emperor.*
(1921) 1921 Cal 269 (270): 23 Cri L Jour 41, *Gangadhar Goala* v. *Reginald William Lemon Reed.*
(1923) 1923 Cal 196 (198): 50 Cal 223 : 24 Cri L Jour 198, *Mazahur Ali* v. *Emperor.* Provisions of the Code mandatory.
(1923) 1923 Cal 470 (481, 482): 50 Cal 518 : 24 Cri L Jour 248, *Promotha Nath Mukhopadyaya* v. *King Emperor.* The accused should be examined

does not dispense with the examination under second part of the Section.[3] The reason is that the Code intends that the accused shall be given an opportunity of explaining any circumstances appearing in the evidence against him. That must mean the *whole* of the evidence against him and any examination *before that evidence is closed, i. e.*, before *all* the prosecution witnesses have been examined, cross-examined and re-examined, cannot possibly fulfil the conditions of the Section,[4] and

after the re-examination of the prosecution witnesses. He cannot be examined before the close of the prosecution evidence or after the close of his defence evidence.

(1923) 1923 Cal 727 (732): 50 Cal 939: 25 Cri L Jour 27, *Diba Rantu Chatterjee* v. *Gour Gopal Mukerjee.* "Examine" in S. 342 is to be taken in the ordinary English sense in which it covers all kinds of examination including cross-examination and re-examination, and that the accused should have been examined again, after all the witnesses for the prosecution have been examined and cross-examined.

(1925) 1925 Cal 361 (363): 52 Cal 522: 26 Cri L Jour 631, *Emperor* v. *Alimuddi Naskar.* Latter clause mandatory.

(1926) 1926 Cal 537 (538): 27 Cri L Jour 406, *Mahomed Rafique* v. *King Emperor.*

(1928) 29 Cri L Jour 382 (383): 108 Ind Cas 381 (Lah), *Bazkhan* v. *Emperor.* Provisions of Section are mandatory.

(1918) 1918 Lah 348 (348): 1918 Pun Re Cr No. 1: 19 Cri L Jour 280, *Ghulla* v. *Emperor.* Provision is mandatory.

(1922) 1922 Lah 45 (46): 23 Cri L Jour 154, *Haji Mohammad Baksh* v. *Emperor.* Section is mandatory.

(1925) 1925 Lah 288 (288): 27 Cri L Jour 87, *Ghaza Ali* v. *King Emperor.*

(1926) 1926 Lah 551 (552): 7 Lah 564: 27 Cri L Jour 1007, *Lachhman Singh* v. *Emperor.* The provisions of S. 342 (1) are mandatory.

(1926) 1926 Lah 684 (685): 27 Cri L Jour 1021, *Fazal Ahmed* v. *Emperor.*

(1931) 1931 Lah 153 (154): 32 Cri L Jour 708: 1931 Cri Cas 265, *Bhim Sen Sacnar* v. *Emperor.* Provisions imperative.

(1900) 23 Mad 636 (637), *Queen-Empress* v. *Pandara Tevan.*

(1886) 2 Weir 507 (508), *In re Cholakel Koya.*

(1898) 1 Oudh Cas 84 (85), *Queen-Empress* v. *Bharat Singh.*

(1931) 1931 Mad 241 (241): 32 Cri L Jour 757: 1931 Cri Cas 361, *Nataraja Mudaliar* v. *Devasigamani Mudaliar.*

(1924) 1924 Nag 301 (304): 25 Cri L Jour 417, *Udhao Patel* v. *King Emperor.*

(1934) 1934 Oudh 457 (458): 35 Cri L Jour 1417: 1934 Cri Cas 1308, *Onkar Singh* v. *Emperor.*

(1920) 1920 Pat 471 (477): 5 Pat L Jour 430: 21 Cri L Jour 705, *Raghu Bhumij* v. *Emperor.*

(1921) 1921 Pat 374 (375): 22 Cri L Jour 460, *Ramnath Rai* v. *Emperor.*

(1924) 1924 Pat 376 (376): 24 Cri L Jour 475, *Baldeo Dubey* v. *King-Emperor.* Hesitatingly held.

(1925) 1925 Pat 723 (725): 26 Cri L Jour 927, *Rameshar Singh* v. *Emperor.*

(1934) 1934 Pat 330 (334): 35 Cri L Jour 1322: 1934 Cri Cas 722, *Shyama Charan Bharthuar* v. *Emperor.* Section is mandatory but not exhaustive.

(1892-1896) 1 Upp Bur Rul 144 (144), *Queen-Empress* v. *Nga Tha Din.*

(1904) 1 Cri L Jour 737 (737): 2 Low Bur Rul 239, *King Emperor* v. *Kyan Baw.*

(1910) 11 Cri L Jour 746 (748): 8 Ind Cas 988 (Rang), *Emperor* v. *Sit Nyein.*

(1925) 1925 Rang 101 (101): 26 Cri L Jour 321, *Bawa Rowther* v. *King-Emperor.*

(1927) 1927 Rang 19 (19): 4 Rang 361: 27 Cri L Jour 1364, *King-Emperor* v. *Nga Po Byu.*

(1921) 1921 Sind 131 (132): 16 Sind L R 201: 25 Cri L Jour 191, *Dinu* v. *Emperor.*

(1925) 1925 Sind 127 (129): 19 Sind L R 104: 25 Cri L Jour 662, *Jhangli* v. *King-Emperor.*

(1927) 1927 Sind 175 (176): 21 Sind L R 331: 28 Cri L Jour 417, *Motankhan* v. *Emperor.*

(1932) 1932 Sind 165 (166): 34 Cri L Jour 161: 1932 Cri Cas 743, *Emperor* v. *Rihan Dodo.*

3. (1921) 1921 Pat 374 (375): 22 Cri L Jour 460, *Ramnath Rai* v. *Emperor.*

4. (1925) 1925 Bom 170 (172): 50 Bom 42: 26 Cri L Jour 690, *Emperor* v. *Nathu Kasthurchand Marwari.*

(1926) 1926 Lah 551 (552): 7 Lah 564: 27 Cri L Jour 1007, *Lachhman Singh* v. *Emperor.* Examination *in the course of prosecution evidence* is insufficient.

(1926) 1926 Sind 1 (2): 20 Sind L R 34: 26 Cri L Jour 1554, *Emperor* v. *Nabu.*

(1925) 1925 Cal 574 (575): 24 Cri L Jour 943, *Hamid Ali* v. *Sri Kissen Gosain.*
[See also (1923) 1923 Lah 539 (540): 25 Cri L Jour 426, *Barketi* v. *The Crown.*]

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is contrary to law and unfair to the accused.[5]

The word "examination" includes cross-examination and re-examination and "examined" means *completely* examined.[6] An examination of the accused, therefore, before the cross-examination and re-examination of the prosecution witnesses are over, is not a sufficient compliance with the Section.[7] There is a conflict of opinion as to whether an accused, who has been examined once before charge is framed, should be examined a second time, when the prosecution witnesses are *re-called*, under Section 256 and cross-examined a second time. The High Court of Lahore[8] and Madras[9] and the Chief Court of Oudh[10] have held that such second examination under this Section is not necessary, the High Court of Madras, proceeding on the ground that cross-examination after charge is really evidence for the *defence* and not for the *prosecution*. The High Courts of Rangoon[11] and Patna[12] and the Judicial Commissioner's Court of Nagpur[13] have, on the other hand, held that a second examination after the cross-examination of the re-called witnesses is necessary.

When the accused *enters upon his defence*, the stage at which he must be examined, passes. It is no compliance with the Section if the examination takes place at a later stage.[13a] This Section has, therefore, no application and no fresh examination of the accused is necessary where, for example, a prosecution witness is re-called under Section 257 of the Code, (after the accused has entered on his defence) and cross-examined[14] or where additional evidence is taken or ordered

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5. (1914) 15 Cri L Jour 436 (437): 24 Ind Cas 172 (Oudh), *Ram Harakh* v. *Emperor*.
6. (1924) 1924 Nag 51 (52): 25 Cri L Jour 713, *Krishnappa* v. *Emperor*.
   (1925) 1925 Nag 44 (47): 20 Nag L R 174: 26 Cri L Jour 971 (F B), *Local Government* v. *Maria*. The decision in 1925 Nag 147 (149): 25 Cri L Jour 1152, *Gangadhar* v. *Bhangi Sao*, must be considered to have been overruled by this decision.
   (1922) 1922 Pat 158 (160): 6 Pat L Jour 644: 22 Cri L Jour 697, *Mitarjit Singh* v *King-Emperor*.
   (1927) 1927 Sind 175 (176): 21 Sind L R 331: 28 Cri L Jour 417, *Motankhan* v. *Emperor*.
   (1932) 1932 Sind 165 (166): 34 Cri L Jour 161: 1932 Cri Cas 743, *Emperor* v. *Rihan Dodo*.
   (1923) 1923 Cal 727 (732): 50 Cal 939: 25 Cri L Jour 27, *Dibakanta Chatterjee* v. *Gour Gopal Mukerjee*.
7. [See cases cited in foot-note (6).]
8. (1929) 1929 Lah 371 (372): 30 Cri L Jour 625, *Emperor* v. *Nadir*.
   (1924) 1924 Lah 84 (88): 4 Lah 61: 25 Cri L Jour 801, *R. A. Byrne* v. *The Crown*.
   [But see (1926) 1926 Lah 51 (52): 26 Cri L Jour 1370, *Muhammad Sadiq* v. *Emperor*.]
9. (1923) 1923 Mad 608 (611): 24 Cri L Jour 456, *In re, Kama Kondiah*. Overruling 1922 Mad 512.
   (1923) 1923 Mad 694 (696): 25 Cri L Jour 7, *Thachroth Hydrosi, In re*.
10. (1925) 1925 Oudh 422 (423): 28 Oudh Cas 130: 26 Cri L Jour 1301, *Emperor* v. *Brij Behari*.
    (1932) 1932 Oudh 113 (113): 33 Cri L Jour 811: 1932 Cri Cas 186, *Pitam* v. *Emperor*. Relying on 1925 Oudh 422.
11. (1925) 1925 Rang 363 (364): 27 Cri L Jour 336, *Ah Khaung* v. *King-Emperor*.
    (1929) 1929 Rang 331 (332): 7 Rang 470: 30 Cri L Jour 1164: 1929 Cri Cas 507, *L. M. Subbaya Naidu* v. *Emperor*.
    [But see (1925) 1925 Rang 258 (260): 3 Rang 139: 26 Cri L Jour 1336, *Nga Hla U* v. *King-Emperor*.]
12. (1924) 1924 Pat 791 (791): 25 Cri L Jour 711, *Mt. Buchan Dai* v. *Jugal Kishore*.
13. (1925) 1925 Nag 44 (47): 20 Nag L R 174: 26 Cri L Jour 971, *Local Government* v. *Maria*.
    (1924) 1924 Nag 51 (52): 25 Cri L Jour 713, *Krishnappa* v. *Emperor*.
    (1924) 1924 Nag 301 (304): 25 Cri L Jour 417, *Udhao Patel* v. *King-Emperor*.
    (1928) 1928 Nag 162 (164): 29 Cri L Jour 475, *Mahommad Hayat Khan* v. *Emperor*.
    (1933) 1933 Nag 192 (193): 34 Cri L Jour 340: 1933 Cri Cas 786, *Emperor* v. *Amirbi*.
13a (1925) 1925 Cal 480 (480): 51 Cal 933: 26 Cri L Jour 261, *Surendra Lal Shaha* v. *Isamaddi*.
14. (1930) 1930 Cal 219 (220): 56 Cal 1157: 31 Cri L Jour 406: 1930 Cri Cas 219, *Obedar Rahman* v. *Emperor*.
    (1933) 1933 Cal 594 (596): 35 Cri L Jour 226: 1933 Cri Cas 958, *Dharni Kanta Chakrabarty* v. *Emperor*. Arguments had commenced.

to be taken by the Appellate Court under Section 428, *infra*,[15] or where a Court-witness is examined under Section 540,[16] or where witnesses are re-called under Section 231 on an altered charge after the accused has been called on for his defence,[17] though in all such cases it may be *desirable* that the accused should be examined again.[18]

10. Examination after framing charge.

Provided the accused is examined after the prosecution evidence is completely closed, it makes no difference whether the examination takes place before or after the charge is framed.[1] Where witnesses are examined after charge, the accused must be questioned under this Section after the close of such examination.[2]

11. "Evidence," meaning of.

The word "evidence" in this Section means evidence *already given* at the enquiry or trial at the time of the examination.[1]

12. Examination must be by the Court itself and not by others.

The *Court alone* is authorised to examine the accused person and the counsel for the complainant or the prosecution should not be allowed to take part in the examination.[1] It is improper for a Magistrate to base his examination on detailed instructions given by the counsel for the prosecution.[2]

13. De novo trial—Examination by successor.

Where the Magistrate trying the case is transferred and his successor begins the trial once again, he should examine the accused once again under this Section and cannot rest satisfied with the examination held by his predecessor.[1] The High

15. (1928) 1928 Bom 200 (200) : 52 Rom 699 : 29 Cri L Jour 972, *Narayan Keshav* v. *Emperor*.
(1925) 1925 Pat 414 (417, 420) : 4 Pat 488 : 26 Cri L Jour 811, *Saiyid Mohiuddin* v. *Emperor*.

16. (1928) 1928 Bom 388 (389) : 29 Cri L Jour 1057, *Mahadu Raghavji Thakkar* v. *Emperor*.
(1926) 1926 Nag 348 (348) : 27 Cri L Jour 475, *Pai Mahomed* v. *Emperor*. The examination of prosecution witnesses under S. 540, after they are re-called by the Court, is no part of the prosecution case.
(1924) 1924 Pat 764 (765) : 3 Pat 1015 : 25 Cri L Jour 1276, *Prayag Gope* v. *King-Emperor*.
(1933) 1933 Sind 49 (52) : 34 Cri L Jour 591 : 1933 Cri Cas 175, *Ibrahim* v. *Emperor*. Per Ferrers, J. C.
[But see (1933) 1933 Cal 347 (348) : 34 Cri L Jour 549 : 1933 Cri Cas 419, *Hoogly Chinsura Municipality* v. *Keshab Chandra Pal*.
(1929) 1929 Sind 5 (6) : 23 Sind L R 1 : 29 Cri L Jour 932, *Allah Dito* v. *Emperor*.]

17. (1922) 1922 Pat 393 (394) : 1 Pat 54 : 23 Cri L Jour 146, *Shamlal Kalwar* v. *Emperor*.

18. (1933) 1933 Sind 49 (52) : 34 Cri L Jour 591 : 1933 Cri Cas 175, *Ibrahim* v. *Emperor*.

Note 10.

1. (1930) 1930 Bom 241 (242) : 31 Cri L Jour 743 : 1930 Cri Cas 693, *Vishram Narayan Deoli* v. *Emperor*. Observation of Patkar, J., in (1929) 1929 Bom 447 : 31 Cri L Jour 402 : 1929 Cri Cas 559, *Emperor* v. *Genu Gopal*, to the contrary dissented from.

2. (1928) 29 Cri L Jour 382 (383) : 108 Ind Cas 381 (Lah), *Baz Khan* v. *Emperor*.
(1935) 36 Cri L Jour 407 (407) : 153 Ind Cas 445 (Lah), *Muhammad Din* v. *Emperor*.

Note 11.

1. (1892) 14 All 242 (253), *Queen-Empress* v. *Hargobind Singh*.

Note 12.

1. (1930) 1930 Lah 166 (167) : 31 Cri L Jour 560 : 1930 Cri Cas 174, *Faqir Singh* v. *Emperor*.
(1886) 10 Mad 121 (122), *Queen-Empress* v. *Kamandu*. Complainant cannot examine accused.

2. (1933) 1933 Nag 269 (269) : 34 Cri L Jour 1172 : 1933 Cri Cas 1003, *Krishna Murattilal* v. *Emperor*.
(1934) 1934 Nag 213 (215) : 35 Cri L Jour 1457 : 31 Nag L R 49 : 1934 Cri Cas 984, *Hari Krishnaji Ghate* v. *Emperor*.

Note 13.

1. (1927) 1927 Lah 720 (720) : 29 Cri L Jour

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Court of Madras has held that a failure to examine the accused, where no new matter has been introduced in the *de novo* trial, does not vitiate the proceedings.[2]

14. Nature of examination contemplated by the Section.

An accused person can be questioned under this Section only "for the purpose of enabling the accused to *explain any circumstances appearing in the evidence against him.*"[1] The real object of the Section is to enable the Judge to ascertain from the accused such explanation as he may desire to give regarding any statements made by the prosecution witnesses or to elicit from the accused how he proposes to meet such evidence as, in the opinion of the Court, implicates him.[2] It follows that the Section has no application where *no evidence* at all has been recorded on behalf of the prosecution,[3] or where no evidence *implicating the accused* has been given.[4] The reason is that no *explanation* from the accused is necessary in such cases. The Section has also no application where the *purpose* of the examination is something different from that specified in the Section. Thus an examination cannot be made of the accused for the purpose of getting from the accused the names of his witnesses, the nature of his evidence and the particulars of his defence.[5] The examination contemplated is not a *cross-examination* or an examination of an inquisitorial nature[6] for

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125, *Akhtar Mohammad* v. *Emperor.*

2. (1935) 1935 Mad 22 (22) : 58 Mad 427 : 36 Cri L Jour 307 : 1935 Cri Cas 25, *Marudamuthu Padayachi* v. *C. S. Raghava Sastri.*

Note 14.

1. (1902) 7 Cal W N 345 (351), *Emperor* v. *Bhut Nath Ghose.*
   (1878) 1 Cal L R 436 (437), *In the Matter of Chinibash Ghose.*
   (1886) 10 Mad 121 (122), *Queen-Empress* v. *Kamandu.*
2. (1880) 6 Cal 96 (102, 103), *Hossein Buksh* v. *The Empress.*
3. (1891) 13 All 345 (348), *Queen-Empress* v. *R. Hawthorne.*
   (1884) 1884 All W N 106 (107), *Empress* v. *Budha.*
   (1883) 1883 All W N 238 (238), *Empress* v. *Baljit.*
   (1893) Ratanlal 679 (680), *Queen-Empress* v. *Narayan.*
   (1901) 5 Cal W N 864 (865), *Gaya Singh* v. *Mahomed Sulaiman.*
   (1925) 1925 Lah 432 (433) : 6 Lah 183 : 26 Cri L Jour 1238, *Bahawala* v. *The Crown.*
   (1928) 1928 Lah 88 (89) : 29 Cri L Jour 958, *Jagindar Singh* v. *Agha Safdar Ali Khan.* Examination at the stage of enquiry under S. 202 is bad.
   (1934) 1934 Lah 96 (96) : 15 Lah 60 : 35 Cri L Jour 1394 : 1934 Cri Cas 175, *Karam Din* v. *Emperor.* Accused pleading guilty in summons case—He can be convicted without taking prosecution evidence—In such cases this Section does not apply.
   (1910) 11 Cri L Jour 193 (193): 4 Ind Cas 1126 (Mad), *In re Sadayan.*
   (1916) 1916 Mad 407 (408): 39 Mad 770: 16 Cri L Jour 623, *In re Abibulla Rowthan.*
   (1904) 1 Cri L Jour 699 (699): 7 Oudh Cas 191, *Chedan* v. *Emperor.*
   [See also (1921) 1921 All 282 (283): 22 Cri L Jour 146, *Ganga Saran* v. *Emperor.* In this case the complainant only had been examined, but not cross-examined by the accused.
   (1882) 1882 All W N 166 (166), *Empress* v. *Kura.* The question was held to be a matter of discretion.]
4. (1923) 1923 Lah 225 (226): 4 Lah 55 : 24 Cri L Jour 693, *Devi Dial* v. *Emperor.*
   (1929) 1929 Nag 350 (352): 31 Cri L Jour 15 : 1929 Cri Cas 673, *Shamlal* v. *Emperor.*
5. (1892) 14 All 242 (254), *Queen* v. *Hargobind Singh.*
   (1925) 1925 Nag 403 (404): 22 Nag L R 1 : 27 Cri L Jour 66, *Mahadeo Singh* v. *Emperor.*
6. (1883) 5 All 253 (256). *Queen* v. *Yakub Khan.*
   (1892) 14 All 242 (254), *Queen* v. *Hargobind Singh.*
   (1897) 19 All 291 (293), *In the matter of Gudar Singh.* No judicial officer should attempt to compel any accused person to make any admission detrimental to his interest.
   (1930) 1930 All 17 (17): 31 Cri L Jour 8: 1930 Cri Cas 33, *Goli* v. *Emperor.*
   (1933) 1933 All 690 (695): 34 Cri L Jour 967 : 1933 Cri Cas 1202 : 55 All 1040, *S. H. Jhabwala* v. *Emperor.*
   (1871) 16 Suth W R Cr 21 (22), *Revision of proceedings in the case of Dinoo Roy.*
   (1904) 6 Bom L R 94 (98), *Emperor* v. *Anant Narayan.*

the purpose of entrapping the accused and of extracting from him damaging admissions upon which to build up[7] or to supply a gap[8] in the case for the prosecution. The Magistrate or Judge cannot thus ask the accused under this Section about his previous convictions.[9]

It is of great importance that the spirit as well as the letter of the provisions of law in this Section should be appreciated : they should not be under-

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(1883) 10 Cal 140 (143), *Hurry Churn Chuckerbutty* v. *Empress.*
(1878) 1 Cal L R 436 (437), *In the matter of Chinibash Ghose.*
(1902) 7 Cal W N 345 (351), *Emperor* v. *Bhut Nath Ghose.*
(1925) 1925 Cal 361 (369) : 52 Cal 522 : 26 Cri L Jour 631, *Emperor* v. *Alimuddi Naskar.*
(1910) 11 Cri L Jour 171 (174) : 5 Ind Cas 602 (Lah), *Ahmad Yar Khan* v. *Emperor.*
(1921) 1921 Lah 32 (33, 34) : 3 Lah 4 : 67 Ind Cas 340 (342), *Umar Din* v. *Emperor.*
(1930) 1930 Lah 166 (167) : 1930 Cri Cas 174 : 31 Cri L Jour 560, *Faqir Singh* v. *Emperor.*
(1921) 1921 Lah 32 (33) : 2 Lah 129 : 23 Cri L Jour 388, *Umar Din* v. *Emperor.*
(1922) 1922 Lah 456 (456) : 23 Cri L Jour 431, *Nura* v. *Emperor.*
(1929) 1929 Lah 382 (384) : 10 Lah 223 : 29 Cri L Jour 769, *Faqir Singh* v. *Emperor.*
(1910) 11 Cri L Jour 193 (193) : 4 Ind Cas 1126 (Mad), *In re Sadayan.*
(1903) 6 Oudh Cas 204 (211), *Sri Kishen* v. *King-Emperor.* Under the colour of an examination, under S. 342, Cr. P. C. an accused person should not be examined as if he were being examined as an approver.
(1904) 1 Cri L Jour 699 (700) : 7 Oudh Cas 191, *Chedan* v. *Emperor.*
(1917) 1917 Low Bur 58 (59) : 18 Cri L Jour 941, *Nga Chit Ye* v. *Emperor.*
(1918) 1918 Upp Bur 34 (39) : 3 Upp Bur Rul 3 : 18 Cri L Jour 774, *Nga San Nyein* v. *Emperor.*
(1930) 1930 Rang 351 (353) : 1930 Cri Cas 1179 : 8 Rang 372 : 32 Cri L Jour 23, *U Ba Thein* v. *Emperor.*
(1925) 1925 Sind 116 (121) : 25 Cri L Jour 761, *Topandas* v. *Emperor.*
(1930) 1930 Sind 225 (235) : 1930 Cri Cas 865 : 31 Cri L Jour 1026. *Mohammad Yusuf* v. *Emperor.*
(1935) 1935 All 717 (719) : 1935 Cri Cas 919 : 36 Cri L Jour 773, *Bhagwan Das* v. *Emperor.* Sessions Judge should not cross-examine accused to confront them with statements made to investigating officer.

7. (1884) 1884 All W N 106 (107), *Empress* v. *Budha.*
(1920) 1920 All 274 (275) : 42 All 522 : 22 Cri L Jour 84, *Mohan Singh* v. *Emperor.*
(1866) 3 Bom H C R Crown Cas 51 (53), *Reg.* v. *J. M. Diaz.*
(1878) 1 Cal L R 436 (437), *In the matter of Chinibash Ghose.*
(1898) 2 Cal W N 702 (717), *Queen-Empress* v. *Bhairab Chunder.*
(1880) 6 Cal L R 431 (435), *Empress* v. *Behari Lal Bose.*
(1912) 13 Cri L Jour 283 (284) : 14 Ind Cas 667 (Cal), *Tufani Sheikh* v. *Emperor.* Questions to elicit confessional statement not to be put.
(1913) 14 Cri L Jour 129 (130) : 18 Ind Cas 881 (Cal), *Haidar Ali Pradhania* v. *Emperor.*
(1887) 10 Mad 295 (315), *Queen* v. *Rangi.*
(1882) 5 C P L R 9 (10), *Empress* v. *Nagia.*
(1882) 5 C P L R 11 (12), *Empress* v. *Mt. Bhura and Hulka.* *Q.* "Then you admit that the property before the Court is not yours ?"—*Ans.* "I do."
(1909) 9 Cri L Jour 56 (57) : 4 Nag L R 163, *Emperor* v. *Kissan Yessu,*
(1914) 1914 Oudh 32 (37) : 15 Cri L Jour 474, *Malik Hussain* v. *Emperor.*
(1872-82) 1872-82 Low Bur Rul 320 (322), *Nga Hmun* v. *Queen-Empress.*
(1893-1900) 1893-1900 Low Bur Rul 349 (352), *Ali Hussan* v. *Empress.*
(1917) 1917 Low Bur 137 (139) : 17 Cri L Jour 316, *Maung Po Nyun* v. *Mutukurpen Chetty.*

8. (1899) 26 Cal 49 (51), *Basanta Kumar Ghattak* v. *Queen.*
(1925) 1925 Nag 403 (404) : 22 Nag L R 1 : 27 Cri L Jour 66, *Mahadeo Singh* v. *Emperor.*
(1930) 1930 Pat 498 (499) : 1930 Cri Cas 926 : 9 Pat 504 : 32 Cri L Jour 898, *Kalumanjhi* v. *Emperor.*
(1900-02) 1 Low Bur Rul 292 (292), *Nga Tha Zan* v. *Crown.*
(1908) 8 Cri L Jour 62 (63) : 4 Low Bur Rul 244, *Gaung Gyi* v. *Emperor.*
(1930) 1930 Sind 225 (235) : 1930 Cri Cas 865 : 31 Cri L Jour 1026, *Mohammad* v. *Emperor.*

9. (1901) 5 Cal W N 239*n* (240*n*).
(1901) 5 Cal W N 864 (866), *Gya Singh* v. *Mohammad Soliman.*
(1900-02) 1 Low Bur Rul 8 (8), *Queen-Empress* v. *Nga Po Thet.*
(1901) 28 Cal 689 (693), *Yasin* v. *Emperor.*
(1902-1903) 1 Upp Bur Rul Cr. P. Code 23 (23), *Nga Te* v. *King Emperor.*
(1901) 1 Cri L Jour 227 (243) : 28 Bom 129, *Emperor* v. *Alloomiya Husan.*

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stood as countenancing an interrogation of the kind permitted in French procedure.[10] The Section is designed to secure that the Court, by the frame of its questions, performs a double duty, *viz.* :

(*a*) communicate with the accused to the full extent that may be necessary in each particular case, what is alleged against him in the prosecution evidence, and

(*b*) ascertain from him what explanation or defence he wishes to put forward in respect thereof.[11]

15. "Question him generally on the case."

As has been seen already in Note 2, *ante*, it is imperative that the Court should question the accused *generally on the case* after the witnesses for the prosecution have been examined and before he is called on for his defence. There is a difference of opinion among the High Courts as to what is meant by questioning "generally on the case." According to one view the word "generally" does not limit the nature of the questioning to one or more questions of a general nature relating to the case but means that the questions should *relate to the whole case* and should not be limited to particular part or parts of it ; the law, therefore, intends that the *salient points* appearing in the evidence against the accused must be pointed out to him in a succinct form and he should be asked to explain them if he wishes to do so.[1] It may be that when a general question as to whether he wishes to say anything, is asked he will reply in the negative. If he does so it will be no use asking further questions. If on the other hand it does not appear that he will refuse to answer questions, his attention must be drawn to the salient points and he should be questioned on these points.[1a] Merely questioning the accused generally, as to whether he has anything to say or anything to add to what he has said before the committing Magistrate is, therefore, not a compliance with the Section[2]

(1905) 2 Cri L Jour 227 (227) (Rang), *Nga Te* v. *Emperor*.

10. (1884) 1884 All W N 106 (107), *Empress* v. *Budha*.

11. (1904) 1 Cri L Jour 854 (858) : 17 C P L R 113, *Emperor* v. *Katay Kisan*.

(1918) 1918 Nag 143 (145) : 20 Cri L Jour 12, *Mt. Tani* v. *Emperor*. 17 C P L R 113, followed.

Note 15

1. (1925) 1925 Cal 361 (365, 369) : 52 Cal 522 : 26 Cri L Jour 631, *Emperor* v. *Alimuddi Naskar*. Per Mukerji, J. ; Newbould, J., *contra*.

(1925) 1925 Cal 980 (980): 26 Cri L Jour 572, *Shamlal Singh* v. *Emperor*.

(1933) 1933 Oudh 305 (308) : 34 Cri L Jour 568 (572): 1933 Cri Cas 686: 9 Luck 1, *Sohan Lal* v. *Emperor*. Relying upon 1933 P C 124.

(1924) 1924 All 735 (738) : 46 All 549, *Mahabir Singh* v. *Matabadal Singh*. Attention should be called to important points.

(1912) 13 Cri L Jour 226 (233) : 36 Mad 159, *In re Basrur Venkata Row*. Where a letter is to be used as genuine which is not proved, the Court should ask the accused about it and put him questions respecting its significance, otherwise it ought to be ignored or a favourable construction put upon it.

(1918) 1918 Nag 143 (146) : 20 Cri L Jour 12, *Mt. Tani* v. *Emperor*.

(1924) 1924 Nag 301 (305) : 25 Cri L Jour 417, *Udhao Patel* v. *King Emperor*.

(1918) 1918 Upp Bur 34 (39) : 3 Upp Bur Rul 3 : 18 Cri L Jour 774, *Nga San Nyein* v. *Emperor*.

(1924) 1924 Rang 172 (173) : 1 Rang 689 : 25 Cri L Jour 487, *Baqa Mahar* v. *King Emperor*.

(1930) 1930 Rang 114 (118) : 1930 Cri Cas 402 : 7 Rang 821 : 31 Cri L Jour 387, *Maung Ba Chit* v. *Emperor*.

(1930) 1930 Sind 225 (229) : 1930 Cri Cas 865 : 31 Cri L Jour 1026, *Mahammad Yusif* v. *Emperor*.

[See also (1933) 34 Cri L Jour 411 (412) : 142 Ind Cas 785 (Nag), *Emperor* v. *Baliram*. Assumed.]

1a (1925) 1925 Cal 361 (369) : 52 Cal 522 : 26 Cri L Jour 631, *Emperor* v. *Alimuddi Naskar*.

2. (1924) 1924 Nag 301 (305) : 25 Cri L Jour 417, *Udhao Patel* v. *King Emperor*.

(1925) 1925 Cal 980 (980) : 26 Cri L Jour 572, *Shamlal Singh* v. *Emperor*.

(1931) 1931 Lah 153 (154) : 32 Cri L Jour 708 : 1931 Cri Cas 265, *Bhim Sen Sacnar* v. *Emperor*. Non-compliance

especially in a complicated case.[3] According to another view, a general question "you have heard the evidence; what is your defence" or "have you anything to say" is a sufficient compliance with the Section.[4] It was held in the undermentioned case[5] that according to the practice prevailing in the province of Madras putting specific questions was not necessary but a general question was enough. In *Kallam Narayana* v. *Emperor*,[5a] Mr. Justice Reilly observed as follows :—

> "It is a very difficult duty and a duty which has to be performed with the greatest caution so that without the slightest flavour of cross-examination, without asking anything which may lead the accused to incriminate himself the important points against him may be brought to his notice and he may have an opportunity of explaining them. The task is such a difficult one that, when the accused is represented by counsel, it is often in his interest that the Judge should *formally* comply with the Section by asking a general question and then leave the accused's counsel to offer explanations on his behalf in the way most favourable and least dangerous to him."

According to a third view, the question as to what must be the nature of the questions to be put depends upon the circumstances of each case; it would however, be a sufficient compliance with the Section if the accused is given an *opportunity* of explaining the circumstances appearing against him : it is neither necessary nor desirable to examine the accused in detail so as to enable the prosecution to take advantage thereof.[6]

In *Dwarakanath Varma* v. *Emperor*,[7] Lord Atkin observed as follows :—

> "The other question is a general question whether there was anything else he desired to say about the charges or the evidence. The learned Chief Justice told the jury that the absence of blood in the body cavity was a vital point. If so, it is plain that under Section 342 of the Code it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation."

The first of the three views set out above must, in the light of the Privy Council decision, be accepted as correct.

A long composite question should not be asked, but separate questions on the various points should be put and the explanation of the accused asked.[8]

16. "Without previously warning the accused."

The Section does not require, as in the case of statements taken under Section 164, *ante*, that the accused shall be *warned* of the consequences of the

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vitiates trial.

(1918) 1918 Nag 143 (146) : 20 Cri L Jour 12, *Mt. Tani* v. *Emperor*.

(1924) 1924 Pat 791 (791) : 25 Cri L Jour 711, *Bhokhari Singh* v. *The King Emperor*.

(1925) 1925 Pat 342 (344): 26 Cri L Jour 716, *Durga Ram* v. *Emperor*. It vitiates trial.

(1924) 1924 Rang 172 (173) : 1 Rang 689 : 25 Cri L Jour 487, *Mg. Hman* v. *Emperor*.

(1924) 1924 Oudh 111 (112) : 24 Cri L Jour 661, *Nageshar Prasad* v. *Emperor*. Accused stating in answer to general questions "My evidence in cross-case is correct. I have no more to say"—Examination improper.

3. (1930) 1930 Rang 114 (118) : 1930 Cri Cas 402 : 7 Rang 821 : 31 Cri L Jour 387, *Maung Ba Chit* v. *Emperor*.

4. (1926) 1926 Cal 424 (424) : 26 Cri L Jour 1510, *Rez Muhammad* v. *Emperor*.

(1927) 1927 Nag 71 (72) : 27 Cri L Jour 181, *Wasudeo* v. *Emperor*.

(1923) 1923 Pat 91 (94) : 23 Cri L Jour 233, *Panchu Chowdhry* v. *Emperor*. When accused defended by legal practitioner, lengthy examination *ought not* to be held.

(1925) 1925 Pat 389 (389) : 26 Cri L Jour 682, *Banamali Kumar* v. *Emperor*.

5. (1927) 1927 Mad 613 (613) : 28 Cri L Jour 383, *Ramaswami* v. *Emperor*.

5a (1933) 1933 Mad 233 (238) : 1933 Cri Cas 289 : 56 Mad 231 : 34 Cri L Jour 481, *Kallam Narayana* v. *Emperor*.

6. (1925) 1925 Pat 713 (716) : 4 Pat 459 : 26 Cri L Jour 954, *Mohammad Nasiruddein* v. *Emperor*.

7. (1933) 1933 P C 124 (130) : 1933 Cri Cas 442: 34 Cri L Jour 322 (PC), *Dwarkanath Varma* v. *Emperor*.

8. (1927) 1927 Lah 650 (650) : 28 Cri L Jour

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statements he makes. It has however been held in the undermentioned case,[1] that it is extremely desirable that the Magistrate should follow the practice in England and warn the accused that they are not obliged to answer unless they desire to do so.

17. Examination of pleader of accused.

There is a conflict of opinion as to whether this Section enables the Court to examine the pleader of the accused in cases where the personal attendance of the accused has been dispensed with under Section 205, *ante*. According to the High Courts of Allahabad,[1] Calcutta[2] and Madras[3] the examination must be of the accused *in person* who should be directed under sub-section 2 of Section 205 to be present for the purpose. The High Courts of Bombay[4] and Rangoon[5] and the Judicial Commissioner's Court of Sind[6] have, on the other hand, held that the Magistrateis not bound to examine the accused personally in such cases.

18. Written statement of accused, if sufficient.

Under the Code of 1861, where the examination of the accused was in the *discretion* of the Court it was held, that, where a written defence was given, it was not necessary for the Magistrate to examine the accused orally.[1] The latter part of the present Section is, however, as has been seen already, mandatory, and the accused is not entitled, as of right, to put in a written statement in lieu of answers which he may give to questions put to him under this Section.[2] It has been generally held that this Section contemplated an *oral* examination,[3] that a written statement of defence cannot be allowed to take the place of the examination which this Section imperatively orders the Court to make,[4]

767, *Hasni* v. *Emperor*.

Note 16.

1. (1926) 1926 Mad 570 (572, 573) : 27 Cri L Jour 311, *Kannammal, In re.*

Note 17.

1. (1934) 1934 All 693 (694) : 1934 Cri Cas 866 : 35 Cri L Jour 879, *Ishwar Das* v. *Bhagwan Das.*
2. (1926) 1926 Cal 430 (431) : 26 Cri L Jour 1032, *Messer Bepari* v. *Emperor.*
3. (1921) 1921 Mad 679 (680) : 23 Cri L Jour 697, *Nainamalai Konan, In re.*
4. (1934) 1934 Bom 212 (212) : 1934 Cri Cas 759 : 35 Cri L Jour 1035, *Emperor* v. *Jaffar Cassam Moosa.*
5. (1927) 1927 Rang 73 (73) : 4 Rang 506 : 28 Cri L Jour 226, *Maung Po Nyein* v. *Haka Singh.*
6. (1913) 14 Cri L Jour 272 (272) : 6 Sind L R 206 : *Emperor* v. *Musammats Jamal Khatun and Khatijan.*

Note 18.

1. (1871) 16 Suth W R Cri 53 (53), *Dila Mundul* v. *Kally Shaha.*
2. (1929) 1929 Bom 296 (300) : 1929 Cri Cas 114 : 53 Bom 479 : 31 Cri L Jour 65, *Emperor* v. *C. E. Ring.*
   (1917) 1917 Cal 687 (692) : 17 Cri L Jour 9, *Dy. Legal Remembrancer, Behar and Orissa* v. *Matukdhari Singh.*
   (1916) 1916 Cal 633 (641) : 16 Cri L Jour 724, *Emperor* v. *Dwijendra Chandra Mukerjee.*
3. (1931) 1931 Mad 241 (242) : 1931 Cri Cas 361 : 32 Cri L Jour 757, *Nataraja Mudaliar* v. *Devasigamani.*
4. (1903) 1903 All W N 1 (1), *Emperor* v. *Ansuiya.*
   (1933) 1933 All 690 (695) : 1933 Cri Cas 1202 : 34 Cri L Jour 967 : 55 All 1040, *S. H. Jhabwala* v. *Emperor.*
   (1925) 1925 Pat 378 (380) : 4 Pat 231 : 26 Cri L Jour 932, *Bhagwat Singh* v. *Emperor.*
   (1921) 1921 Pat 374 (375) : 22 Cri L Jour 460, *Ramnath Rai* v. *Emperor.*
   (1921) 1921 Pat 415 (418) : 22 Cri L Jour 442, *Moinuddin* v. *Emperor.*
   (1922) 1922 Pat 5 (6) : 23 Cri L Jour 114, *Balkesar Singh* v. *Emperor.*
   (1934) 1934 Nag 213 (215) : 1934 Cri Cas 984 : 35 Cri L Jour 1457 : 31 Nag L R 49, *Hari Krishnaji Ghate* v. *Emperor.*
   (1924) 1924 Nag 301 (306) : 25 Cri L Jour 417, *Udhao Patel* v. *Emperor.*
   (1916) 1916 Cal 188 (214) : 42 Cal 957 : 16 Cri L Jour 497, *Amritlal Hazra* v. *Emperor.*
   (1921) 22 Cri L Jour 276 (279) : 60 Ind Cas 676 (679) (Lah), *Harnam* alias *Harnam Singh* v. *Emperor.* Written statement of defence cannot take the place of the examination of the accused at the close of the case of the prosecution.
   (1921) 1921 Mad 679 (680) : 23 Cri L Jour 697, *Nainamalai Konan, In re.* A written statement by the accused would not take the place of such an

and that the practice of taking such statements is pernicious,[5] and entirely irresponsible.[6] A written statement drafted by the accused's legal adviser, for instance, can never have the same value as answers coming directly from the accused's mouth.[7] In the undermentioned cases,[8] however, it was held that the filing of a written statement of defence dispensed with the necessity to examine the accused orally under this Section. It is submitted that this view is not correct and is against the general trend of opinion.

The immunity under sub-section 2 of the Section does not extend to written statements filed by the accused.

19. Examination by committing Magistrate.

A committing Magistrate is bound, before commitment, to examine the accused as required by this Section. The words "and he has (if necessary) examined the accused" in Section 209 of the Code cannot be taken as giving a discretion to the Magistrate who intends to commit, to examine the accused.[1] The Calcutta High Court, however, has in a recent case, held that the mandatory provisions of this Section apply only to the *Sessions Court* in such cases as it is in that Court that the accused is called on for his defence.[1a] A similar view has also been taken by the Judicial Commissioner's Court of Sind.[2]

20. Examination of accused in Sessions trials.

The Section is a general provision applicable to trials in all cases including Sessions cases, and even where the accused has been examined generally by the committing Magistrate, the Sessions Judge is bound to examine the accused in the trial.[1] It makes a considerable difference to listeners like the jury whether a statement before the Magistrate is read out in Court or whether an accused person is carefully examined in the presence of the jury and his answers and demeanour noted by the jury.[2] A contrary view has, however, been taken in the undermentioned case[3] based upon the interpretation of the words "if any" used in Section

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examination.
[See (1926) 1926 Pat 566 (568) : 27 Cri L Jour 1041, *Emperor* v. *Zahir Haider Bilgrami.* There is no provision in law for the accused filing a written statement.]

5. (1916) 1916 Cal 633 (641) : 16 Cri L Jour 724, *Emperor* v. *Dwijendra Chandra Mukerjee.*
6. (1917) 1917 Cal 687 (692) : 17 Cri L Jour 9, *Dy. Legal Remembrancer, Behar and Orissa* v. *Matukdhari Singh.*
7. (1916) 1916 Cal 633 (641) : 16 Cri L Jour 724, *Emperor* v. *Dwijendra Chandra Mukerjee.*
8. (1930) 31 Cri L Jour 171 (172) : 120 Ind Cas 753 (Pat), *Gurdial Singh* v. *Bhola Halwai.*
   (1925) 1925 Pat 414 (417) : 4 Pat 488 : 26 Cri L Jour 811, *Saiyid Mohiuddin* v. *Emperor.*
   (1926) 1926 All 287 (288) : 27 Cri L Jour 253, *Mt. Champa Devi* v. *Pirbhu Lal.*

Note 19.

1. (1900) 23 Mad 636 (637), *Queen-Empress* v. *Pandara Tevan.*
1a (1935) 1935 Cal 605 (606) : 1935 Cri Cas 1022 : 62 Cal 475 : 36 Cri L Jour 1340, *Emperor* v. *Ajahar Mandal.*
2. (1921) 1921 Sind 131 (132) : 16 Sind L R 201 : 25 Cri L Jour 191, *Dinu* v. *Emperor.*
   (1917) 1917 Sind 24 (24) : 11 Sind L R 52 : 18 Cri L Jour 913, *Emperor* v. *Dosu.*

Note 20.

1. (1920) 1920 Pat 471 (478) : 5 Pat L Jour 430 : 21 Cri L Jour 705, *Raghu Bhumij* v. *Emperor.*
   (1926) 1926 Oudh 57 (58) : 26 Cri L Jour 1576, *Emperor* v. *Mahammad Shafi.*
   (1903-1904) 2 Low Bur Rul 115 (117), *Emperor* v. *Nga Thet U.*
   (1927) 1927 Rang 19 (19) : 4 Rang 361 : 27 Cri L Jour 1364, *Emperor* v. *Nga Po Byu.*
   (1907) 6 Cri L Jour 74 (75) (Bom), *Emperor* v. *Raju Ahilaji.* It has however observed that the proposition was open to serious doubt.
2. (1926) 1926 Oudh 57 (58) : 26 Cri L Jour 1576, *Emperor* v. *Mahammad Shafi.*
3. (1909) 10 Cri L Jour 325 (339) : 3 Ind Cas 625 (Cal), *Khudiram Bose* v. *Emperor.*

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289 of the Code. It is submitted that this view is not correct. The words "if any" in Section 289 should be construed as conflicting with this Section. Section 289 must be taken to contemplate the case in which there are no circumstances for the accused to explain.[4]

21. Refusal to answer—Sub-section 2.

An accused person is entitled to refuse to answer questions put to him under this Section,[1] and when he does so, the Court is not bound to go on questioning him.[2] Nor should the Court hold inquisitorial proceedings against him in such a case.[3]

Where an accused declines to answer questions put to him under this Section the fact should be noted on the record.[4]

Although an accused is entitled to refuse to answer, such refusal may often be attended with great risk to him inasmuch as the Court and the jury, if any, may draw such inference against him from such refusal as it thinks just.[5] An innocent man cannot well injure himself by a truthful explanation of the circumstances appearing against him.[5a]

An accused person does not render himself liable to punishment by refusing to answer *questions* put to him.[6]

But the accused is not entitled to refuse to sign the record of his examination under Section 364, *infra* ; and if he refuses to do so, he renders himself liable to punishment under Section 180 of the Penal Code.[6a]

The fact that the accused declines to make a statement, will not necessarily indicate that he would not like to answer specific questions.[7]

22. Giving false answers—Sub-section 2.

An accused person does not, by giving false answers to the questions put to him under this Section, render himself liable to punishment. The resort to a false defence will, however, affect the credit to be attached to the case of the accused and raise an inference against him, though this will not relieve the Court from the task of attempting to arrive at a sound conclusion from the whole evidence, inasmuch as, notwithstanding his false defence, the accused may be innocent of the offence charged.[1]

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4. (1903-1904) 2 Low Bur Rul 115 (116), *Nga Thet U* v. *Emperor*.

Note 21.

1. (1931) 1931 Lah 178 (181, 182) : 1931 Cri Cas 298 : 32 Cri L Jour 684, *Sher Jang* v. *Emperor*.
[See also (1906) 3 Cri L Jour 134 (135) (Lah), *Mr. A.* v. *Emperor*. A counsel may legally advise the accused not to answer.]
2. (1925) 1925 Pat 378 (381) : 4 Pat 231 : 26 Cri L Jour 932, *Bhagwat Singh* v. *Emperor*. Especially where a written statement has been put in.
3. (1930) 1930 Cal 209 (212) : 1930 Cri Cas 209 : 57 Cal 1074 : 31 Cri L Jour 903, *Prafulla Kumar Bose* v. *Emperor*.
4. (1871) 15 Suth W R Cr 16 (17), *In re Gopal Hajjam*.
5. (1916) 1916 Cal 633 (641) : 16 Cri L Jour 724, *Emperor* v. *Dwijendra Chandra Mukerjee*.
(1931) 1931 Lah 178 (181, 182) : 1931 Cri Cas 298 : 32 Cri L Jour 684, *Sher Jang* v. *Emperor*. He cannot defeat the ends of justice by refusing to answer.
5a (1916) 1916 Cal 524 (525) : 16 Cri L Jour 576, *Emperor* v. *Nagendra Nath Sen Gupta*.
6. (1899) 1 Bom L R 435 (436), *Queen-Empress* v. *Jayapa Nagappa*. Same rule applies to his examination by a Police patel.
6a (1935) 1935 All 652 (653) : 1935 Cri Cas 652 : 36 Cri L Jour 1098, *Motilal* v. *Emperor*.
7. (1930) 1930 Cal 209 (212) : 1930 Cri Cas 209 : 57 Cal 1074 : 31 Cri L Jour 903, *Prafulla Kumar Bose* v. *Emperor*.

Note 22.

1. [See (1868) 1868 Pun Re Cri No. 22, page 52 (65), *Jehangir Khan* v. *The Crown*.]
(1890) 1890 Pun Re Cri No. 21, page 47 (49), *Empress* v. *Harjas Rai*.
[See also (1921) 1921 Lah 89 (90) : 22

23. Answers given, to be taken into consideration.

Where facts are put forward on behalf of the prosecution, which, unless explained, justify an inference of guilt being drawn against the accused, it is both lawful and proper for the Court to consider the explanation of those facts which the accused puts forward in his defence.[1] In cases of circumstantial evidence, the Court should always take the explanation of the accused into consideration.[2] The burden of proving an exception under the Penal Code is on the accused[3] and in such cases the circumstances, with his statement, may be sufficient to establish the exception in his favour.[4]

The proof of a case against the accused must depend, not on the absence of an explanation on his part but upon the positive affirmative evidence of his guilt given by the prosecution.[5] Where, however, the prosecution evidence *prima facie* establishes his guilt or involves him in considerable suspicion, his absence of explanation may give rise to an inference against him.[6]

The answers given can only be "taken into consideration" in the inquiry or trial in which they are given. They cannot be allowed to fill up a *gap* in the prosecution evidence ; the prosecution must make out its case by evidence.[7] Thus where in a prosecution for defamation, no evidence was let in to prove publication, it was held, that the admission of publication made by the accused in his statement under this Section was not sufficient to fill up the gap in the prosecution evidence.[8]

Cri L Jour 595, *Hari Ram* v. *Emperor.*]

Note 23.

1. (1916) 1916 All 63 (64) : 17 Cri L Jour 23, *Abdul Aziz* v. *Emperor.*
   (1918) 1918 Cal 314 (315) : 19 Cri L Jour 81, *Ashraf Ali* v. *Emperor.*
   (1920) 1920 All 72 (74) : 21 Cri L Jour 410, *Jagdeo Pershad* v. *Emperor.*
2. (1926) 1926 Bom 71 (73) : 49 Bom 878 : 27 Cri L Jour 114, *Emperor* v. *Abdul Gani Bahadurbhai.*
3. (1914) 1914 Cal 532 (533) : 15 Cri L Jour 276, *Ram Newaz Lal* v. *Emperor.*
   (1927) 1927 Cal 324 (326) : 28 Cri L Jour 334, *Adam Ali Taluqdar* v. *Emperor.* *Onus* to establish circumstances justifying exercise of right of private defence is on the accused.
   (1929) 1929 Cal 346 (348) : 56 Cal 1013 : 31 Cri L Jour 369, *Muhammad Gul* v. *Hazi Fazley Karim.*
   (1888) 1888 Pun Re Cri No. 1, page 1 (2), *Allah Bakhsh* v. *Empress.*
   (1887) 1887 Pun Re Cri No. 27, page 52 (55), *Khuda Bakhsh* v. *Empress.*
   (1884) 1884 Pun Re Cri No. 41, page (91), *Hakim* v. *Empress.*
   (1932) 1932 Lah 11 (12) : 1932 Cri Cas 21 : 33 Cri L Jour 186, *Umar Khan* v. *Emperor.* Grave and sudden provocation,
   (1924) 1924 Lah 733 (734) : 25 Cri L Jour 1005, *Kakar Singh* v. *Emperor.*
   (1925) 1925 Lah 399 (400) : 6 Lah 171 : 27 Cri L Jour 438, *Rakha* v. *Emperor.*
   (1927) 1927 Lah 786 (787) : 28 Cri L Jour 838, *Hazura Singh* v. *Emperor.*
   (1915) 1915 Mad 250 (250) : 15 Cri L Jour 447, *In re Ponshala Narisi Reddi.*
   (1912) 13 Cri L Jour 470 (471) : 15 Ind Cas 310 (Mad), *Veerana Nadan* v. *Emperor.*
   (1933) 34 Cri L Jour 404 (407) : 142 Ind Cas 741 (Nag), *Suleman* v. *Emperor.*
   (1928) 1928 Nag 58 (62) : 28 Cri L Jour 996, *Surajmal* v. *Ramnath.*
   (1933) 1933 Rang 142 (143) : 1933 Cri Cas 728 : 34 Cri L Jour 783, *Nga Ba Shein* v. *Emperor.*
   (1929) 1929 Sind 90 (92) : 23 Sind L R 216 : 30 Cri L Jour 548, *Mir Allahbux Khan* v. *Emperor.*
   [See (1921) 1921 Mad 303 (303) : 22 Cri L Jour 613, *In re Bhyri Rajayya.*]
   [See also (1913) 14 Cri L Jour 440 (441) : 20 Ind Cas 600 (Rang), *Emperor* v. *Stella.*
   (1927) 1927 Cal 409 (409) : 28 Cri L Jour 469, *Harendra Kumar Ghosh* v. *Emperor.*]
4. (1927) 1927 All 119 (119) : 27 Cri L Jour 1395, *Mangalia* v. *Emperor.*
5. (1924) 1924 Cal 257 (283) : 25 Cri L Jour 817 (F B), *Emperor* v. *Barendra Kumar Ghose.*
6. (1918) 1918 Mad 111 (115) : 19 Cri L Jour 189, *E. D. Smith* v. *Emperor.*
   (1919) 1919 Oudh 160 (174) : 20 Cri L Jour 465, *Sushil Chandra Lahiri* v. *Emperor.*
   (1914) 1914 Sind 111 (112) : 7 Sind L R 109 : 15 Cri L Jour 497, *Isarsingh Sawansingh* v. *Emperor.*
   [See (1924) 1924 Cal 257 (283) : 25 Cri L Jour 817 (F B), *Emperor* v. *Barendra Kumar Ghose.*]
7. [See cases cited in foot-note (8) below.]
8. (1923) 1923 Lah 225 (226) : 4 Lah 55 : 24 Cri L Jour 693, *Devi Dial* v. *Emperor.*

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Where the answers given satisfactorily explain the prosecution evidence, there can be no conviction : if they do not rebut the prosecution evidence, the Court will convict : but in any case the Court cannot supplement the prosecution evidence by selecting only the passages, which might corroborate the prosecution evidence and rejecting passages exonerating the accused : the *entire statement* should be considered.[9]

Under the Code of 1872 the statement of an accused person could be used only as *against* him. Under the corresponding Section of the Code of 1882 as well as under the present Section it can be used *for* or *against* him[10] in the same case, or, in a subsequent trial for a different offence.[11] It cannot, however, be used against any person *other* than the one who made it.[12]

As to the meaning of the words "taken into consideration" in Section 30 of the Evidence Act, *see* the undermentioned cases.[13]

24. Irrelevant answers.

In giving his answers, the accused must confine himself to relevant answers. The Judge can refuse to record irrelevant answers and may even prevent the making of such answers.[1]

25. Answers making defamatory statements.

It has been held by the High Courts of Allahabad[1] and Madras[2] that a defamatory statement made in answer to questions put by the Court under this Section will not render the accused liable to punishment. The High Court of

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(1904) 1 Cri L Jour 566 (568) : 27 Mad 238 (240), *Mohideen Abdul Kadir* v. *Emperor.*
(1911) 12 Cri L Jour 585 (587) : 36 Mad 457, *G. G. Jerimiah* v. *F. S. Vas.*
(1928) 1928 Oudh 373 (373) : 29 Cri L Jour 763, *Rameshwar* v. *Emperor.*
(1929) 1929 Sind 255 (256) : 1929 Cri Cas 683 : 24 Sind L R 10 : 30 Cri L Jour 1135, *Saleh* v. *Emperor.*
[See also (1916) 1916 Mad 851 (853) : 39 Mad 449: 16 Cri L Jour 294, *Subramania Mudaly* v. *Kuppammal.*]

9. (1929) 1929 All 1 (5) : 51 All 313 : 30 Cri L Jour 101, *Bhola Nath* v. *Emperor.*
(1933) 1933 All 401 (402) : 1933 Cri Cas 384 : 34 Cri L Jour 765, *Man Singh* v. *Emperor.*
(1894) 21 Cal 955 (976), *Wafadar Khan* v. *Empress.*
(1912) 13 Cri L Jour 195 (196) : 39 Cal 855, *Pika Bawa* v. *Emperor.*
(1869-1870) 5 Mad H C R App 4 (4).
(1911) 12 Cri L Jour 142 (142) : 9 Ind Cas 790 (Mad), *Kamakka* v. *Emperor.*
[See also (1932) 33 Cri L Jour 570 (571) : 138 Ind Cas 217 (Lah), *Faquir Mahomed* v. *Emperor.* Admissions must be taken as a whole.]

10. (1921) 1921 Pat 122 (122) : 22 Cri L Jour 433, *Baldeo Koeri* v. *Emperor.*
[See (1867) 7 Suth W R Cri 59 (60), *Queen* v. *Kallychurn Potial.* Admission of parties that they lived as man and wife coupled with evidence leads to inference that adultery must have been committed.
(1923) 1923 All 90 (91) : 45 All 166 : 24 Cri L Jour 6, *Deo Datt* v. *Emperor.* Contradictory statements of accused may be taken into consideration against the accused.]

11. (1921) 1921 Pat 122 (122) : 22 Cri L Jour 433, *Baldeo Koeri* v. *Emperor.*

12. (1870) 2 N W P H C R 336 (337), *The Queen* v. *Hurgobind.*
(1894) 21 Cal 955 (976), *Wafadar Khan* v. *Empress.*
(1869) 1869 Pun Re Cri No. 27, page 54 (55), *Crown* v. *Hossainee.*
(1878) 1878 Pun Re Cri No. 13, page 34 (36), *The Crown Prosecutor* v. *Jhaba.*

13. (1890) 15 Bom 66 (68), *Empress* v. *Khandia bin Pandu.*
(1893-1900) 1893-1900 Low Bur Rul 368 (368), *Nga Tha Nyan* v. *Queen Empress.*
(1886) Ratanlal 311 (312), *Queen Empress* v. *Bayaji.*
(1889) Ratanlal 456 (456), *Queen Empress* v. *Ganapabhat.*
(1866) 5 Suth W R Cri 1 (1), *Queen* v. *Suneechur.*

Note 24.

1. (1933) 1933 All 690 (695) : 1933 Cri Cas 1202 : 55 All 1040 : 34 Cri L Jour 967, *S. H. Jhabwala* v. *Emperor.*

Note 25.

1. (1927) 1927 All 707 (708) : 50 All 169 : 29 Cri L Jour 262, *Murli Pathak* v. *Emperor.*
2. (1909) 9 Cri L Jour 276 (277): 1 Ind Cas 248 (Mad), *In re Payini Chellaya.*

Bombay has, on the other hand, held, that he will render himself liable in such cases.[3]

26. Answers amounting to contempt of Court.

A statement which amounts to contempt of Court will render the accused liable to punishment.[1]

27. Answers by one accused if can be considered against co-accused.

It has already been seen that the answers given by the accused can be used only for or against *him* and not against others. There is no indication in the language of this Section that the answers given by one accused under this Section could be considered against his co-accused ; it can, however, under the provisions of Section 30 of the Evidence Act be so taken into consideration against him if the conditions of that Section are satisfied.[1] Where, however, each accused was examined in the absence of the other and convicted chiefly on the statements of the co-accused, it was held that the conviction could not be supported.[2]

28. Several accused—Each to be examined separately.

Where there are several accused in a case, it is incumbent on the Magistrate to examine each of them separately ; a joint statement of all the accused in a single paragraph is not authorised by the Section.[1] Where, after the Judge took an explanation from one of the accused persons as regards the nature of his defence and subsequently took another statement from a co-accused under this Section, it was held that he was entitled to do so.[2]

29. Accused's defence in general.

The nature of the defence should be ascertained not only from the statement of the accused but from the trend of the cross-examination of the prosecution witnesses and from the arguments of the accused's pleader at the close of the trial.[1]

An accused person is entitled to put forward any defence open to him, technical or otherwise, and to have the Court's judgment on it.[2] Nor is there anything in law to prevent him from setting up alternative and inconsistent defences,[3]

Statements held privileged.
(1912) 13 Cri L Jour 275 (282) : 36 Mad 216, *Potaraju Venkata Reddy* v. *Emperor.*

3. (1926) 1926 Bom 141 (143) : 50 Bom 162 : 27 Cri L Jour 423 (F B), *Bhai Santa* v. *Umrao Amir Malek.*

Note 26.

1. (1922) 1922 Bom 261 (264) : 46 Bom 973 : 23 Cri L Jour 325, *Emperor* v. *Venkatrao Rajerao Mudvedkar.*

Note 27.

1. (1930) 1930 Bom 354 (355, 356) : 1930 Cri Cas 786 : 54 Bom 531 : 31 Cri L Jour 1137, *William Cooper* v. *Emperor.*
(1931) 1931 Nag 169 (170) : 1931 Cri Cas 830 : 27 Nag L R 163 : 32 Cri L Jour 1222, *Ganpat* v. *Emperor.*
2. (1881) 7 Cal 65 (69), *Empress* v. *Chandranath Sirkar.*

Note 28.

1. (1931) 1931 Bom 132 (135) : 1931 Cri Cas 180 : 55 Bom 356 : 32 Cri L Jour 572, *Balkrishna Anant Hirlekar* v. *Emperor.*
(1914) 1914 Lah 42 (44) : 1913 Pun Re Cr No. 20 : 15 Cri L Jour 11, *Emperor* v. *Nanak Chand.*
(1928) 29 Cri L Jour 469 (469) : 109 Ind Cas 117 (Lah), *Girdhari Lal* v. *Emperor.*
(1926) 1926 Lah 154 (155) : 26 Cri L Jour 1418, *Fazal Karim* v. *Emperor.*
(1928) 29 Cri L Jour 469 (469) : 109 Ind Cas 117 (Lah), *Girdhari Lal* v. *Emperor.*
[But see (1925) 1925 Nag 403 (404) : 22 Nag L R 1 : 27 Cri L Jour 66, *Mahadeo Singh* v. *Emperor.* Co-accused not debarred from giving concerted statement.]
2. (1928) 1928 Cal 675 (677) : 55 Cal 858 : 29 Cri L Jour 1022, *Mahadeo Singh* v. *Emperor.*

Note 29.

1. (1930) 1930 Cal 442 (442, 443) : 1930 Cri Cas 750 : 31 Cri L Jour 1203, *Kuti* v. *Emperor.*
2. (1914) 1914 Cal 456 (459) : 41 Cal 350 : 15 Cri L Jour 385, *Ramesh Chandra Banerjee* v. *Emperor.*
3. (1918) 1918 All 189 (190) : 40 All 284 : 19 Cri L Jour 371, *Yusuf Hussain* v *Emperor.*

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though such defence may ordinarily weaken his case.[4]

It is open to an accused person to plead the right of private defence either specifically or in the alternative.[4a]

It is not the affair of the defence to explain or to supply gaps in the prosecution evidence.[5] Nor can the Court call upon the accused to frame a theory, particularly in a case of difficulty in which the theory of the prosecution is itself not clear.[5a] Where, however, a *prima facie* case is made out by the prosecution, it is the duty of the defence to rebut the presumption arising therefrom, by some tangible evidence.[6]

An accused can make admissions of *facts* at his trial which may relieve the prosecution from bringing evidence to prove such admitted facts: a plea of guilty is an extreme instance of such an admission and a decision may be based thereon.[7]

30. Court, if can ask accused to give thumb impressions.

Section 73 of the Evidence Act provides that the Court may direct any person present in Court to write any words or figures or to give his thumb impressions. Section 5 of the Identification of Prisoners' Act, 33 of 1920, also enables the Court to direct the measurements (which include thumb impressions) of any person to be taken for the purpose of any proceeding under the Code. It was held in the undermentioned cases,[1] that the taking of thumb impressions of accused persons is in the nature of a questioning of the accused for the purpose of eliciting incriminating statements from him, and that they are, therefore, prohibited by this Section. These decisions have not been followed by later decisions of the same Courts on the ground that Section 342 applies only to oral statements and has no application to the taking of thumb impressions and signatures.[2]

Where the accused refused to give his handwriting in a forgery case against him, it was held that an adverse inference can be drawn against him by reason of

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(1919) 1919 Cal 439 (441) : 20 Cri L Jour 661, *Afiruddi Chakdar* v. *Emperor*, *Alibi* or right of private defence.
(1927) 1927 Lah 710 (712) : 29 Cri L Jour 117, *Santa Singh* v. *Emperor*.
(1920) 1920 Pat 843 (843) : 21 Cri L Jour 799, *Faudi Keot* v. *Emperor*.
(1928) 1928 Rang 167 (167) : 30 Cri L Jour 239, *Abdul Aziz* v. *Fazal Rahman*.

4. (1923) 1923 Cal 717 (718) : 25 Cri L Jour 190, *Nagendra Chandra Dhar* v. *King-Emperor*.
(1927) 1927 Lah 710 (712) : 29 Cri L Jour 117, *Santa Singh* v. *Emperor*.

4a (1920) 1920 Pat 843 (843) : 21 Cri L Jour 799 (800), *Faudi Keot* v. *Emperor*.

5. (1914) 1914 Cal 456 (466) : 41 Cal 350 : 15 Cri L Jour 385, *Ramesh Chandra Banerjee* v. *Emperor*.

5a (1918) 1918 All 160 (166) : 19 Cri L Jour 935, *Surendra Nath Mukerjee* v. *Emperor*.
(1930) 1930 Mad W N 1211 (1215), *Pichumma Naidu* v. *Emperor*.
[See also (1894) Ratanlal 686 (686), *Queen-Empress* v. *Jethmal Narayan*.]

6. (1928) 1928 Cal 27 (40) : 29 Cri L Jour 49, *Hari Narayan Chandra* v. *Emperor*.
(1933) 1933 Cal 599 (600) : 1933 Cri Cas 963 : 34 Cri L Jour 1015, *Arman Ulla* v. *Jaimulla*.
(1928) 1928 Pat 100 (101) : 6 Pat 627 : 29 Cri L Jour 239, *Ghanshyam Singh* v. *Emperor*.
(1931) 1931 Pat 384 (386) : 1931 Cri Cas 912 : 10 Pat 590 : 33 Cri L Jour 111, *Lada Bhagat* v. *Emperor*.
(1927) 1927 Sind 85 (87) : 27 Cri L Jour 1265, *Bukshan* v. *Emperor*.

7. (1906) 4 Cri L Jour 471 (475) : 3 Low Bur R 208, *Abbas Ali* v. *Emperor*.

Note 30.

1. (1917) 1917 Low Bur 137 (139) : 17 Cri L Jour 316, *Maung Po Nyun* v. *Mutu Kurpen Chetty*.
(1922) 1922 Pat 73 (75) : 1 Pat 242 : 23 Cri L Jour 638, *Bazari Hajam* v. *King-Emperor*. New Act not referred to.
(1928) 1928 Pat 103 (104) : 6 Pat 623 : 28 Cri L Jour 1028, *Zohuri Sahu* v. *Emperor*.

2. (1928) 1928 Pat 129 (132) : 6 Pat 305 : 28 Cri L Jour 850, *Basgit Singh* v. *Emperor*.
(1924) 1924 Rang 115 (117) : 1 Rang 759 : 26 Cri L Jour 108 (F B), *King-Emperor* v. *Nga Tun Hlaing*.

such refusal.[3]

31. "No oath shall be administered to the accused"—Sub-section 4.

Under the Indian Law, a person cannot be administered an oath in any case in which he is an accused person.[1] In *Emperor* v. *Kazi Davood*,[2] the High Court of Bombay observed:—"It is repugnant to all principles of criminal law as administered in this country to compel a person to give evidence in the very matter in which he is accused, or is liable to be accused, and then to base the charge on such evidence, and at the trial of the accused, to use such evidence given on oath as a statement tending to prove the guilt of the accused."

The "accused" means the accused *then under trial* and under examination by the Court.[3] In other words he must be an accused in the enquiry or trial in

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3. (1932) 1932 Bom 406 (409): 1932 Cri Cas 572: 56 Bom 304: 33 Cri L Jour 666, *Emperor* v. *Ramrao Mangesh Burde*.

Note 31.

1. (1931) 1931 Lah 476 (478): 1931 Cri Cas 700: 12 Lah 635: 32 Cri L Jour 913, *In the matter of Khairatiram*.
(1906) 3 Cri L Jour 225 (226): 28 All 331, *Bindesri Singh* v. *Emperor*. False affidavit by accused—No prosecution for false evidence.
(1886) 5 Cal L R 574 (576), *In the matter of A. David*. Upon a joint trial for the same offences or for different offences in the same transaction, one accused is not a competent witness for or against the other.
(1919) 1919 Cal 1021 (1022): 45 Cal 720: 19 Cri L Jour 663, *Akhoy Kumar Mukerjee* v. *Emperor*.
(1931) 1931 Cal 341 (342): 1931 Cri Cas 405: 58 Cal 1214: 32 Cri L Jour 667, *Mahammad Yusuf* v. *Emperor*.
(1882) 5 C P L R 1 (2), *Empress* v. *Shakur*.
(1929) 1929 Pat 145 (148): 30 Cri L Jour 646 (F B), *Indra Chandra Narang* v. *Emperor*.
(1900-02) 1 Low Bur R 59 (60), *Queen-Empress* v. *Nga Saw*. Accused cannot be converted into a witness, when no pardon has been granted.
(1919) 1919 Upp Bur 31 (32): 3 Upp Bur Rul 115: 20 Cri L Jour 341, *Nga Ngwe Gyaw* v. *Emperor*. Co-accused tried jointly at one trial.
(1911) 12 Cri L Jour 577 (578): 12 Ind Cas 841 (Rang), *Emperor* v. *Lal Meah*. Solemn affirmation of person in the position of accused is bad.
(1902) 26 Mad 116 (118), *In re, Paree Kunhammad*.
(1910) 11 Cri L Jour 537 (537): 33 All 163, *Mattan* v. *Emperor*.
(1896) 19 Mad 209 (210), *Queen-Empress* v. *Bhashyam Chetti*. Affidavit in revision by accused is not admissible.
[See also (1880) 1880 Pun Re Cr No. 3, page (9), *Raj Mal* v. *Empress*. The administering of an oath or affirmation to an accused person, although prohibited does not render the statement inadmissible either against him or against a co-accused at the trial.
(1902) 1902 Pun Re Cr No. 12, pages (33, 35, 36), *Nabi Baksh* v. *Emperor*.]
[But see (1866) 6 Suth W R Cr 91 (91), *Queen* v. *Ashruff Sheik*. Persons jointly tried—No community of interest — Any person jointly indicted is a competent witness against others.]

2. (1926) 1926 Bom 144 (146): 50 Bom 56: 27 Cri L Jour 433, *Emperor* v. *Kazi Dawood Kazi*. Statement of accused on oath before Coroner at inquest not admissible in evidence.
[See also (1908) 7 Cri L Jour 131 (131) (Mad), *Anthony* v. *Emperor*. Conviction based on the deposition of the accused taken on solemn affirmation is bad.]
[But see (1926) 1926 Bom 151 (152): 50 Bom 111: 27 Cri L Jour 466, *Emperor* v. *Ramnath Mahabir*. Statement of accused on oath at Coroner's inquest is admissible at his trial.]

3. (1898) 23 Bom 213 (219), *Empress* v. *Durant*.
(1902) 15 C P L R 112 (114), *Emperor* v. *Vinayak Jageshwar*.
(1916) 1916 Bom 229 (231, 235): 17 Cri L Jour 256, *Govind Balvant Laghate* v. *Emperor*.
(1919) 1919 Cal 1021 (1022): 45 Cal 720: 19 Cri L Jour 663, *Akhoy Kumar Mukerjee* v. *Emperor*.
(1920) 1920 Nag 255 (256): 16 Nag L R 9: 21 Cri L Jour 769, *Govinda Sambuji Mali* v. *Emperor*.
(1925) 1925 Oudh 227 (227): 25 Cri L Jour 1194, *Makhdum* v. *Emperor*. Accused in case before Sub-Magistrate making false statements in application before District Magistrate not protected.
(1925) 1925 Rang 122 (125): 3 Rang 11: 26 Cri L Jour 492, *A. V. Joseph* v. *King-Emperor*. Co-accused tried separately is a competent witness

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which he is presented as a witness.[4] It cannot include an accused over whom the Court is exercising jurisdiction in *another* inquiry or trial.[5] Thus *A*, against whom an enquiry or trial is pending in Court *X*, can file an affidavit in the High Court in support of an application for transfer under Section 526[6] or for leave to appeal under Section 449, Clause (c)[7] inasmuch as such application is a different proceeding from that in which he is an accused person.

The word "accused" cannot include any person who at the time he is administered an oath, is not on his trial in any proceeding.[8] Thus where an accused person is pardoned under Section 337,[9] or is discharged,[10] he ceases to be an accused. Where several persons were arrested in the course of a police investigation and the police discharged one of them and made him a witness in the trial started against the others, it was held that he was a competent witness even though his discharge by the *police* was illegal.[11] Where *A* and *B* are charged with theft but process is issued by the Magistrate only against *A*,

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for the other.

(1892) 16 Bom 661 (668), *Queen-Empress* v. *Mona Puna.*

(1896) 23 Cal 493 (494), *Jhoja Singh* v. *Queen-Empress.*

(1901) 28 Cal 709 (714), *Lalit Mohan Moitra* v. *Surja Kanta Acharjee.*

(1920) 1920 Nag 255 (257): 16 Nag L R 9: 21 Cri L Jour 769, *Govinda Sambhuji Mali* v. *Emperor.*

(1935) 1935 Bom 186 (188): 1935 Cri Cas 487: 59 Bom 355: 36 Cri L Jour 937, *Keshav Vasudeo Kortikar* v. *Emperor.* Persons not sent up for trial —Mere inclusion of his name in police charge sheet does not make him accused.

4. (1920) 1920 Nag 255 (256): 16 Nag L R 9: 21 Cri L Jour 769, *Govinda Sambhuji Mali* v. *Emperor.*

5. [See the cases cited in Foot-Note (3).]
See also the following cases:—

(1898) 20 All 426 (427), *Queen-Empress* v. *Tirbeni Sahai.*

(1908) 7 Cri L Jour 95 (102): 35 Cal 161, *Bepin Chandra Pal* v. *Emperor.*

(1919) 1919 Cal 1021 (1022): 45 Cal 720: 19 Cri L Jour 663, *Akhoy Kumar Mukerjee* v. *Emperor.*

(1928) 1928 Cal 557 (559): 56 Cal 400: 30 Cri L Jour 818, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Murray.*

(1931) 1931 Cal 341 (342): 1931 Cri Cas 405: 58 Cal 1214: 32 Cri L Jour 667, *Muhammad Yusuf* v. *Emperor.*

(1887) 1887 Pun Re Cr No. 38, page (90), *Mal Singh* v. *The Empress.*
[See also (1895) Ratanlal 776 (777), *Queen-Empress* v. *Ramachandra Sawairam.*]

6. (1933) 1933 Nag 201 (202): 1933 Cri Cas 797: 29 Nag L R 338: 34 Cri L Jour 1035, *Sada Sheo Suryabhanji Kunbi* v. *Emperor.* S. 342, sub-s. (4), applies only to the conduct of trials and to the examination of the accused at the trial and does not apply to any proceeding outside the trial, such as an application to the High Court for transfer.

(1928) 1928 All 182 (184): 29 Cri L Jour 336, *Baddu Khan* v. *Emperor.*

(1922) 1922 Lah 113 (113): 3 Lah 46: 23 Cri L Jour 399, *Gulam Muhammad* v. *Emperor.*

(1925) 1925 Lah 312 (313, 314): 6 Lah 34: 27 Cri L Jour 98, *Emperor* v. *Pir Qadir Baksh Shah.*

(1926) 1926 Lah 12 (13): 26 Cri L Jour 1369, *Mt. Allah Wasai* v. *Emperor.*

(1909) 10 Cri L Jour 509 (513): 12 Oudh Cas 308, *Tribhavan* v. *Emperor.*

(1930) 1930 Oudh Cas 62 (63): 1930 Cri Cas 158: 31 Cri L Jour 600, *Prag Datt* v. *Emperor.*

(1908) 8 Cri L Jour 378 (379): 1 Sind L R 124, *Imperator* v. *Khan Mahommed.* Statements in affidavit not made to questions put, not protected by Clause 2.
[But see (1896) 19 Mad 209 (210), *Queen-Empress* v. *Bhashyam Chetti.* Affidavit in revision is not admissible.]

7. (1927) 1927 Cal 307 (308): 54 Cal 52: 28 Cri L Jour 481, *Gallagher* v. *Emperor.*

8. (1920) 1920 Nag 255 (256): 16 Nag L R 9: 21 Cri L Jour 769, *Govinda Sambhuji Mali* v. *Emperor.* 1887 Pun Re Cr No. 38, page (85), relied on.
[See also (1868) 5 Bom H C R Crown Cas 1 (2), *Reg* v. *Narayan Sundar.*]

9. (1904) 1 Cri L Jour 1066 (1068): 1904 Pun Re Cr No. 21, *Sardar Khan* v. *Emperor.*

(1915) 1915 Sind 43 (45): 9 Sind L R 43: 16 Cri L Jour 632, *Harumal Paramanand* v. *Emperor.*

10. (1867) 7 Suth W R Cr 44 (45), *Queen* v. *Behary Lall Bose.*

11. (1892) 16 Bom 661 (668), *Queen* v. *Mona Puna.*

B is a competent witness in the trial against *A*.[12] An accused person who has not been *legally* granted a pardon[13] or who has not been legally discharged by the Magistrate[13a] does not cease to be an accused person. A pardon granted by the Government after the commencement of the trial is not one under Section 337 and he does not cease to be an "accused" person. His evidence is, therefore, not admissible against his co-accused.[13b]

Where an accused person is *convicted*, he ceases to be an accused person.[14] Where therefore one of several co-accused is convicted on his plea of guilty he becomes a competent witness against others who were originally jointly put up for trial with him.[15] It was also held in the undermentioned case[15a] that where an accused person *pleads guilty*, the incompetency of being a witness is removed, though he is convicted on such plea some time later.

Where a prosecution is withdrawn against one of several accused under Section 494, he ceases to be an accused person and is a competent witness to whom an oath can be administered in further proceedings against others.[16]

A criminal appeal is a *continuation* of the criminal case and the appellant

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[See also (1909) 9 Cri L Jour 370 (374): 4 Low Bur Rul 362, *Aung Min* v. *King-Emperor*.]

12. (1882) 10 Cal L R 553 (554), *Mohesh Chunder Kopali* v. *Mohesh Chunder Dass*.
(1917) 1917 Cal 261 (262): 17 Cri L Jour 428, *Emperor* v. *Nanda Gopal Roy*.
[See also (1923) 1923 Lah 666 (667): 25 Cri L Jour 520, *Emperor* v. *Darya Singh*.]

13. (1903) 4 Cri L Jour 282 (283): 1906 Pun Re Cr No. 9, *Ailadad* v. *Emperor*.
(1879) 2 All 260 (262), *Empress of India* v. *Ashgir Ali*.
(1866) 3 Bom H C R Crown Cas 59 (60), *Reg* v. *Remedios*.
(1877) 1 Bom 610 (618), *Reg* v. *Hanmanta*.
(1920) 1920 Lah 215 (216): 1 Lah 102: 21 Cri L Jour 599, *Mahandu* v. *Emperor*. No formal order of discharge under S. 337.
(1906) 4 Cri L Jour 44 (46) (Cal), *Paban Singh* v. *Emperor*. Conditional pardon invalid—Not a competent witness.

13a (1889) Ratanlal 461 (461), *Queen-Empress* v. *Lilladhur*.

13b (1906) 4 Cri L Jour 282 (283): 1906 Pun Re Cr No. 9, *Alladad* v. *Emperor*.
(1879) 2 All 260 (262), *Empress of India* v. *Ashgir Ali*.
(1902) 1902 Pun L R 7 (p. 29), *Allahdad* v. *Emperor*.

14. (1901) 3 Bom L R 437 (438), *Emperor* v. *Annya*.
(1931) 1931 Cal 341 (343): 1931 Cri Cas 405: 58 Cal 1214: 32 Cri L Jour 667, *Muhammad Yusuf* v. *Emperor*.
(1878) 1878 Pun Re Cr No. 23, page (61), *Muhammad Ali* v. *Crown*.
[See also (1875) 24 Suth W R Cr 8 (9), *Queen* v. *Ram Rutton Mookerjee*.]

15. (1901) 3 Bom L R 437 (438), *Emperor* v. *Annya*.
[See (1892) 2 Weir 520 (521), *In re Marudaimuthu Kavirayan*. Such evidence stands on a different footing from that of an approver or unconvicted accomplice. The Judge is justified in saying that the jury may look to the evidence of such person for confirmation of the story told by an approver.]

15a (1900) 10 Mad L Jour 147 (160) (F B), *N. A. Subramaniya Aiyar* v. *Queen-Empress*.

16. (1910) 11 Cri L Jour 21 (22): 5 Ind Cas 21 (All), *Muhammad Nur* v. *Emperor*.
(1918) 1918 All 111 (113): 40 All 416: 19 Cri L Jour 401, *Abdul Latif Khan* v. *Emperor*.
(1900) 25 Bom 422 (428), *Queen-Empress* v. *Hossein Haji*.
(1916) 1916 Bom 229 (235): 17 Cri L Jour 256, *Govind Balvant Laghate* v. *Emperor*.
(1907) 5 Cri L Jour 142 (146) (Cal), *Deputy Legal Remembrancer* v. *Banu Singh*.
(1915) 1915 Cal 184 (184): 15 Cri L Jour 693, *Sherati Sheikh* alias *Sherati Sarcar* v. *Emperor*.
(1920) 1920 Cal 87 (87): 47 Cal 154: 21 Cri L Jour 386, *Kasem Ali* v. *Emperor*.
(1920) 1920 Cal 300 (301): 46 Cal 700: 21 Cri L Jour 5, *Sital Singh* v. *Emperor*.
(1929) 1929 Cal 319 (321): 56 Cal 1023: 31 Cri L Jour 315, *G. V. Raman* v. *Emperor*.
(1933) 1933 Cal 148 (149): 1933 Cri Cas 225: 34 Cri L Jour 675, *Sudam Chandra Bag* v. *Emperor*.
(1924) 1924 Lah 235 (235): 24 Cri L Jour 696, *Chhaprolia* v. *Emperor*.
(1926) 1926 Nag 426 (428): 27 Cri L Jour 807, *Mahadeo* v. *King-Emperor*.
[See also (1906) 4 Cri L Jour 145 (149): 33 Cal 1353, *Banu Singh* v. *Emperor*.]

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has the privilege of the accused and cannot be administered an oath.[17]

A Magistrate should not put persons on oath unless he is satisfied of his authority to do so. Where he examines persons against whom a complaint is laid before issue of process, the procedure is irregular and illegal.[18]

Section 10 of the Bombay Gambling Act, 1887 empowers the Magistrate to examine as witnesses any of the persons arrested and brought before him in accordance with Section 6 (b) thereof. This procedure is a special procedure which overrides the general law enacted in this Section.[19] A contrary view was, however, expressed in the undermentioned case.[20]

In the undermentioned case,[21] it was held that a proceeding for the forfeiture of recognizances is in the nature of a civil proceeding and that the person proceeded against can give evidence on oath on his own behalf.

32. Examination of accused in cross-case as a witness.

Where there is a case and a counter or cross-case both pending, it was held in the undermentioned cases,[1] that the examination of the accused in the one case as witness in the other constituted a grave irregularity as it was impossible to assume in such a case that the evidence so given could be impartial. This view, it is submitted, cannot be accepted as correct if it means that such examination is not authorised by the law. The said view has not been followed in later cases.[2] In any case if the accused is not prejudiced by the course adopted, it will not vitiate the trial.[3]

See also the undermentioned cases.[4]

32a. Applicability of Section to proceedings under Section 14 of the Legal Practitioners Act.

The High Court of Madras has held that a pleader against whom proceedings are taken under Section 14 of the Legal Practitioners Act, is an *accused* person and he cannot be solemnly affirmed.[1] The High Court of Calcutta has, in the undermentioned case,[2] taken a contrary view.

32b. Applicability to proceedings under Section 145.

None of the parties litigating under Section 145 can be called an accused

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17. (1889) 12 Mad 451 (453), *Queen-Empress* v. *Subbayya.*
(1926) 1926 Lah 309 (309) : 7 Lah 148 : 27 Cri L Jour 463, *Dulla* v. *Emperor.*
18. (1896) Ratanlal 844 (846), *Queen-Empress* v. *Shidlingappa.*
(1906) 4 Cri L Jour 165 (167) (Bom), *In re Trimbak Balaji Mahajan.*
19. (1914) 1914 Sind 45 (46) : 8 Sind L R 309 : 16 Cri L Jour 447, *Liladhar Unersi* v. *Emperor.*
20. (1915) 1915 Bom 123 (124) : 17 Cri L Jour 2, *Babilal Balwant* v. *Emperor.*
21. (1871) 15 Suth W R Cr 87 (88), *In re Jehan Buksh.*

Note 32.

1. (1886) 14 Cal 358 (359), *Bachu Mullah* v. *Sia Ram Singh.*
(1880) 6 Cal 96 (102), *Hoosein Buksh* v. *Empress.* Court is not a Court of inquisition.
(1883) 13 Cal L R 275 (278), *Chakowri* v. *Moti.*
2. (1904) 1 Cri L Jour 199 (204) (Cal), *Sahadev Ahir* v. *Emperor.*
(1892) 20 Cal 537 (548, 549), *Queen-Empress* v. *Chandra Bhinya.*
(1928) 1928 Cal 557 (559) : 56 Cal 400 : 30 Cri L Jour 818, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Murray.*
3. (1904) 1 Cri L Jour 199 (204) (Cal), *Sahadev Ahir* v. *Emperor.*
(1928) 1928 Cal 557 (559) : 56 Cal 400 : 30 Cri L Jour 818, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Murray.*
4. (1925) 1925 Cal 1260 (1262) : 26 Cri L Jour 1615, *Makhan Mapa* v. *Monindra Nath Bose.*
[See also (1916) 1916 Low Bur 20 (20) : 17 Cri L Jour 503, *Ram Sarup* v. *Emperor.*]

Note 32a.

1. (1883) 6 Mad 252 (253), *Kotha Subba Chetti* v. *Queen.*
2. (1922) 1922 Cal 515 (529) : 49 Cal 732 : 24 Cri L Jour 33, *Emperor* v. *Rajani Kanta Bose.* Proceedings under this Section are quasi-criminal proceedings.

person and therefore they can be examined as witnesses in the case.[1]

33. Examination of accused—How recorded.—*See* Section 364, *infra*.

34. Destruction of record—Proof of Examination.

Where the records have been destroyed and, in his explanation the Magistrate states that the accused was examined under this Section, his statement must be accepted.[1]

35. Non-compliance with the Section—Effect of.

There is a conflict of opinion as to the effect of a non-compliance with the provisions of the Section, one set of cases holding that such a non-compliance is one which vitiates the trial.[1] This view is based upon the observation of their

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Note 32b.

1. (1925) 1925 Oudh 286 (286): 26 Cri L Jour 70, *Choudhuri Mohammad Ayab* v. *Choudhury Sarfaraz Ahmad.*

Note 34.

1. (1929) 1929 Cal 406 (406): 1929 Cri Cas 30: 56 Cal 1067: 30 Cri L Jour 526, *Sadagar Chaudhuri* v. *Emperor.*

Note 35.

1. *No examination made after close of prosecution evidence:—*
(1915) 1915 Bom 221 (221): 16 Cri L Jour 765, *Basapa Ningapa* v. *Emperor.*
(1933) 1933 Cal 347 (348): 1933 Cri Cas 419: 34 Cri L Jour 549, *Hoogly Chinsura Municipality* v. *Keshab Chandra Pal.*
(1926) 1926 Lah 667 (668): 27 Cri L Jour 1000, *Mr. Demello* v. *Mrs. Demello.*
(1907) 5 Cri L Jour 332 (333) (Bom), *Emperor* v. *Savalya Atma Pastya.* Non-compliance of this mandatory provision raises a presumption of prejudice,
(1928) 1928 Lah 382 (386): 30 Cri L Jour 18, *M. L. Pritchard* v. *Emperor.*
(1922) 1922 Mad 512 (514): 45 Mad 820: 24 Cri L Jour 124, *Marudamuthu Vannian* v. *Emperor.*
(1931) 1931 Mad 241 (241): 1931 Cri Cas 361: 32 Cri L Jour 757, *Nataraja Mudaliar* v. *Devasigamani Mudaiar.* Provision is mandatory—Examination of prosecution witness after examination of accused—Latter must again be examined.
(1921) 1921 Bom 370 (371): 23 Cri L Jour 21, *Emperor* v. *Rustomji Mancherji.* Non-examination in summons case.
(1921) 1921 Bom 374 (376, 377): 45 Bom 672: 22 Cri L Jour 17, *G. S. Fernandes* v. *Emperor.*
(1922) 1922 Bom 290 (291): 46 Bom 441: 23 Cri L Jour 45, *Gulabjap* v. *Emperor.*
(1925) 1925 Bom 170 (172): 50 Bom 42: 26 Cri L Jour 690, *Emperor* v. *Nathu Kasthurchand Marwadi.* Accused examined before the close of prosecution evidence but not after.
(1926) 1926 Bom 57 (58): 50 Bom 34: 27 Cri L Jour 165, *B. N. Gamadia* v. *Emperor.* Non-compliance constitutes illegality—Consent of accused does not affect.
(1928) 1928 Bom 140 (141): 29 Cri L Jour 535, *Emperor* v. *Bhau Dharma.* Examination of witnesses after examination of accused—Accused not further examined subsequently.
(1921) 1921 Cal 605 (606): 25 Cri L Jour 524, *Kashi Pramanick* v. *Damu Pramanick.* Proper course is to remit the case for re-trial.
(1923) 1923 Cal 470 (482): 50 Cal 518: 24 Cri L Jour 248, *Promotha Nath Mukhopadhya* v. *King-Emperor.*
(1924) 1924 Cal 975 (976): 51 Cal 924: 26 Cri L Jour 15, *Remembrancer of Legal Affairs, Bengal* v. *Satish Chandra Roy.*
(1924) 1924 Cal 153 (153): 25 Cri L Jour 460, *Sailendra Chandra Singh* v. *The Crown.* Re-trial should be ordered.
(1925) 1925 Cal 574 (575): 24 Cri L Jour 943, *Hamid Ali* v. *Sri Kissen Gosain.*
(1928) 29 Cri L Jour 382 (383): 108 Ind Cas 381 (Lah), *Baz Khan* v. *Emperor.*
(1934) 36 Cri L Jour 407 (1) (407): 153 Ind Cas 445 (Lah), *Muhammad Din* v. *Emperor.* Framing of charge — Recording of fresh prosecution evidence after framing charge—Statement of accused, necessity of recording after evidence—Omission to do so is not curable by S. 537.
(1918) 1918 Lah 348 (348): 1918 Pun Re Cri No. 1: 19 Cri L Jour 280, *Ghulla* v. *Emperor.* Omission to perform such a duty must be deemed to have prejudiced seriously the accused and necessitates a re-trial.
(1922) 1922 Lah 45 (47): 23 Cri L Jour 154, *Haji Muhammad Baksh* v. *Emperor.*
(1924) 1924 Lah 734 (737); 25 Cri L Jour 1020, *Nanak Chand* v. *Emperor.*
(1925) 1925 Lah 288 (288): 27 Cri L Jour 87, *Ghaza Ali* v. *King-Emperor.* Questioning accused is mandatory.
(1926) 1926 Lah 51 (52): 26 Cri L Jour 1370, *Muhammad Sadiq* v. *Emperor.*

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(1926) 1926 Lah 551 (552) : 7 Lah 564 : 27 Cri L Jour 1007, *Lachhman Singh* v. *Emperor.*
(1926) 1926 Lah 683 (683) : 27 Cri L Jour 1023, *Ismail* v. *Emperor.*
(1926) 1926 Lah 684 (685) : 27 Cri L Jour 1021, *Fazal Ahmad* v. *Emperor.*
(1927) 1927 Lah 720 (720) : 29 Cri L Jour 125, *Akhtar Mohammad* v. *Emperor.*
(1928) 1928 Lah 230 (231) : 29 Cri L Jour 905, *Emperor* v. *Gian Singh.*
(1928) 1928 Lah 382 (386) : 30 Cri L Jour 18, *M. L. Pritchard* v. *Emperor.*
(1934) 1934 Lah 96 (96) : 1934 Cri Cas 175 : 15 Lah 60 : 35 Cri L Jour 1394, *Karam Din* v. *Emperor.*
(1934) 1934 Lah 415 (415) : 1934 Cri Cas 642: 35 Cri L Jour 1447, *Amir* v. *Emperor.*
(1934) 1934 Lah 631 (632) : 1934 Cri Cas 966 : 36 Cri L Jour 401, *Anand Prakash* v. *Emperor.*
(1934) 1934 Nag 213 (215) : 1934 Cri Cas 984 : 31 Nag L R 49 : 35 Cri L Jour 1457, *Hari Krishnaji Ghate* v. *Emperor.* Magistrate not examining accused when written statement filed.
(1921) 22 Cri L Jour 598 (598) : 62 Ind Cas 870 (870) (Pat), *Tilak Gope* v. *Bhayaram.*
(1920) 1920 Pat 471 (479) : 21 Cri L Jour 705, *Raghu Bhumij* v. *Emperor.*
(1920) 1920 Pat 729 (730) : 21 Cri L Jour 793, *Suraj Pandey* v. *Emperor.*
(1921) 1921 Pat 11 (12) : 22 Cri L Jour 427, *Gulam Rasul* v. *King-Emperor.*
(1921) 1921 Pat 109 (114) : 22 Cri L Jour 417. *Fatu Santal* v. *King-Emperor.*
(1922) 1922 Pat 5 (6) : 23 Cri L Jour 114, *Balkesar Singh* v. *King-Emperor.*
(1922) 1922 Pat 212 (213), *Ram Nandan Singh* v. *King-Emperor.*
(1922) 1922 Pat 296 (297) : 23 Cri L Jour 440, *Parameshwar Lal Mitter* v. *Emperor.*
(1922) 1922 Pat 299 (299): 22 Cri L Jour 259, *Rameshwar Singh* v. *Emperor.* Accused examined, before evidence for prosecution closed.
(1923) 1923 Pat 292 (293) : 24 Cri L Jour 311, *Baijnath Sahay* v. *King-Emperor.*
(1925) 1925 Pat 723 (724) : 26 Cri L Jour 927, *Rameshwar Singh* v. *Emperor.*
(1926) 1926 Pat 29 (29): 26 Cri L Jour 1289, *Ram Charan Singh* v. *Emperor.*
(1934) 1934 Pesh 75 (75): 1934 Cri Cas 1111: 35 Cri L Jour 1361, *Anar Gul* v. *Emperor.*
(1918) 1918 Upp Bur 43 (44) : 3 Upp Bur Rul 18 : 18 Cri L Jour 944, *Emperor* v. *Nga Po Mya.*
(1923) 1923 Rang 132 (133) : 4 Upp Bur Rul 127 : 25 Cri L Jour 319, *King-Emperor* v. *Nga Sein.*
(1927) 1927 Rang 19 (19) : 4 Rang 361 : 27 Cri L Jour 1364, *King-Emperor* v. *Nga Po Byu.* Re-trial ordered even though accused had been acquitted.
(1926) 1926 Sind 1 (3) : 20 Sind L R 34 : 26 Cri L Jour 1554 (F B), *Emperor* v. *Nabu.*
(1926) 1926 Sind 281 (282) : 19 Sind L R 121 : 27 Cri L Jour 1290, *The Crown* v. *Pario.*
(1905) 1 Cri L Jour 737 (737) : 2 Low Bur Rul 239, *King-Emperor* v. *Kyan Baw.*
[See also (1890) 2 Weir 405 (407), *In re Raja Padaiyachi.* Not a mere error of form—But where no prejudice High Court will not interfere.]

Examination, after prosecution witnesses were examined and before their cross-examination:—

(1923) 1923 Cal 196 (198) : 50 Cal 223 : 24 Cri L Jour 198, *Mahazur Ali* v. *Emperor.*
(1924) 1924 Nag 51 (52) : 25 Cri L Jour 713, *Krishnappa* v. *Emperor.*
(1928) 1928 Nag 162 (164) : 29 Cri L Jour 475, *Mahommad Hayat Khan* v. *Emperor.* Failure to examine after second cross-examination of re-called witnesses.
(1933) 1933 Nag 192 (193): 1933 Cri Cas 786 : 34 Cri L Jour 340, *Emperor* v. *Amirbi.* Omission to examine accused after second cross-examination of re-called witnesses.
(1929) 1929 Bom 447 (450): 1929 Cri Cas 559 : 31 Cri L Jour 402, *Emperor* v. *Genu Gopal.*
(1931) 32 Cri L Jour 623(1) (623): 130 Ind Cas 845(Cal), *Moharrum Muhammad* v. *Emperor.* Statement after examination and before cross-examination of prosecution witnesses.
(1923) 1923 Cal 164 (164): 49 Cal 1075 : 24 Cri L Jour 3, *Gulzari Lal* v. *Emperor.* Accused examined after the examination-in-chief of some of the prosecution witnesses, but not examined again after another witness for the prosecution had been examined after the cross-examination of the previous witnesses.
(1923) 1923 Cal 668 (668) : 50 Cal 308 : 25 Cri L Jour 799, *Jummon Christian* v. *Emperor.* Examination of accused after examination-in-chief of the prosecution witnesses is not sufficient.
(1924) 1924 Cal 182 (183): 25 Cri L Jour 289, *Haro Nath Malo* v. *Ala Bux.* Examination before cross-examination of prosecution witnesses.
(1934) 1934 Lah 648 (1) (648) : 1934 Cri Cas 972 : 36 Cri L Jour 468, *Kundan Lal* v. *Emperor.* Second cross-examination.
(1934) 1934 Oudh 457 (459) : 1934 Cri Cas 1308 : 35 Cri L Jour 1417, *Onkar*

Lordships of the Privy Council in *Subramania Ayyar* v. *King-Emperor*[2] to the following effect :

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase, as irregularity, is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment."

In the undermentioned cases,[3] a contrary view has been expressed, namely that a non-compliance with the Section does not vitiate the trial unless accused

Singh v. *Emperor*.

(1922) 1922 Pat 158 (160): 22 Cri L Jour 697, *Mitarjit Singh* v. *King-Emperor*.

(1925) 1925 Rang 363 (364): 27 Cri L Jour 336, *Ah. Khaung* v. *King Emperor*.

(1927) 1927 Sind 175 (176): 21 Sind L R 331: 28 Cri L Jour 417, *Motankhan* v. *Emperor*.

Asking general questions:—

(1925) 1925 Pat 342 (344): 26 Cri L Jour 716, *Durga Ram* v. *Emperor*. 1922 Pat 388 dissented from.

(1921) 1921 Mad 679 (681): 23 Cri L Jour 697, *Nainamalai Konan, In re*.

(1918) 1918 Nag 143 (146): 20 Cri L Jour 12, *Mt. Tani* v. *Emperor*. Mandatory — Non-compliance with—Trial vitiated.

(1924) 1924 Nag 301 (304, 307): 25 Cri L Jour 417, *Udhao Patel* v. *King-Emperor*. General questioning illegal.

Taking joint statement from several accused:—

(1931) 1931 Bom 132 (135): 55 Bom 356: 32 Cri L Jour 572: 1931 Cri Cas 180, *Balkrishna Anant Hirlekar* v. *Emperor*.

(1928) 29 Cri L Jour 469 (469): 109 Ind Cas 117 (Lah), *Girdhari Lal* v. *Emperor*. Statements of accused recorded jointly—Illegality vitiating trial.

(1926) 1926 Lah 154 (155): 26 Cri L Jour 1418, *Fazal Karim* v. *Emperor*. Taking joint statement of several accused.

Examination after the defence began :—

(1925) 1925 Cal 480 (480): 51 Cal 933: 26 Cri L Jour 261, *Surendra Lal Shahu* v. *Isamaddi*.

2. (1902) 25 Mad 61 (97) (P C), *Subramania Ayyar* v. *King-Emperor*.

3. *Failure to examine at all*:—

(1926) 27 Cri L Jour 719(2) (720): 94 Ind Cas 911 (912) (All), *Rammu* v. *Emperor*. Examination after some only of the prosecution witnesses were examined—No further examination after *all* the witnesses were examined.

(1924) 1924 All 763 (763): 26 Cri L Jour 132, *Ganga Sahai* v. *King-Emperor*.

(1935) 1935 All 217 (218): 1935 Cri Cas 260: 36 Cri L Jour 1290, *Sia Ram* v. *Emperor*. Summary trial—Mere fact, that statement of accused has not been recorded, is not fatal.

(1892) Ratanlal 625 (625), *Queen Empress* v. *Manchi*.

(1924) 1924 Oudh 111 (112): 24 Cri L Jour 661, *Nageshar Prasad* v. *Emperor*.

(1925) 1925 Oudh 491 (491): 26 Cri L Jour 655, *Emperor* v. *Sheopal*.

(1926) 1926 Oudh 424 (425): 27 Cri L Jour 852, *Girdhari Lal* v. *King-Emperor*. Omission, to examine an accused under S. 342, Cr. P. C., in a warrant case tried summarily not prejudicing the accused, is covered by the provisions of S. 537 of the Code.

(1922) 1922 Pat 388 (389): 1 Pat 31: 23 Cri L Jour 703, *Mir Tilawan* v. *Emperor*.

(1925) 1925 Pat 414 (417): 4 Pat 488: 26 Cri L Jour 811, *Saiyid Mohiuddin* v. *Emperor*.

(1929) 1929 Pat 64 (64): 29 Cri L Jour 771, *Sheodatt Roy* v. *Emperor*. Absence of examination of accused under S. 342 will not vitiate trial where no prejudice is caused.

(1932) 1932 Rang 190 (192): 1932 Cri Cas 932: 10 Rang 511: 34 Cri L Jour 121 (F B), *Emperor* v. *Nga Po Min*.

(1934) 1934 All 389 (390): 1934 Cri Cas 465: 35 Cri L Jour 784, *Hikmat Ali* v. *Emperor*. Where there is prejudice, it will vitiate trial.

[See also (1921) 1921 Cal 269 (270): 23 Cri L Jour 41, *Gangadhar Goala* v. *Reginald William Lemon Reed*.

(1885) 2 Weir 405 (405), *In the matter of Gandi Tataiya* alias *Venkaiya*. Assumed.

(1926) 1926 Bom 231 (232): 50 Bom 174: 27 Cri L Jour 1335, *Emperor* v. *Harjivan Valji*. Accused putting in written statement on questioning by Magistrate—Omission to orally examine is not illegality.

(1919) 1919 Cal 696 (700): 46 Cal 411: 20 Cri L Jour 24, *Ah Foong Chinaman* v. *Emperor*.]

Examination before the close of prosecution evidence:—

(1923) 1923 All 81 (2) (82): 45 All 124: 24 Cri L Jour 67, *Bechu Chaube* v. *King-Emperor*. Examination of witness after recording statement.

(1926) 1926 All 358 (358): 27 Cri L Jour 405, *Kacha Mal* v. *Emperor*.

(1927) 1927 All 475 (476): 49 All 551: 28 Cri L Jour 399, *Sudaman* v. *Emperor*.

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has been prejudiced by the procedure adopted. In *Abdul Rahman* v. *King-Emperor*[4] which was a case arising under Section 360 of the Code, their Lordships of the Privy Council distinguished *Subramania Ayyar's* case on the ground that in that case, the procedure adopted was one which the Code *positively prohibited*, and held that an omission or irregularity in the case of other provisions of the Code, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction. It is submitted that unless the provisions of this Section are construed as conveying the positive prohibition, the cases holding that a non-compliance, *ipso facto* vitiates conviction, require re-consideration.

Where the non-compliance with the Section is held to vitiate the trial whether by reason of prejudice to the accused or independently of any prejudice, ordinarily the proper course is to order a re-trial from the stage at which the provisions of this Section were not complied with.[5] In other words the

(1928) 1928 All 222 (227): 30 Cri L Jour 203, *Emperor* v. *Jhabbar Mal.*
(1924) 1924 Lah 84 (88): 4 Lah 61: 25 Cri L Jour 801, *R. A. Byrne* v. *The Crown.*
(1925) 1925 Oudh 422 (423): 28 Oudh Cas 130: 26 Cri L Jour 1301, *Emperor* v. *Brij Behari.* Non-examination after second cross-examination.
(1925) 1925 Oudh 603 (604): 26 Cri L Jour 1374, *Khuman Singh* v. *Emperor.* Non-examination after second cross-examination.
(1930) 31 Cri L Jour 171 (172): 120 Ind Cas 753 (Pat), *Gurdial Singh* v. *Bholanath Halwai.*
(1925) 1925 Rang 258 (260): 3 Rang 139: 26 Cri L Jour 1336, *Nga Hla U* v. *King-Emperor.*
(1929) 1929 Rang 331 (333): 1929 Cri Cas 507: 7 Rang 470: 30 Cri L Jour 1164, *K. M. Subbayya Naidu* v. *Emperor.*
(1929) 1929 Sind 5 (6): 23 Sind L R 1: 29 Cri L Jour 932, *Alla Dito* v. *Emperor.*
(1932) 1932 Sind 165 (166): 1932 Cri Cas 743: 34 Cri L Jour 161, *Emperor* v. *Rihan Dodo.*
(1934) 1934 Sind 67 (68): 1934 Cri Cas 636: 28 Sind L R 106: 35 Cri L Jour 1175, *Hidayatullah* v. *Emperor.*

Examination after the defence was over:—

(1927) 1927 Cal 330 (331): 28 Cri L Jour 347, *Tawezkhan* v. *Rajjabali Mir.* Obiter.
(1926) 1926 Pat 393 (394): 27 Cri L Jour 1017, *Balgobind Thakur* v. *King-Emperor.* Technical failure to comply is not fatal in the absence of prejudice.

Failure to question specifically:—

(1930) 1930 Rang 114 (118): 1930 Cri Cas 402: 7 Rang 821: 31 Cri L Jour 387, *Maung Ba Chit* v. *Emperor.*

Questions in the nature of cross-examination:—

(1930) 1930 Rang 351 (354): 1930 Cri Cas 1179: 8 Rang 372: 32 Cri L Jour 23, *U Ba Thein* v. *Emperor.*

Miscellaneous:—

(1935) 1935 All 217 (219): 1935 Cri Cas 260: 36 Cri L Jour 1290 (1291), *Sia Ram* v. *Emperor.*
(1936) 1936 Oudh 16 (17,18): 36 Cri L J 1303 (1304): 1936 Cri Cas 23, *Emperor* v. *Karnashankar.* But prejudice may be presumed in such circumstances.
(1895) Ratanlal 735 (735), *Queen-Empress* v. *Posha Hari. Held*, that the accused had a vigilant pleader. The accused probably suffered no prejudice by the Sessions Judge having ignored the provisions of this Section.

4. (1927) 1927 P C 44 (49): 5 Rang 53: 54 I A 96: 28 Cri L Jour 259 (P C), *V. M. Abdul Rahman* v. *King-Emperor.*

5. (1933) 1933 Lah 1002 (2) (1003): 1933 Cri Cas 1515: 35 Cri L Jour 104, *Tej Ram* v. *Emperor.*
(1928) 1928 Lah 230 (231): 29 Cri L Jour 905, *Emperor* v. *Gian Singh.*
(1928) 1928 Lah 382 (386): 30 Cri L Jour 18, *M. L. Pritchard* v. *Emperor.*
(1930) 1930 Lah 153 (2) (154): 1930 Cri Cas 161: 31 Cri L Jour 720, *Arjan Singh* v. *Emperor.*
(1926) 1926 Nag 348 (349): 27 Cri L Jour 475, *Pai Mahomed* v. *Emperor.* Non-compliance will not *ipso facto* result in acquittal.
(1928) 1928 Nag 162 (164): 29 Cri L Jour 475, *Mohammad Hayat Khan* v. *Emperor.* Breach of the same vitiates such portion of the trial as is subsequent to the stage where it occurred.
(1921) 1921 Pat 374 (375): 22 Cri L Jour 460, *Ramnath Rai* v. *Emperor.*
(1924) 1924 Pat 376 (376): 24 Cri L Jour 475, *Baldeo Dubey* v. *King-Emperor.*
(1926) 1926 Pat 29 (30): 26 Cri L Jour 1289, *Sham Sher Narain Singh* v. *Mohammad Sale.*
(1925) 1925 Sind 127 (129): 19 Sind L R 104: 25 Cri L Jour 662, *Jhangli* v. *King-Emperor.*
[See also (1921) 22 Cri L Jour 598 (598): 62 Ind Cas 870 (871) (Pat),

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matter should be set right by again questioning the accused as required by this Section and then by calling on him to enter on his defence.[6] The Court remanding the case should not keep the case on its own file and simply call for a re-submission after taking the necessary examination ; it should remand the whole case to be tried on the merits as if it were before the Court for the first time.[7] But where the case is a petty one[8] or the offence is merely technical,[9] it has been held, that it is not in the interests of justice that the case should be tried *de novo* and that the accused should be acquitted.

Where questions are put in contravention of the Section, such as questions in the nature of cross-examination,[10] or where further evidence is taken after the examination of the accused and the latter is not examined again under this Section,[11] the answers given in the one case and the further evidence taken in the other should be rejected and not taken into account. In the undermentioned case,[12] it was held, that it was not proper for the Judge to take into consideration circumstances appearing in the prosecution evidence against the accused if he had not drawn his attention to them in his examination and called for an explanation.

An objection, on the ground of the failure to comply with the provisions of this Section, raises a point of law and can be taken at the hearing of an application for revision, although it was not urged in the Courts below and is not set forth in the application.[12a] But in revision proceedings, the High Court is not *bound* to interfere even if the non-compliance with Section 342 is held to be illegal.[13]

Where a Magistrate examines an accused person before any evidence has been recorded, it has been held, that such statements cannot be rejected as inadmissible on account of the irregularity in procedure and that they may be evidence as being admissions under Section 21 of the Evidence Act.[14]

Tilak Gope v. *Bhaya Ram.*]

6. (1925) 1925 Nag 433 (433): 26 Cri L Jour 1425, *Wasudeo* v. *Emperor.*

7. (1925) 1925 Cal 172 (172): 26 Cri L Jour 313, *Md. Abdus Samad* v. *Emperor.*

8. (1925) 1925 Cal 361 (369): 52 Cal 522: 26 Cri L Jour 631, *Emperor* v. *Alimuddi.*
(1934) 1934 Lah 415 (416): 1934 Cri Cas 642: 35 Cri L J 1447, *Amir* v. *Emperor.*
(1925) 1925 Cal 980 (980): 26 Cri L Jour 572, *Shamlal Singh* v. *Emperor.*
(1921) 22 Cri L Jour 276 (2) (279): 60 Ind Cas 676 (679) (Lah), *Harnama* v. *Emperor.* Magistrate asked the accused whether he had to say anything besides the written statement. *Held* that the procedure, though not right, was not illegal.
(1933) 1933 Lah 1002 (1003): 1933 Cri Cas 1515: 35 Cri L Jour 104, *Tej Ram* v. *Emperor.*
(1933) 1933 Nag 192 (193): 1933 Cri Cas 786: 34 Cri L J 340, *Emperor* v. *Amirbi*
(1922) 1922 Pat 212 (213), *Ram Nandan Singh* v. *The King-Emperor.*

9. (1934) 1934 Lah 648 (1) (648): 1934 Cri Cas 972: 36 Cri L Jour 468, *Kundan Lal* v. *Emperor.*

10. (1923) 1923 Lah 225 (226): 4 Lah 55: 24 Cri L Jour 693, *Devi Dial* v. *Emperor.*
(1908) 8 Cri L Jour 62 (64): 4 Low Bur Rul 244, *Gaung Gyi* v. *Emperor.* Questions about confession inadmissible —Therefore answers to such questions are inadmissible.
(1909) 10 Cri L Jour 325 (340): 3 Ind Cas 625 (Cal), *Khudiram Bose* v. *Emperor.* Some questions proper and others in the nature of cross-examination—Answers to former may be considered.
(1916) 1916 Mad 407 (408): 39 Mad 770: 16 Cri L Jour 623, *In re Abibullah Rowthan.* Questions put when no evidence at all had been taken—Answers not admissible in evidence.

11. (1927) 1927 Lah 916 (916): 29 Cri L Jour 11, *Mangta* v. *Emperor.*

12. (1933) 34 Cri L Jour 411 (412): 142 Ind Cas 785 (Nag), *Emperor* v. *Baliram Krishnaji Kunbi.*

12a (1921) 1921 Pat 415 (418): 22 Cri L Jour 442, *Moniuddin* v. *Emperor.*

13. (1928) 1928 Lah 230 (231): 29 Cri L Jour 905, *Emperor* v. *Gian Singh.*
(1926) 1926 Lah 553 (554): 27 Cri L Jour 727, *Hazara Singh* v. *Emperor.*
(1932) 1932 Oudh 113 (114): 1932 Cri Cas 186: 33 Cri L Jour 811, *Pitan* v. *Emperor.*
(1921) 1921 Pat 374 (375): 22 Cri L Jour 460, *Ramnath Rai* v. *Emperor.*
(1908) 7 Cri L Jour 422 (422, 423): 4 Low Bur Rul 143, *Emperor* v. *Ba Pe.*

14. (1893) Ratanlal 679 (680), *Queen-Empress* v. *Narayen.*

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343.* Except as provided in Sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

No influence to be used to induce disclosures.

Synopsis.

Other Topics.

Accused—Meaning same as in Section 342. See Note 1, Pts. 1 and 2.
Compulsion of confessions. See Note 3, Pts. 1 and 3.
Inducement to witness—Section inapplicable. See Note 1, Pt. 3 ; Note 3, Pt. 5.
Invalid pardon—Evidence inadmissible. See Note 2, Pt. 2.
No caution against free confessions. See Note 3, Pt. 2.
No pressure for production of co-accused. See Note 3, Pt. 4.
Offer to drop another case—Inducement to witness. See Note 1, F-N (3).
Pardon on conditions. See Note 2, Pt. 1.
Statements under inducement—Inadmissible. See Note 4.

1. Scope of the Section.

Section 163, *ante*, is an analogous provision applicable where an *investigation* is proceeding under Chapter XIV. This Section applies to *accused* persons and during the stage of *inquiries and trials*. The words "accused person" have the same meaning as the word "accused" in Section 342[1] and unless influence is used to a person who is an "accused" within the meaning of that Section, this Section does not apply.[2] Thus it does not apply where an inducement is offered to a *witness* and not to an accused person then under bail.[3] *See* Note 31 to Section 342 as to the meaning of "accused person."

2. Except as provided under Section 337, etc.

Sections 337 and 338, *supra*, provide for the grant of pardon to accused persons. Except under those Sections, no inducement can be offered to an accused person to make any disclosures. Thus a conditional pardon cannot be tendered by any authority save as provided by Sections 337 and 338, *supra*.[1]

Where the pardon tendered turns out to be illegal under Section 337, it would be unlawful to examine the accused as a witness and his statement would be irrelevant and inadmissible in evidence.[2]

*(1882—S. 343; 1872—S. 344 and 1861—S. 203—Same.)

Section 343—Note 1.

1. (1926) 1926 Nag 426 (427): 27 Cri L Jour 807, *Mahadeo* v. *Emperor*.
[See also (1901) 25 Bom 422 (425), *Queen-Empress* v. *Hussein Haji*.]
2. (1872-1892) 1872-1892 Low Bur Rul 246 (248, 252), *In the matter of Nga Po Aung*.
3. (1916) 1916 Bom 229 (233): 17 Cri L Jour 256, *Govind* v. *Emperor*. Offer to drop another pending case was construed only as an inducement offered to him as a witness and not as an accused.
(1920) 1920 Nag 255 (257): 16 Nag L R 9: 21 Cri L Jour 769, *Govinda Sambhaji Mali* v. *Emperor*.

Note 2.

1. (1906) 4 Cri L Jour 44 (45) (Cal), *Paban Singh* v. *Emperor*.
2. (1902) 1902 Pun L Re No. 52, page (192), *Durga* v. *Emperor*.

3. No influence, etc.

An accused person is neither bound nor is under an obligation to make any admission injurious to his own interests. No judicial officer should attempt to compel him to make any such admission.[1] Where, however, the accused wishes to make a statement of his own accord, it is not necessary that the Magistrate should give him any caution before taking his statement.[2] The eliciting of an admission by putting words into the mouth of the accused is unfair.[3]

An accused person is not bound to produce his co-accused who are absconding and the Court cannot exercise any pressure upon him for the purpose of producing them.[4]

An assurance of amnesty given to a *witness* is not within the mischief of the Section, and does not affect the competency of the witness, though it may affect his credibility.[5]

4. Evidentiary value of statements.

See also Note 6 to Section 163.

This Section does not declare what the consequences would be if an accused person did make a statement under inducement.[1] It seems to be, however, clear that the statements so made would be inadmissible in evidence. *See* Note 31 to Section 342, *ante*.

344.* (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the

Power to postpone or adjourn proceedings.

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* **(Code of 1872—Ss. 194, Para. 1 and Expl.; 208, Para. 1; 219 and 264.)**

194. If from the absence of a witness or from any other reasonable cause, it becomes necessary or advisable to defer the examination, or further examination, of witnesses, the Magistrate may, by a written order, from time to time adjourn the inquiry and remand the accused person for such time as is deemed reasonable, not exceeding 15 days.

Adjournment of inquiry and remand.

* * * * *

Explanation :—After commencing the inquiry, if sufficient evidence has been obtained to raise a suspicion that the person accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable ground for a remand.

208. Before or during the hearing of any complaint, the Magistrate may, in order to secure the attendance of witnesses or for any other reason, adjourn the hearing of the same to a day to be then appointed and stated in the presence and hearing of the party or parties.

Adjournment.

(1902) 1902 Pun Re Cr No. 12, page (36), *Nabi Baksh* v. *Emperor*.

Note 3.

1. (1897) 19 All 291 (292), *In the matter of Gudar Singh*.
   (1922) 1922 Pat 73 (74, 75) : 1 Pat 242 : 23 Cri L Jour 638, *Bazari Hajan* v. *King-Emperor*.
   (1864) 1 Suth W R Cr 24 (24), *Queen* v. *Ramdhun Sing*.
2. (1869) 5 Mad H C R App 11 (11).
3. (1892) 5 C P L R Cr 11 (11, 12), *Empress* v. *Mt. Bhura*.
4. (1930) 1930 Lah 953 (954) : 32 Cri L Jour 344 : 1930 Cri Cas 1049, *Fakir Muhammad* v. *Emperor*.
5. (1925) 1925 Nag 313 (316) : 26 Cri L Jour 1467, *Anant Wasudeo Chandekar* v. *Emperor*.

Note 4.

1. (1916) 1916 Bom 229 (233) : 17 Cri L Jour 256, *Govind* v. *Emperor*.

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same on such terms as it thinks fit, for such time, as it considers reasonable, and may by a warrant remand the accused if in custody:

Remand.

Provided that no Magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at a time.

(2) Every order made under this Section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Reasonable cause for remand.

Explanation.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Synopsis.

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Evidence for the defence.

219. The Magistrate shall, subject to the provisions of Section 362, summon any witness and examine any evidence that may be offered in behalf of the accused person, to answer or disprove the evidence against him, and may for this purpose, at his discretion, adjourn the trial from time to time, as may be necessary.

Adjournment. Postponement of trial.

264. The Court may, in its discretion, postpone the hearing of the case; and may, from time to time, adjourn the trial, if it considers that such adjournment is proper and will promote the ends of justice.

(Code of 1861—Ss. 224, 269, 253 and 377.)

When Magistrate may adjourn the enquiry.

224. If from the absence of a witness or from any other reasonable cause, it shall become necessary or advisable to defer the examination, or further examination of witnesses, it shall be lawful for the Magistrate by a written order, from time to time, to adjourn the enquiry, and to remand the accused person for such time as shall be deemed reasonable, not exceeding 15 days;

* * * *

Adjournment.

269. Before or during the hearing of any complaint, it shall be lawful for the Magistrate to adjourn the hearing of the same to a day to be then appointed and stated in the presence and hearing of the party or parties;

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Other Topics.

Adjournment of appeals—Costs. See Note 15, Pt. 11.
Costs against absent accused. See Note 15, Pt. 8.
Detention—Period of. See Note 16, Pt. 2.
Detention — Whether intended to be penal. See Note 18, Pt. 2.
Grounds held insufficient for adjournment. See Note 7, Pts. 12 to 17.
Protraction of trial—Impropriety of. See Note 2, Pt. 2.
Remand for getting a confession—Remand, when objectionable. See Note 18, Pt. 9.
Remand in bailable cases. See Section 496.
Remand to Police custody. See Note 16, Pt. 3.
Revision. See Note 13, Pt. 2.
Second remand. See Note 18, Pt. 10.
Who can be ordered to pay costs. See Note 15, Pts. 1 to 8.

1. Legislative changes.

There was no separate Chapter in the Codes of 1861 and 1872 dealing with the general provisions applicable to all kinds of trials. Hence a provision of adjournment was made under each Chapter relating to different proceedings such as preliminary inquiry by Magistrates, trial of warrant cases, of summons cases and Sessions trials. When the 1882 Code was passed re-casting in many respects the two former Codes, some of the general provisions applicable to all kinds of trials were clubbed together in Chapter XXIV and the Court's power to adjourn and remand was provided for in Section 344. The Section as re-enacted provided also for the postponement of the *commencement* of an inquiry or trial which was not found in the Codes of 1861 and 1872. In the present Code the words "if it thinks fit" in sub-section 1, were inserted between the words "the Court may" and "by order in writing" etc.

2. Scope and applicability of the Section.

This Section provides for the *postponement of the commencement* or the *adjournment* of any inquiry or trial, and also for remand of the accused where such postponement or adjournment is made. Thus, after a Magistrate has taken cognizance of an offence, his powers of postponement and adjournment are regulated by this Section.[1]

The policy of the law is that criminal cases should be disposed of with the least possible delay.[2] The object is to avoid hardship to the parties and wit-

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Evidence for the defence.

253. The Magistrate shall summon any witness and examine any evidence that may be offered in behalf of the accused person, to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time, as may be necessary.

Adjournment.

377. The Court may in its discretion, from time to time, adjourn the trial as may be necessary.

Section 344—Note 2.

1. (1924) 1924 Cal 614 (616): 26 Cri L Jour 68, *Bholanath Das* v. *Emperor.*
2. (1908) 35 Cal 909 (912), *Hem Chandra Ray* v. *Atal Behari Ray.*
(1929) 1929 Nag 42 (43): 29 Cri L Jour 1092, *Raotmal* v. *Sampat.* Intention of Code is that Criminal trial should be continued from day to day until termination.
(1925) 1925 Cal 1017 (1019): 27 Cri L Jour 129, *Thomas James Henry Arnup* v. *Kedar Nath Ghose.* Whether considered from the point of view of the complainant or of the accused, delay is inexcusable.
(1926) 1926 Cal 102 (104): 26 Cri L Jour 1050, *Rash Behary Narury* v. *Corporation of Calcutta.* Frequent adjournments, at the instance of the prosecution, condemned.
(1917) 1917 Sind 73 (76): 18 Cri L Jour 54 (57): 10 Sind L R 148, *Jehangir Perozshah* v. *Gangaram Naumal* (Do).
(1923) 1923 Cal 725 (727): 25 Cri L Jour 492, *Shermull* v. *Corporation of Calcutta.* Long adjournment for 3 years condemned.
(1918) 1918 Cal 588 (590): 18 Cri L Jour 609 (611), *Mahomed Ibrahim* v. *Emperor.* Protracted trial in the Presidency Magistrate's Court animadverted on.
(1871) 16 Suth W R Cri 58 (58), *Mahomed*

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nesses.[3] If the accused is in custody, frequent adjournments will be a harassment to him and, from the point of view of the prosecution, time will efface recollection of facts. The longer the period allowed to elapse from the time of the arrest to the time when the witnesses give evidence, the greater is the probability of confusion and of the truth being obscured.[4] The Section consequently provides that a postponement or adjournment can be given only in two cases :—

1. where witnesses are absent, or
2. for any other reasonable cause.

It is not expedient for a Sessions trial to be adjourned. Where once begun, such trial should be continued *de die in diem*—from day to day—until it is finished.[5] The Section applies only to proceedings in *inquiries* and *trials*. It does not apply to *appeals*.[6]

As to adjournment in other cases, *see* Sections 229, 508 and 526.

3. Postponement and adjournment.

The Section empowers the Court not only to *adjourn* an enquiry or trial, but to postpone its *commencement*. Thus a Magistrate receiving a complaint may postpone the issue of a process under Section 204, and is not bound to pass any order under Sections 202, 203 or 204 immediately after examining the complainant.[1]

There should be a fixed time for the purpose of appointing new dates for cases which have been posted for a certain day but which cannot be reached on such day.[2]

4. Postponement of case sine die.

A postponement or adjournment of a case *sine die* is not in accordance with

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Alum v. *Sheikh Akil*. Constant unnecessary adjournment is reprehensible.

(1917) 1917 Sind 46 (47) : 18 Cri L Jour 834 : 11 Sind L R 27, *F. W. Soler* v. *Emperor*. Protracted trial by lengthy cross-examination.

(1932) 1932 Pat 276 (278) : 34 Cri L Jour 263, *Birdhi Chand* v. *Jaipuria*. Numerous adjournments in petty cases.

(1930) 1930 Pat 241 (243) : 1930 Cri Cas 509 : 9 Pat 113 : 31 Cri L Jour 789, *Narayana Maharana* v. *Emperor* (Do.)

(1868) 9 Suth W R Cr Cir 5 (6).

(1899) 2 Bom L R 322 (323), *Queen-Empress* v. *Mahadu*.

(1932) 1932 Cal 63 (64) : 58 Cal 1293 : 33 Cri L Jour 303 : 1932 Cri Cas 11, *U. K. Mitra* v. *Corporation of Calcutta*. Proceedings allowed to drag on indefinitely—Attention of Government was called.

(1929) 1929 Cal 776 (776) : 31 Cri L Jour 614 : 1929 Cri Cas 520, *Sirajuddin Kazi* v. *Sergeant H. Jenner*. The case of an accident to a motor due to the negligent and reckless driving of another motor car ought to be tried within a week.

[See (1900) 2 Bom L R 1092 (1094), *Queen-Empress* v. *Majesty*. The committing Magistrate and the Sessions Judge should inquire into any great delay in investigation and consider its bearing on the story of the prosecution.

(1925) 1925 Oudh 501 (502) : 27 Oudh Cas 327 : 26 Cri L Jour 530, *Bahadur* v. *Emperor*. A delay of over 4½ months in hearing an appeal would amount to denial of justice in a majority of cases.]

3. (1865) 4 Suth W R Cr Cir No. 12, (page 1.) [See also (1924) 1924 Cal 18 (44) : 25 Cri L Jour 1313, *P. E. Billinghurst* v. *Emperor*.]

4. (1925) 1925 Cal 1017 (1020) : 27 Cri L Jour 129, *Thomas James Henry Arnup* v. *Kedar Nath Ghose*.

5. (1912) 13 Cri L Jour 861 (862) : 35 All 63, *Badri Prasad* v. *Emperor*.

(1919) 1919 All 200 (201) : 20 Cri L Jour 127, *Ram Sarup* v. *Emperor*.

6. (1920) 1920 Lah 289 (290) : 1919 Pun Re Cri No. 29 : 21 Cri L Jour 201, *Suraj Bhan* v. *Emperor*.

Note 3.

1. (1925) 1925 Pat 619 (620, 621) : 26 Cri L Jour 1179, *Ram Saran Singh* v. *Nikhal Narain Singh*.

(1929) 1929 Cal 281 (282) : 31 Cri L Jour 262, *Ram Golam Singh* v. *Sarat Chandra Ganguly*.

2. (1934) 1934 Bom 130 (133) : 35 Cri L Jour 1139 : 1934 Cri Cas 475, *In re Jam-*

this or any other provision of the Code.[1] The postponement or adjournment under this Section can only be "from time to time", *i. e.*, for *fixed and definite* periods.[2]

5. Inquiry or trial.—*See* Section 4, Clause (*k*).

5a. Adjournment by public proclamation.

An adjournment, must, under this Section be by *an order in writing.* It is irregular and objectionable to adjourn a trial by public proclamation.[1]

6. "May, if it thinks fit."

These words show that the question of postponement or adjournment of an enquiry or trial is a matter of the Court's *discretion.* The discretion is, however, not an *arbitrary* one but should be exercised judiciously and only in cases which come within the terms of the Section.[1]

7. Reasonable cause for adjournment.

An adjournment can be granted only in the *absence of a witness*[1a] or for other *reasonable cause.*[1b] As a general rule Magistrates should refrain from granting adjournments save in cases where they are clearly necessitated for the purposes of justice.[1]

The following have been held to be good grounds for adjournment :—

1. To enable the accused to secure the attendance of his witnesses.[2]
2. To enable him to examine such of his witnesses as he has produced.[3]
3. To enable him to engage the services of a pleader to properly defend himself in complicated cases.[4]
4. Where the accused's advocate is absent at another place to fulfil a long-standing engagement.[5]
5. Where a large number of witnesses have been examined for the prosecution and the accused wants two days' time to consider what evidence he should produce.[6]

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Note 4.

1. (1905) 9 Cal W N 75*n*, *Doran* v. *Heard.*
   (1909) 9 Cri L Jour 35 (36) (Cal), *Abdur Rauf Mia* v. *Rahamuddi.*
   (1932) 1932 Sind 214 (215) : 27 Sind L R 17 : 1932 Cri Cas 905 : 34 Cri L Jour 139, *Tarachand Gehimal* v. *Emperor.* Distinguishing 11 Cri L Jour 7.
   (1933) 1933 Sind 358 (359) : 1933 Cri Cas 1340 : 27 Sind L R 219 : 35 Cri L Jour 517, *Emperor* v. *Dinalshah Rajanshah.*
   [But see (1910) 11 Cri L Jour 7 (8) : 4 Ind Cas 537 (Cal), *Guru Das Hazara* v. *G. L. Weatheral.*]
2. (1926) 1926 All 421 (422) : 27 Cri L Jour 560, *Kewal Ram* v *Emperor.*

Note 5a.

1. (1870-71) 6 Mad H C R App 29 (30).

Note 6.

1. (1872) 17 Suth W R Cri 55 (57), *Muthoora Nath Chuckerbutty* v. *Heera Lall Doss.*

Note 7.

1a (1870) 5 Mad H C R App 27.
   (1924) 1924 Cal 534 (534) : 24 Cri L Jour 370, *Mihir Lal Roy* v. *Emperor.*
   (1866) 5 Suth W R Cri Letters 10 (10). But accused cannot be discharged on that ground.
   (1896) 19 Mad 375 (381), *Queen* v. *Virasami.*

1b (1925) 1925 Pat 619 (621) : 26 Cri L Jour 1179 (1180), *Ram Saran Singh* v. *Nikhal Narain Singh.*

1. (1930) 1930 Pat 241 (243) : 9 Pat 113 : 31 Cri L Jour 789 : 1930 Cri Cas 509, *Narayana Maharana* v. *Emperor.*
2. (1914) 1914 Lah 84 (84) : 15 Cri L Jour 521, *Lal Singh* v. *Emperor.*
   (1870) 5 Mad H C R App 27.
   (1871) 16 Suth W R Cri 21 (22), *In the case of Dinoo Roy.*
3. (1903) 7 Cal W N 714 (716), *Emperor* v. *Keso Singh.*
4. (1916) 1916 Mad 142 (142, 143) : 16 Cri L Jour 334 (336), *In re Murugesa Naidu.*
   (1902) 1 Low Bur Rul 270 (271), *Taung Bo* v. *Crown.* But not in petty cases.
   [See also (1905) 9 Cal W N 285*n*, *Hira Lal* v. *King-Emperor.* Appeal, hearing of—Pleader's unforeseen and unavoidable absence—Refusal of postponement of hearing—Re-hearing of appeal was ordered by High Court.]
5. (1911) 12 Cri L Jour 474 (476) : 12 Ind Cas 82 (Rang), *E. J. Esteves* v. *Emperor.*
6. (1920) 1920 Pat 25 (28) : 21 Cri L Jour 321,

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6. Where the counsel for the accused in a capital case wants to cross-examine the witnesses on the following day as he was not prepared to cross-examine on that day.[7]
7. Where a party is asked to cross-examine his witness at 6-30 p.m., and he asks for time on the ground that the pleader is not then available.[8]
8. Where the accused is tried for separate offences and an appeal is pending against the conviction in respect of another case against him.[9]
9. Where a new witness is produced in the Sessions Court who was not examined before the committing Magistrate and the accused wants time on the ground that it is a surprise to him.[10]
10. For producing material documents filed in a civil case.[11]
11. Where in a Sessions trial it is found that a witness is absent and therefore his deposition before the committing Magistrate could not be received and the witness has consequently to be summoned.[11a]

The following have been held not to be sufficient grounds for granting an adjournment :—

1. To enable the accused to get a ruling from the High Court on a point of law.[12]
2. The absence of a co-accused and desirability of a joint trial.[13]
3. To enable the complainant to examine witnesses whom he had not cared to have in attendance.[14]
4. To enable a party to summon witnesses where sufficient time has already been allowed for the purpose.[15]
5. To enable the prosecution to find out evidence, the existence of which is entirely problematical.[16]
6. To enable the prosecution to examine witnesses not named in the *chalan*.[17]

8. Stating the reasons therefor.

The reasons for the adjournment should be clearly expressed on record. It is not enough that a reasonable cause *exists*. Such cause should be stated in the order. The reason is that the prisoner is entitled to know what such cause is, and an Appellate Court cannot form an opinion of its reasonableness unless it is stated

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Rameshwar Dusadh v. *Emperor*.

7. (1914) 1914 Cal 834 (835) : 41 Cal 299 : 15 Cri L Jour 596, *Sadasiv Singh* v. *Emperor*.
8. (1928) 1928 Pat 277 (278) : 29 Cri L Jour 299, *Gulai Jha* v. *Emperor*.
9. (1909) 9 Cri L Jour 495 (496) : 2 Ind Cas 128 (Mad), *In re Mantri Kamaraju*.
10. (1889) 1889 Pun Re Cr No. 1, page 1 (3), *Khan Muhammad* v. *Empress*.
11. (1921) 22 Cri L Jour 335 (336) : 61 Ind Cas 63, *Biswambhar Roy Basia* v. *Aminuddi Talukdar*.

11a (1882) 12 Cal L R 120 (121), *Empress* v. *Sagambar*.
(1874) 21 Suth W R Cr 56 (57), *Queen* v. *Lukhun Santhal*.

12. (1907) 7 Cri L Jour 400 (401) : 12 Cal W N 604 (604), *Mohesh Sonar* v. *Emperor*.
(1933) 1933 Sind 17 (20) : 1933 Cri Cas 17 : 26 Sind L R 255 : 33 Cri L Jour 908, *Abdullah Khan Khair Mahomed Khan* v. *Emperor*.

13. (1901) 1 Low Bur Rul 60 (61), *Queen-Empress* v. *Nga Tun Hla*.
(1922) 1922 Cal 334 (335) : 49 Cal 182 : 22 Cri L Jour 465, *Billinghurst* v. *Meek*.

14. (1925) 1925 Sind 315 (316) : 26 Cri L Jour 958, *Ali Sher* v. *Mir Mahomed*.
15. (1874) 23 Suth W R Cri 9 (11), *Chalun Tewari* v. *Sukedad Khan*.
(1923) 1923 Mad 185 (186) : 46 Mad 253 : 24 Cri L Jour 84, *In re Derwish Hussain*. Where accused did not ask for fresh process after the witness failed to attend though served.
16. (1930) 1930 Rang 76 (77) : 7 Rang 592 : 31 Cri L Jour 296 : 1930 Cri Cas 183, *Ah Phone* v. *Emperor*.
17. (1934) 1934 Nag 156 (157) : 35 Cri L Jour 1163 : 1934 Cri Cas 660, *Hajari Tika Lodhi* v. *Emperor*. Prosecution not entitled to file fresh list of prosecution witnesses.

on record.[1]

9. Adjournment to and trial on holiday.

A trial of an accused person on a Sunday or other holiday would not necessarily make the proceedings illegal or invalid.[1a] Where, however, the result of taking the unusual procedure of trying the case on a holiday is to cause prejudice to the accused, as for example by preventing him from engaging a pleader to defend him, the conviction will be set aside.[1]

10. Advancement of hearing.

This Section does not stand in the way of the Court advancing the hearing of a case to an earlier date, provided due notice thereof is given to the parties.[1] An acceleration of the date of hearing against the wishes of the accused or his pleader is not proper.[2]

11. Stay of Criminal proceedings.

This Section authorises only the postponement or adjournment of a criminal case from *time to time* and does not contemplate a stay of proceedings for an *indefinite period.* (*See* Note 4 above.) But every Court has an *inherent power* to stay a case pending on its file where it is necessary for the ends of justice to do so.[1] The power of the High Court in this respect is expressly recognised by Section 561-A of the Code.[2] The High Court has also, independent of Section 561-A, power under Section 107 of the Government of India Act, 1915 to stay proceedings

Note 8.

1. (1883) 6 Mad 63 (68), *Manickam Mudali* v. *Queen.*

Note 9.

1a [See (1868) 10 Suth W R Cri 350 (351), *D. Abrahim, In re.* Applicability of Lord's Day Act.]

1. (1915) 1915 Bom 254 (255) : 16 Cri L Jour 752 (753), *Baban Daud* v. *Emperor.*
   (1871) 8 Beng L R App 12 (12), *The Queen* v. *Hargobind Datta Sirkar.* System of trying cases by Magistrates, while moving about from day to day, also condemned.
   (1864) 1864 Suth W R (Gap) Cri 2 (2, 3), *Grijamonee* v. *Issur Chunder.* Magistrates should not take up judicial work on a Sunday.
   (1915) 1915 Bom 254 (255) : 16 Cri L Jour 752, *Baban Daud* v. *Emperor.* Trial on Sunday or other holiday irregular as contrary to Criminal Circular No. 37 of the Bombay High Court.
   (1930) 1930 Nag 255 (258, 259) : 31 Cri L Jour 705 : 1930 Cri Cas 831, *Girdari* v. *Emperor.*

Note 10.

1. (1929) 1929 Nag 42 (43) : 29 Cri L Jour 1092, *Raotmal* v. *Sampat.*
2. (1898) 1898 Pun Re Cr No. 14, page 32 (33), *Karamdin* v. *Queen.*

Note 11.

1. (1916) 1916 Lah 174 (175) : 17 Cri L Jour 7 (8), *Parsram* v. *Jalal Din.*
   (1866) 2 Bom H C R Cri 384 (385), *Reg.* v. *Dalsukram Haribhai.* A Magistrate is not warranted in convicting and imprisoning a person for disobeying an order, the legality of which is then properly under the consideration of an appellate Court.
   [Compare (1934) 1934 Sind 143 (144) : 36 Cri L Jour 94 : 1934 Cri Cas 1150, *Rewatmal Udhomal* v. *Sajanmal Mehrumal.* Where the remarks in the judgment imply that the pendency of civil proceedings between the parties is a reasonable ground for adjournment or postponement of proceedings under this Section.]
   [See (1927) 1927 Mad 1060 (1060) : 28 Cri L Jour 225, *Venkata Reddy* v. *Linga Reddy.* Where it was desirable that the complaint was disposed of without delay, the High Court refused to stay the proceedings.]
   [See also (1884) 8 Mad 140 (147), *In the matter of the petition of Paul De Cruz.* Assumed.
   (1924) 1924 Mad 888 (888), *In re Periasamy Muthiryan.*]
   [But see (1929) 1929 Sind 115 (116) : 1929 Cri Cas 106 : 23 Sind L R 225 : 30 Cri L Jour 399, *Ramchand* v. *Emperor.* No power except under S. 344 to adjourn from time to time—The question of inherent power was not adverted to.
   (1927) 1927 Mad 851 (851) : 28 Cri L Jour 849, *Murugan* v. *Gutha Rami Naidu.* (Do.)
   (1933) 1933 Sind 358 (359) : 1933 Cri Cas 1340 : 27 Sind L R 219 : 35 Cri L Jour 517, *Emperor* v. *Dinalshah Rajanshah.* Following 1929 Sind 115 and 1932 Sind 214.]
2. (1928) 29 Cri L Jour 1053 (1055) : 112 Ind Cas 477 (Bom), *Jehangir* v. *Framji*

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in Subordinate Courts in the exercise of its powers of superintendence over inferior Courts.[3]

Questions very often arise as to whether criminal proceedings should be stayed during the pendency of *civil* proceedings in respect of the same or substantially the same subject matter. There is now a consensus of judicial opinion that there is no *invariable rule* that criminal proceedings should be stayed pending the issue of a civil suit,[4] but that the matter is entirely one of *discretion* of the

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Rustomji Wadia.
(1926) 1926 All 30 (33) : 48 All 60 : 26 Cri L Jour 1485, *Kanhaiya Lal* v. *Bhagwandas.*

3. (1923) 1923 Mad 595 (595) : 25 Cri L Jour 280, *Nambia Pillai* v. *Sudalaimuthu Nadan.*
(1896) 23 Cal 610 (612), *Rajkumari Debi* v. *Bama Sundari Debi.* Rampini, J., *contra.*
(1931) 1931 Pat 411 (414) : 33 Cri L Jour 147 : 1931 Cri Cas 999, *Jagannath Acharya Goswami* v. *A. Rajagopalachari.*
(1921) 1921 All 365 (366) : 43 All 180 : 22 Cri L Jour 236, *Rajkunwar Singh* v. *Emperor.*
(1908) 8 Cri L Jour 390 (391) : 31 Mad 510, *In re L. Jogiah.*
(1907) 6 Cri L Jour 131 (132) : 30 Mad 226, *Anna Aiyar* v. *Emperor.*
[See also (1924) 1924 Mad 235 (236) : 24 Cri L Jour 640, *Y. Anakamma* v. *P. Adribhotlu.*]

4. (1929) 1929 Pat 500 (501) : 30 Cri L Jour 1101 : 1929 Cri Cas 252, *Hirday Narain Singh* v. *Emperor.*
(1930) 1930 Pat 194 (194) : 30 Cri L Jour 1144 : 1930 Cri Cas 277, *Bhagirath Bhagal* v. *Ram Narain Sahu.*
(1933) 1933 Lah 37 (38, 39) : 34 Cri L Jour 96 (98) : 1933 Cri Cas 117, *Basheshar Nath* v. *Ratan Chand.*
(1916) 1916 Lah 137 (137, 138) : 17 Cri L Jour 205 (206), *Nur Din* v. *Emperor.*
(1930) 1930 Lah 802 (803) : 31 Cri L Jour 1053 : 1930 Cri Cas 893, *Lorind Singh* v. *Emperor.*
(1893) 18 Bom 581 (584), *In re Devaji valad Bhawani.*
(1896) 23 Cal 610 (620, 621), *Raj Kumari Debi* v. *Bama Sundari Debi.*
(1923) 1923 Mad 595 (596) : 25 Cri L Jour 280, *Nambia Pillai* v. *Sudalaimuthu Nadan.*
(1930) 1930 Pat 351 (352) : 31 Cri L Jour 766 : 1930 Cri Cas 723, *Bhagwat Prasad* v. *Ramkisun Ram Sonar.* Order can be justified only on special grounds, the general rule being that the High Court should avoid staying proceedings.
(1927) 1927 Mad 308 (310) : 28 Cri L Jour 181, *Gnanasigamani Nadar* v. *Vedamuthu Nadar.*
(1921) 1921 Lah 386 (386) : 23 Cri L Jour 700, *Taj-ud-din* v. *Tajmuhammad Nasir.*
(1921) 1921 Pat 484 (484), *Jodhi Singh* v. *Emperor.*
(1927) 1927 Mad 778 (778) : 50 Mad 839 : 28 Cri L Jour 812, *Chitrala Ramaya* v. *Natukula Ramiah.*
(1910) 11 Cri L Jour 4 (6) : 4 Ind Cas 485 (Cal), *Brojobashi Panda* v. *Emperor.*
(1902) 26 Bom 785 (791), *In re Bal Gangadhar Tilak.* Ordinarily it is not desirable, dissenting from Jardine, J.'s remarks in 16 Bom 729.
(1922) 23 Cri L Jour 84 (85) : 65 Ind Cas 436 (436) (All), *Anrudh Kumar* v. *Emperor.*
(1912) 13 Cri L Jour 848 (848) : 17 Ind Cas 720 (Bom), *In re Kesava Narain Manolkar.*
(1928) 29 Cri L Jour 1053 (1056) : 112 Ind Cas 477 (Bom), *Jehangir Pestonji Wadia* v. *Framji Rustomji.*
(1908) 8 Cri L Jour 435 (437) : 35 Cal 909, *Hemchandra Ray* v. *Atal Behari Ray.*
(1904) 1 Cri L Jour 852 (854) : 31 Cal 858, *Dwarkanath Rai Chowdhry* v. *Emperor.* Special reason is necessary to grant stay.
(1902) 2 Weir 415 (416, 417), *In re Subramanya Chetty.*
(1929) 1929 Cal 563 (566) : 57 Cal 558 : 1929 Cri Cas 202 : 31 Cri L Jour 211, *Gopal Chandra Chakravarthi* v. *Suresh Chandra Sanyal.*

But see the following cases which seem to proceed upon the view that ordinarily there should be a stay in such cases :—
(1926) 1926 All 30 (33) : 48 All 60 : 26 Cri L Jour 1485, *Kanhaiya Lal* v. *Bhagwan Das.*
(1911) 12 Cri L Jour 615 (616) : 12 Ind Cas 991 (Lah), *Parasram* v. *Emperor.*
(1913) 14 Cri L Jour 128 (128) : 18 Ind Cas 688 (Lah), *Anant Singh* v. *Emperor.*
(1915) 1915 Cal 596 (596) : 16 Cri L Jour 309 (310), *Asrabuddin Sarcar* v. *Kali Doyal.*
(1914) 1914 Sind 80 (80) : 8 Sind L R 20 : 15 Cri L Jour 661, *Mathra Das Dharam Das* v. *Emperor.*
(1914) 1914 Upp Bur 18 (19) : 15 Cri L Jour 488, *Kalima Bibi* v. *Macbul Ahmed.*
(1920) 1920 Low Bur 47 (48) : 10 Low Bur Rul 103 : 21 Cri L Jour 353,

Court to be exercised having regard to the merits and all the circumstances of the case.[5] The real principle to be looked to is whether the accused is likely to be *prejudiced* if the criminal proceedings are not stayed until the disposal of the suit.[6] Where the matter in issue is not of such a complicated kind for the decision of which civil Courts are preferred as peculiarly qualified as, for example, the genuineness of a will, or other document, the validity of a will, and the *bona-fides* of a civil claim, it cannot be assumed that there will be a manifest and irreparable injustice done in the Criminal Court when the integrity of the Court is not questioned.[7]

In exercising the discretion in the matter of stay, the following principles may be remembered :—

(*a*) Where the criminal proceedings are instituted with the motive of hampering the conduct of the civil proceeding, the former may be ordered to be stayed.[8] This, however, will not apply in the case of

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Soorayya v. *Shwe Bwin*. Matter partly civil dispute.

(1916) 1916 Bom 163 (164) : 17 Cri L Jour 153 (153) : 41 Bom 1, *N. F. Markur In re.*

(1916) 1916 Lah 174 (175) : 17 Cri L Jour 7 (8), *Parasram* v. *Jalal Din.*

(1892) 16 Bom 729 (731), *In re Shri Nana Maharaj.*

(1907) 5 Cri L Jour 199 (200) (Cal), *Ram Charan Singh* v. *Emperor.*

(1921) 1921 Pat 495 (495), *Haribux Ram* v. *Gapali Ram.*

(1920) 1920 Pat 816 (818) : 22 Cri L Jour 489, *Mt. Phuleshra Kuer* v. *Emperor.*

(1892) Ratanlal 587 (588), *In re Ebrahim.*

(1901) 5 Cal W N 44 (45), *Goberdhone* v. *Iswar Chunder.* Prosecution under S. 82 of the Registration Act—Civil suit pending.

(1906) 10 Cal W N 211*n* (212*n*), *Gopeshwar Pal Chowdhury* v. *Emperor.*

(1922) 1922 Lah 424 (424) : 23 Cri L Jour 595, *Janki Das* v. *Emperor.*

(1930) 1930 Lah 664 (665) : 32 Cri L Jour 463 : 1930 Cri Cas 808, *Maniram* v. *Emperor.*

(1927) 1927 Lah 17 (18) : 27 Cri L Jour 1114, *Bhishambar Das* v. *Emperor.*

(1933) 1933 Lah 37 (39) : 1933 Cri Cas 117 : 34 Cri L Jour 96, *Bashesharnath* v. *Ratan Chand.*

5. (1894) 2 Weir 260 (261), *Sankarayya* v. *Kerala Subba Aiya.*

(1929) 1929 Pat 500 (501) : 30 Cri L Jour 1101 : 1929 Cri Cas 252, *Hirday Narain Singh* v. *Emperor.*

(1927) 1927 Lah 744 (745) : 28 Cri L Jour 326, *P. F. Linton* v. *Emperor.*

(1925) 1925 Pat 193 (193) : 26 Cri L Jour 286, *Dasarate Meshy* v. *Jaychand Sutradhar.*

(1925) 1925 Mad 39 (42) : 47 Mad 722 : 25 Cri L Jour 1009, *Ramanathan Chettiar* v. *Sivarama Subramaniya Iyer.*

(1892) Ratanlal 587 (588), *In re Ebrahim.*

(1933) 1933 Bom 307 (309) : 1933 Cri Cas 894 : 34 Cri L Jour 900, *Ramchandra Babaji Gujjar In re.*

(1934) 1934 Sind 143 (144) : 1934 Cri Cas 1150 : 36 Cri L Jour 94, *Rewatmal Udhomal* v. *Sajanmal Mehrumal.*

6. (1928) 29 Cri L Jour 1053 (1056) : 112 Ind Cas 477 (Bom), *Jehangir Pestonji Wadia* v. *Framji Rustomji.*

(1926) 1926 Nag 315 (316), *Madhao Bhagwant Deshmukh* v. *Emperor.*

(1916) 1916 Mad 1123 (1123) : 16 Cri L Jour 637, *Mahomed Ibrahim Rawther* v. *Kattayyan.*

(1932) 1932 Nag 86 (88) : 34 Cri L Jour 119 : 1932 Cri Cas 436, *Jhummaklal* v. *Sunderlal.*

(1920) 1920 Pat 143 (144) : 21 Cri L Jour 342, *Raghubar Singh Chander Singh* v. *Emperor.*

(1917) 1917 Pat 621 (622) : 18 Cri L Jour 771, *Khobhari Rai* v. *Bhagwat Rai.*

(1920) 1920 Pat 816 (817) : 22 Cri L Jour 489, *Mt. Phuleshra Kuer* v. *Emperor.*

(1916) 1916 Pat 7 (8) : 18 Cri L Jour 125, *Debi Mahto* v. *Emperor.*

(1907) 6 Cri L Jour 131 (132) : 30 Mad 226, *Anna Ayyar* v. *Emperor.*

(1902) 2 Weir 415 (416, 417), *In re Subramanya Chetty.*

7. (1931) 1931 Pat 411 (416) : 33 Cri L Jour 147 : 1931 Cri Cas 999, *Jaganath Acharya Goswami* v. *A. Rajagopalachari.*

[See also (1927) 1927 Mad 778 (779) : 50 Mad 839 : 28 Cri L Jour 812, *Chitrala Ramiah* v. *Natukula Ramiah.*]

8. (1928) 29 Cri L Jour 1053 (1056) : 112 Ind Cas 477 (Bom), *Jahangir Pestonji Wadia* v. *Framfi Rustomji.*

(1907) 6 Cri L Jour 131 (132) : 30 Mad 226 : *Anna Ayyar* v. *Emperor.*

(1902) 2 Weir 415 (416, 417), *In re Subramanya Chetty.*

(1933) 1933 Bom 307 (309) : 1933 Cri Cas 894 : 34 Cri L Jour 900, *Ramchandra Babaji Gujjar, In re.* If criminal

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public prosecutions, such as prosecutions under Section 195 or Section 476 of the Criminal Procedure Code.[9]

(*b*) Where the civil proceedings are filed for the purpose of delaying or would result in a long delay of the trial of the criminal case, no stay should be granted.[10]

(*c*) Where the civil suit has been filed *before* the institution of the criminal proceeding and it appears that the decision in the former will be of value in arriving at the truth in the criminal case, the latter may be stayed.[11]

(*d*) Where the civil suit is filed *after* the criminal case and there is no possibility of its being decided soon, a stay should not be ordinarily granted.[12]

(*e*) Where the subject-matters of the dispute in the criminal and civil cases are not *identical* or have no bearing on one another, a stay will

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case is filed after the civil case, intention to prejudice the latter may often be suspected especially when there is long delay in presenting the criminal case.

9. (1929) 1929 Cal 563 (566) : 1929 Cri Cas 202 : 57 Cal 558 : 31 Cri L Jour 211, *Gopal Chandra Chakravarthy* v. *Suresh Chandra Sanyal.*
(1928) 29 Cri L Jour 1053 (1055) : 112 Ind Cas 477 (Bom), *Jehangir Pestonji Wadia* v. *Framji Rustomji.*
(1904) 31 Cal 858 (862) : 1 Cri L Jour 852, *Dwaraka Nath Rai Choudhury* v. *Emperor.*
(1902) 26 Bom 785 (791), *In re Bal Gangadhar Tilak.*
(1922) 23 Cri L Jour 84 (84) : 65 Ind Cas 436 (436) (All), *Anrudh Kumar* v. *Emperor.*
(1912) 13 Cri L Jour 848 (848) : 17 Ind Cas 720 (Bom), *In re Keshava Narain.*
(1908) 8 Cri L Jour 435 (437) : 35 Cal 909, *Hem Chandra Roy* v. *Atul Behari Ray.*

10. (1914) 1914 Mad 143 (143) : 15 Cri L Jour 568, *Chapalamadugu Pedda Balliah* v. *Muthialu Venkataswami.* In view of the suit being a summary one, proceedings were stayed.

11. (1927) 1927 Lah 744 (745) : 28 Cri L Jour 326, *P. F. Linton* v. *Emperor.*
(1905) 2 Cri L Jour 798 (800) (All), *Mathura Kunwar* v. *Durga Kunwar.*

Where the decision of the civil suit will not be evidence in the criminal case, stay should be refused. See :—

(1935) 1935 Cal 182 (183) : 1935 Cri Cas 240, *Srikisson Beriwalla* v. *Emperor.* Issues in criminal case likely to be included in issues in civil suit which is ripe for the hearing—Criminal case to be stayed—Even a prosecution launched by police can be stayed under such circumstances.

(1935) 1935 Sind 187 (188) : 36 Cri L Jour 1350 : 1935 Cri Cas 950, *Faiz Mahammad* v. *Abbas Jafferali.* Disputes in criminal proceeding and civil suit intimately connected — Civil suit prior in time—Common issue capable of being decided more properly in civil suit — *Held*, criminal case should be stayed.

(1917) 1917 Pat 621 (622) : 18 Cri L Jour 771, *Khobhari Rai* v. *Bhagwat Rai.*

(1927) 1927 Lah 669 (670) : 28 Cri L Jour 778, *Kalu Mal* v. *Emperor.* Pronouncing of judgment in criminal case stayed pending decision in appeal in civil case out of which criminal case had arisen.
[See (1935) 1935 Sind 81 (83) : 36 Cri L Jour 881 : 1935 Cri Cas 367, *Kalumal Gelomal* v. *Kissumal Issardas.* Statement made in affidavit filed in Court false—Complaint under S. 500 filed before civil suit is over—There is no infraction of law, patent on face of record to justify quashing of proceedings—But it is expedient that hearing of complaint should be stayed till disposal of civil suit.]

12. (1920) 1920 Lah 198 (198) : 21 Cri L Jour 399. *Shib Dayal* v. *Hans Raj.* If however, the cause of action did not arise, till after the filing of the criminal complaint, the criminal proceedings should be stayed.
(1910) 11 Cri L Jour 4 (6) : 4 Ind Cas 485 (Cal), *Brojobashi Panda* v. *Emperor.*
(1910) 11 Cri L Jour 291 (292) : 6 Ind Cas 181 (Cal), *Hari Pada Pal* v. *Jotish Chandra Chatterjee.*
[See also (1910) 12 Cri L Jour 448 (449) : 1911 Upp Bur Rul 87, *Nga Tha Kin* v. *Emperor.* Stay was however, granted under the circumstances of the case.
(1933) 1933 Lah 37 (39) : 1933 Cri Cas 117 : 34 Cri L Jour 96, *Bashesharnath* v. *Ratanchand.* Civil suit likely to be

not be granted.[13]

(*f*) In cases of disputed title to land where it is difficult to draw the line between a *bona fide* claim and a criminal trespass, a stay can be granted.[14]

(*g*) Although it is not illegal to have two separate criminal proceedings in respect of accusations arising out of the same facts, such a course is obviously inconvenient and it is desirable that both the proceedings should be held in a Court having jurisdiction to conduct both.[14a] *See also* Note 12, *infra*, and Section 190, Note 17.

There is no provision in the Code enabling a District Magistrate to stay proceedings in the criminal Courts subordinate to him.[15] Nor is there any provision enabling a Sessions Judge to stay a civil suit pending the decision of a criminal case.[16]

A Magistrate who has directed an inquiry by a Subordinate Magistrate under Section 202, *ante*, can stay proceedings.[17] *See also* the undermentioned case.[18]

12. Adjournment of one of two cross-cases.

Where there is a case and a counter-case, and the Court decides not to try them simultaneously, but one after the other, it has power under this Section to adjourn the one and take up the other for trial.[1] As to whether a simultaneous trial can be held of two cross-cases, *see* Section 239, *supra*, and the undermentioned cases.[2]

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delayed — *Held*, that question of staying criminal case was properly refused to be considered till the evidence for the prosecution had been recorded.]

13. (1921) 1921 Pat 484 (484), *Jodhi Singh* v. *Emperor*.
(1921) 1921 Lah 386 (388) : 23 Cri L Jour 700, *Taj-ud-din* v. *Taj Mahammad Nasir*.
[See also (1933) 1933 Sind 358 (359) : 1933 Cri Cas 1340 : 27 Sind L R 219 : 35 Cri L Jour 517, *Emperor* v. *Dinal Shah*. Decision in civil suit not likely to conclude question before criminal Court—Stay not necessary.]

14. (1927) 1927 Mad 778 (778) : 50 Mad 839 : 28 Cri L Jour 812, *Chitrala Ramiah* v. *Natukula Ramiah*.

14a (1933) 1933 Nag 78 (80) : 29 Nag L R 201 : 1933 Cri Cas 315 : 34 Cri L Jour 519, *Kanhaiyalal* v. *Baijnath Mahcshri*.

15. (1931) 1931 Pat 411 (414) : 33 Cri L Jour 147 : 1931 Cri Cas 999. *Jagannath Acharya Goswami* v. *A. Rajagopalachari*.
(1923) 1923 Mad 688 (688) : 25 Cri L Jour 277, *K. Krishna Rao* v. *P. S. Seshasubramania Iyer*.
[See also (1931) 1931 Pat 411 (414) : 1931 Cri Cas 999 : 33 Cri L Jour 147. *Jagannath Acharya Goswami* v. *A. Rajagopalachari*. Deputy Commissioner had no jurisdiction either as a Revenue Court or as a District Magistrate to stay criminal proceedings pending before the Sub-Divisional Magistrate.]
[But see (1923) 1923 Mad 595 (595) : 25 Cri L Jour 280, *Nambia Pillay* v. *Sudalaimuthu Nadan*.]

16. (1887) 1887 All W N 102 (103), *Empress* v. *Unkar Das*.

17. (1934) 1934 Sind 143 (144) : 1934 Cri Cas 1150 : 36 Cri L Jour 94, *Rewatmal Udhomal* v. *Sajanmal Mehrumal*.

18. (1904) 8 Cal W N 31 (Notes), *In the matter of the petition of Beni Madhub Chatterjee and Ram Krishna Mahto*. Order for criminal prosecution by civil Court—Application for stay of proceedings in criminal Court to be made to Bench in charge of criminal business.

Note 12.

1. (1929) 1929 Cal 281 (283) : 31 Cri L Jour 262, *Ram Golam Singh* v. *Sarat Chandra Ganguly*.
(1935) 1935 Pat 214 (216) : 36 Cri L Jour 714 (716) : 1935 Cri Cas 577 (S B) *Ram Singh* v. *Emperor*. But the Court is not *bound* to grant adjournment.

2. (1933) 1933 Lah 852 (853) : 14 Lah 820 : 35 Cri L Jour 171 : 1933 Cri Cas 1108, *Dhanwantri Durga Das* v. *Emperor*. No legal bar to Courts of concurrent jurisdiction trying same offence simultaneously.
(1923) 1923 Cal 644 (645) : 24 Cri L Jour 940, *Sheikh Samir* v. *Beni Madhab Gope*. Simultaneous trials in different Courts of both cases is undesirable—Proper course is for same Court to

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13. Power of High Court to set aside order of adjournment.

An improper order of adjournment can be set aside by the High Court either under Section 439 or under Section 107 of the Government of India Act, 1915.[1] Ordinarily, however, where the Court has exercised a judicial discretion in the matter, the High Court will not interfere.[2]

14. Power of Sessions Judge or District Magistrate to stay criminal proceedings pending before Subordinate Magistrate.

See Note 11, point 15, *ante*.

15. "On such terms as it thinks fit"—Costs.

These words empower the Court postponing or adjourning a criminal case to impose such terms as it thinks fit. This will include an order for the payment of costs,[1a] though such an order will be made only where the circumstances are exceptional and where, for some reason or other, the ordinary everyday method of conducting criminal cases has to be departed from owing to the conduct of a party.[1] Thus a complainant who is solely to blame for an adjournment can be ordered to pay costs.[2] Similarly an informant to the police in a police case, who though a witness is virtually conducting the prosecution by engaging a vakil, and who asks for time may be ordered to pay costs as a condition of the adjournment.[3] So also an accused person can be ordered to pay costs as a condition of the adjournment.[4] But where in a police case, the Police Sub-Inspector was responsible for securing the attendance of absent witnesses, the complainant, was held not to be liable for costs.[5] Nor will the complainant be liable for costs when the adjournment becomes necessary owing to the absence of the accused[6] or even where he is himself absent when the case is a non-compoundable warrant case and his position after charge is reduced to that of a witness.[7] In the undermentioned case[7a] where only some of the accused persons attended, and it was found that the complainant had not

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try both cases one after the other.

Note 13.

1. (1872) 17 Suth W R Cr 55 (56), *Mathura Nath Chuckerbutty* v. *Heera Lall Doss.* Case under the Code of 1861.
2. (1927) 1927 Mad 778 (779): 50 Mad 839: 28 Cri L Jour 812, *Chitrala Ramiah* v. *Natukula Ramiah.*
   (1862) 1 Mad H C R Cr 66 (67), *Ex Parte P. Varadarajulu Naidu.* No *mandamus* will be issued to compel Magistrate to proceed with the case.
   (1922) 1922 Pat 618 (618): 24 Cri L Jour 120, *Lalji Singh* v. *Nawrangi Lal.* Process issued in one case and the counter-case postponed till after the disposal of the former.
   (1925) 1925 Sind 315 (316): 26 Cri L Jour 958, *Ali Sher* v. *Mir Mahomed.*

Note 15.

1a (1905) 2 Cri L Jour 803 (804): 28 All 207, *Mathura Prasad* v. *Basant Lal.*
   (1918) 1918 Mad 538 (538): 18 Cri L Jour 612 (612): 40 Mad 1130, *Sunnasi Kudumban* v. *Sivasubramania Kone.*
   (1905) 28 All 209*n* (209*n*), *Ram Dayal* v. *Karan Singh.*
   (1918) 1918 Pat 656 (657): 19 Cri L Jour 6, *Raghunandan Prasad* v. *Ramadhin Singh.*
   (1904) 1 Cri L Jour 1095 (1097): 1904 Pun Re Cr No. 20, *Emperor* v. *Shuldham.*
   (1905) 2 Cri L Jour 1 (7, 8) (Cal), *Sew Prosad Poddar* v. *Corporation of Calcutta.*
   (1912) 13 Cri L Jour 268 (269): 14 Ind Cas 652 (All), *Gulzari Lal* v. *Gunga Ram.*
1. (1918) 1918 Bom 253 (253): 42 Bom 254: 19 Cri L Jour 326, *Abdul Rahiman, In re.*
2. (1922) 1922 Bom 239 (239): 23 Cri L Jour 338, *Emperor* v. *Laxman Nath.*
3. (1918) 1918 Mad 538 (540): 18 Cri L Jour 612 (614): 40 Mad 1130, *Sunnasi Kudumban* v. *Sivasubramania Kone.*
4. (1905) 2 Cri L Jour 1 (7, 8) (Cal), *Sew Prosad Poddar* v. *Corporation of Calcutta.*
   (1932) 1932 Bom 470 (472): 56 Bom 536: 33 Cri L Jour 802: 1932 Cri Cas 598, *Sorabji M. Shroff* v. *Erachshaw B. Katrak.*
5. (1922) 1922 Bom 239 (239): 23 Cri L Jour 338, *Emperor* v. *Laxman Nath.*
6. (1926) 1926 Lah 407 (408): 27 Cri L Jour 572, *Bishambar* v. *Ram Chand.*
7. (1924) 1924 Lah 627 (627): 25 Cri L Jour 87, *Nabi Bakhsh* v. *Emperor.*
7a (1933) 1933 Lah 720 (721): 1933 Cri Cas 941: 35 Cri L Jour 457, *Kazam Khan* v. *Emperor.*

accompanied the process-server, the Magistrate ordered the complainant to pay the costs of the accused persons who were present. It was *held* by the High Court in revision that the order for costs was not a proper one.

Where the accused is absent, and the case has perforce to be adjourned, no costs can be ordered against him.[8]

The power to order costs does not extend to previous adjournments granted without conditions.[9]

In the case of an application for transfer under Section 526, *infra*, it has been held that no order for costs should be made.[10]

No costs of adjournment can be awarded in criminal appeals as the Section does not apply to Criminal appeals.[11]

15a. Adjournment for cross-examination of prosecution witnesses in trials of warrant cases—Power to impose terms on accused.

In trials of warrant cases, the accused has a statutory right to the re-call of prosecution witnesses for cross-examination after the charge is framed and he cannot be ordered to pay the expenses of the witnesses in such cases. *See* Notes under Section 256. But this right applies only to the first re-call of the witnesses. Where once the witnesses are re-called but the accused asks for an adjournment of the case on the ground of the absence of his pleader, the Court can, under this Section, grant him the adjournment on condition of his paying bhatta to the prosecution witnesses.[1]

16. Remand.

A remand is a re-committal to custody of a person who has been brought up in custody.[1] The scheme of the Code as to the detention of the accused persons in custody is as follows:—

A person arrested *without warrant* should be brought up before a Magistrate without unnecessary delay (Sections 59 and 60), the maximum period of police custody allowed being 24 hours (Section 61). A person arrested under a warrant is similarly to be brought up before a Magistrate without unnecessary delay (Section 81). On being so brought up the Magistrate may, from time to time, authorise the detention of the accused either in police custody or in the judicial lock-up, as he thinks fit for a term not exceeding 15 days *on the whole* (Section 167). If within that period the investigation shows that there is not sufficient evidence or reasonable ground of suspicion against the accused, he should be released by the investigating officer on taking security for appearance before the Magistrate if and when he is required (Section 169). If within that period the investigation shows that there *is* such evidence or if the period expires without the

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8. (1906) 4 Cri L Jour 78 (79): 1906 Pun Re Cr No. 6, *Browne* v. *Chanda Singh.*
   (1922) 1922 All 184 (184): 23 Cri L Jour 243, *Beedha* v. *Emperor.*
   (1934) 1934 Lah 441 (442): 1934 Cri Cas 699: 36 Cri L Jour 101, *Gulab Singh* v. *Indar Singh.* *A fortiori*, no costs can be ordered in such cases, against the co-accused who is present but applies for adjournment.
9. (1932) 1932 Bom 470 (472): 1932 Cri Cas 598: 56 Bom 536: 33 Cri L Jour 802, *Sorabji Shroff* v. *Erachshaw B. Katrak.*
10. (1911) 12 Cri L Jour 274 (274): 8 Ind Cas 851 (Lah), *Fatta* v. *Emperor.*
    (1932) 1932 Bom 470 (472): 1932 Cri Cas 598: 56 Bom 536: 33 Cri L Jour 802, *Sorabji Shroff* v. *Erachshaw B. Katrak.*
11. (1902) 1902 All W N 59 (60), *Emperor* v. *Chhabraj Singh.*
    (1933) 1933 Mad W N 878 (879), *Rajanna* v. *Emperor.*

Note 15a.

1. (1934) 1934 Mad W N 100 (102), *Papi Naidu* v. *Gangu Naidu.*

Note 16.

1. (1867) 2 Weir 409 (409), *High Court Proceedings, 10th June* 1867.
   (1924) 1924 Cal 614 (615, 616): 26 Cri L Jour 68, *Bholanath Das* v. *Emperor.*

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investigation having been completed, the accused must be forwarded, subject to the provision as to bail, to the Magistrate *empowered to take cognisance of the offence upon a police report* (Section 170). If the latter also receives along with the accused a police report under Section 173, he can take cognisance of the offence on such report and if necessary remand the accused to custody for 15 days *at a time* for the purpose of obtaining further evidence or for other reasonable cause (Section 344). If owing to the investigation not having been completed a final report is not sent with the accused under Section 173, the Magistrate should release the accused. He cannot order a remand in such a case.[2] The High Court of Allahabad has, however, in the under-mentioned case,[3] held that Section 170 applies only to cases where the investigation has not been completed and further, that, even where the accused is sent up under that Section *without any report* under Section 173, the Magistrate can order a remand of the accused under this Section and is not bound to release him. It is submitted that this view cannot be accepted as correct. This Section clearly applies only where the Magistrate has *taken cognisance* of the offence and this he could do only on a police report or in the other modes referred to in Section 190. In the absence, therefore, of a police report or the other things referred to in Section 190, the Magistrate could not act, and there being no subsisting order for detention, the accused must be released.

17. Distinction between detention under Section 167 and under Section 344.

1. Section 167 applies to detention of accused persons during police investigation. This Section applies to detention after police investigation and before or pending inquiry or trial.[1]
2. The maximum period of detention under Section 167 can be only fifteen days. The period of detention under this Section cannot exceed fifteen days *at a time* though the *sum total* of the periods of detention may exceed fifteen days.[2]
3. A detention under Section 167 may be either in police custody or in judicial lock-up. A detention under this Section can only be in a judicial lock-up.[3]
4. A Magistrate acting under Section 167 *need not* be one who has jurisdiction to try or commit the case. A Magistrate acting under

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2. (1924) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732, *Nagendra Nath Chakrabarthi* v. *Emperor.*
[See also (1888) 11 Mad 98 (102), *Queen* v. *Engadu.*]
3. (1931) 1931 All 617 (619, 620) : 1931 Cri Cas 969 : 53 All 729 : 32 Cri L Jour 1045, *Emperor* v *Sooba.*

Note 17.

1. (1931) 1931 All 617 (620) : 1931 Cri Cas 969 : 53 All 729 : 32 Cri L Jour 1045, *Emperor* v. *Sooba.*
2. (1924) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732, *Nagendra Nath Chakrabarthi* v. *King-Emperor.*
(1931) 1931 Lah 99 (100, 101) : 1931 Cri Cas 163 : 12 Lah 435 : 33 Cri L Jour 180, *Bal Krishna* v. *Emperor.*
(1868) 5 Bom H C R Crown Cas 31 (33), *Reg.* v. *Surkya valad Dhaku.*
(1888) 11 Mad 98 (101), *Queen-Empress* v. *Engadu.*
(1924) 1924 Cal 614 (616) : 26 Cri L Jour 68, *Bholanath Das* v. *Emperor.*
(1909) 9 Cri L Jour 375 (377) : 36 Cal 166, *Rajah Narendra Lal Khan* v. *Emperor.*
3. (1902) 4 Bom L R 878 (879), *In re Rama Khandu.*
(1897) 23 Bom 32 (34), *In re Krishnaji Pandurang Joglekar.*
(1931) 1931 Lah 99 (100, 101) : 1931 Cri Cas 163 : 12 Lah 435 : 33 Cri L Jour 180, *Bal Krishna* v. *Emperor.*
(1931) 1931 Lah 353 (355) : 1931 Cri Cas 625 : 12 Lah 604 : 32 Cri L Jour 785, *Kundan Lal* v. *Emperor.*
(1926) 1926 Cal 1121 (1130) : 54 Cal 218 : 27 Cri L Jour 1201, *Muhammad Suleman* v. *Emperor.*

this Section must, however, be one who *has* such jurisdiction.[4]

18. Grounds of remand.

The words "may by a warrant remand" show that the Magistrate has a discretion in the matter of granting a remand.[1] The discretion, must, however, be a judicial one to be exercised in accordance with legal principles. The detention of an accused is not intended to be penal : its object is only to secure the attendance of the accused at the trial.[2] The Magistrate cannot, when an accused is brought before him in custody, further detain him in custody by remand without some reason made manifest to him either in the shape of sworn testimony given before him, or in some other form which can be put upon the record and which is sufficient to justify him in sending the prisoner to prison, there to be detained for a period not exceeding fifteen days.[3] In *Emperor* v. *Sooba and others*,[4] Kendall, J., of the High Court of Allahabad, observed as follows :—

"Two considerations that should influence the Court in deciding whether a remand should be granted are :—

1. Whether sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand, and

2. whether the time asked by the Police for the remand is, in the circumstances of the case, reasonable or not."

A *mere expectation* that after sometime by dint of enquiry some evidence might be obtained is not a sufficient cause for remand. It is only *after sufficient evidence* has been obtained to raise a suspicion that the accused may have committed an offence, that a likelihood of obtaining further evidence will be a reasonable cause for remand.[5] Where some evidence was available but it appeared to the Magistrate necessary to defer the examination so that the inquiry might be continuous, a further remand was held justified.[6] Similarly where it was proved by an affidavit that there was a conspiracy and it was also proved by sufficient evidence that the accused were members of that conspiracy, it was held that the Magistrate was justified in keeping them in custody for such period as appeared to him to be reasonable.[7] But where the complainant and his witnesses were not validly bound over to appear and did not appear on the date of the enquiry, it was held that a detention of the accused was not justified.[8] A remand for the purpose of getting a confession from the accused is most improper.[9]

Where, after one remand the accused is brought up and a further remand is

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4. (1924) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732, *Nagendra Nath Chakrabarthi* v. *Emperor*
   (1924) 1924 Cal 614 (616) : 26 Cri L Jour 868, *Bholanath* v. *Emperor*.

Note 18.

1. (1931) 1931 All 617 (620) : 1931 Cri Cas 969 : 53 All 729 : 32 Cri L Jour 1045, *Emperor* v. *Sooba*.
2. (1909) 9 Cri L Jour 409 (412) : 36 Cal 174, *Jamuni Mullick* v. *Emperor*.
   (1927) 1927 Nag 53 (55) : 27 Cri L Jour 1063, *Tularam* v. *Emperor*.
3. (1873) 20 Suth W R Cr 23 (30), *Abdul Kadir Khan* v. *Magistrate of Purneah*
   (1887) 11 Mad 98 (102), *Queen* v. *Engadu*.
   (1935) 1935 Lah 230 (243) : 1935 Cri Cas 396 : 35 Cri L Jour 1180, *Jahangiri Lal* v. *Emperor*. Duty to allow time for counsel to appear and argue matter before him.
4. (1931) 1931 All 617 (621): 1931 Cri Cas 969 : 53 All 729 : 32 Cri L Jour 1045, *Emperor* v. *Sooba*.
5. (1876) 25 Suth W R Cr 8 (8), *Zuhuruddeen Hossein, In re*. 17 Suth W R Cr 55, followed.
   (1872) 1872 Pun Re Cr No. 17, page 21 (23), *Khuda Bakhsh* v. *The Crown*.
6. (1883) 6 Mad 63 (67), *Manickam Mudali* v. *The Queen*.
7. (1933) 1933 Cal 752 (753): 34 Cri L Jour 1194 : 1933 Cri Cas 1254, *Sundar Ram* v. *Emperor*.
8. (1869) 11 Suth W R Cr 47 (48), *Queen* v. *Pooran Jolaha*.
9. (1886) 2 Weir 414 (415).

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asked for, some *direct evidence* of his guilt should be required to justify his further detention, and with each remand the necessity for producing such evidence increases.[10]

In the undermentioned case,[11] it was held by the High Court of Calcutta that the language of sub-section 1 shows that where the Magistrate properly directs a postponement, he has *unfettered* discretion to remand the accused to custody.

It was further held, that even assuming that there must be reasonable cause, not only for the order of postponement but for the order of remand, the explanation to the Section describes only one type of reasonable cause and there may be reasonable cause for a remand even though the circumstances do not fall under the terms of the explanation.

19. Remand in absence of accused.

A remand cannot be granted in the absence of the prisoner. As has been seen already, the use of the word 'remand' shows that a prisoner is brought up under custody and is again re-committed to custody.[1]

20. Period of detention.

There is no limit set to the total period of a series of orders of remand under this Section[1] provided no single order of remand exceeds 15 days *at a time*.[2] An accused is entitled to have the evidence against him recorded as early as possible[3] and the fact that there may be great body of evidence forthcoming against him is not a good ground for detention for an inordinate period.[4]

Where no evidence of an incriminating nature was forthcoming even after the remand for six weeks, a further detention was held not justified.[5] But in a conspiracy case where considerable time is required to collect evidence, detention for a period of three months was held good.[6]

21. "By a warrant."

A warrant for further detention of an accused, should be a warrant of commitment directed to some jailor or other person having authority to receive and keep prisoners. The warrant must state, that the prisoner is charged with some particular offence.[1]

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10. (1915) 1915 Nag 28 (29) : 16 Cri L Jour 705 : 11 Nag L R 162, *Ahamadali* v. *Emperor*.
(1883) 6 Mad 69 (70), *Ponnuswami Chetty* v. *The Queen*.

11. (1933) 1933 Cal 752 (753): 1933 Cri Cas 1254: 34 Cri L Jour 1194, *Sundar Ram* v. *Emperor*. For instance, a remand would be proper, where there is a strong *prima facie* case against the accused, but it is impossible to proceed with the inquiry owing to the unavoidable absence of a witness though the explanation may not cover such a case.

Note 19.

1. (1867) 2 Weir 409 (409), *H. C. Proceedings*, 10*th June* 1867.
(1867) 1867 Pun Re Cr No. 39, page 72 (76), *Crown* v. *Shera*.

Note 20.

1. (1931) 1931 All 617 (620) : 1931 Cri Cas 969 : 53 All 729 : 32 Cri L Jour 1045, *Emperor* v. *Sooba*.
2. (1921) 22 Cri L Jour 669 (671) : 63 Ind Cas 461 (463) (Lah), *Wadhawa Singh* v. *Emperor*.
(1868) 5 Bom H C R Crown Cas 31 (33), *Reg* v. *Surkya valad Dhaku*.
3. (1902) 26 Bom 552 (557), *In the matter of Lakshman Govind Nirgude*.
(1924) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732, *Nagendra Nath Chakrabarthi* v. *King-Emperor*.
4. (1883) 6 Mad 63 (67), *Manickam Mudali* v. *The Queen*.
5. (1908) 9 Cri L Jour 409 (412) : 36 Cal 174, *Jamini Mullick* v. *Emperor*.
(1870) 13 Suth W R Cr 27 (32), *Nobin Roy* v. *Surrendra Nath Roy*.
(1924) 1924 Cal 476 (479) : 51 Cal 402 : 25 Cri L Jour 732, *Nagendra Nath Chakravarthi* v. *King-Emperor*.
6. (1931) 1931 All 617 (621) : 53 All 729: 32 Cri L Jour 1045 : 1931 Cri Cas 969, *Emperor* v. *Sooba*.

Note 21.

1. (1870) 13 Suth W R Cr 1 (5), *In the matter of Mohesh Chunder Banerjee*.

22. Magistrate's liability for unreasonable detention. **Sec. 344 Note 22**

A Magistrate who, without reasonable cause and without good faith delays proceeding with the trial of persons whom he keeps in jail, will be liable to an action in damages notwithstanding the Judicial Officers' Protection Act (17 of 1850).[1]

345. (1) The offences punishable under the Sections of the Indian Penal Code described in the first two columns of the table next following may be compounded by persons mentioned in the third column of that table. **Sec. 345**

Compounding offences.

345.* (1) The offences punishable under the Sections of the Indian Penal Code *specified* in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table :—

Compounding offences.

Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.
Criminal trespass	447	The person in possession of the property trespassed upon.
House trespass	448	
Criminal breach of contract of service ...	490, 491, 492	The person with whom the offender has contracted.
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman ...	498	
Defamation	500	The person defamed.
Printing or engraving matter, knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter knowing it to contain such matter.	502	

* **(Code of 1882—S. 345**—Same as that of 1898 Code.)

Note 22.

1. (1869) 11 Suth W R Cr 19 (20), *The Queen* v. *Saboo.*

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Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.
Act caused by making a person believe that he will be an object of divine displeasure.	508	*The person against whom the offence was committed.*

(2) The offences of causing hurt and grievous hurt, punishable under S. 324, S. 325, S. 335, S. 337 or S. 338 of the Indian Penal Code, may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

(2) The offences punishable under the Sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table :—

Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Voluntarily causing hurt by dangerous weapons or means.	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt ...	325	Ditto.
Voluntarily causing grievous hurt on grave and sudden provocation.	335	Ditto.
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	337	Ditto.
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Ditto.
Wrongfully confining a person for three days or more.	343	*The person confined.*
Wrongfully confining a person in secret. ...	346	*Ditto.*
Assault or criminal force in attempting wrongfully to confine a person.	357	*The person assaulted or to whom the force was used.*

(Code of 1872—S. 188.)

Compounding offences.

188. In the case of offences which may lawfully be compounded, injured persons may compound the offence out of Court, or in Court with the permission of the Court.

Such withdrawal from the prosecution shall have the effect of an acquittal of the accused person.

Offence.	Sections of Indian Penal Code applicable.	Persons by whom offence may be compounded.
Dishonest misappropriation of property ...	403	*The owner of the property misappropriated.*
Cheating	417	*The person cheated.*
Cheating a person whose interest the offender was bound, by law or by legal contract, to protect.	418	*Ditto.*
Cheating by personation	419	*Ditto.*
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	420	*Ditto.*
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person.	430	*The person to whom the loss or damage is caused.*
House-trespass to commit an offence (other than theft) punishable with imprisonment.	451	*The person in possession of the house trespassed upon.*
Using a false trade or property mark ...	482	*The person to whom loss or injury is caused by such use.*
Counterfeiting a trade or property mark used by another.	483	*The person whose trade or property mark is counterfeited.*
Knowingly selling or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with a counterfeit trade or property mark.	486	*Ditto.*
Marrying again during the lifetime of a husband or wife.	494	*The husband or wife of the person so marrying.*
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.	509	*The woman whom it is intended to insult or whose privacy is intruded upon.*

(3) When any offence is compoundable under this Section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this Section is a minor, an idiot or a lunatic, any person competent to contract on his behalf may compound such offence.

(4) When the person who would otherwise be competent to compound an offence under this Section is *under the age of eighteen years or is* an idiot or a lunatic, any person competent to contract on his behalf may,

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with the permission of the Court, compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(5-A) A High Court acting in the exercise of its powers of revision under Section 439 may allow any person to compound any offence which he is competent to compound under this Section.

(6) The composition of an offence under this Section shall have the effect of an acquittal of the accused.

(6) The composition of an offence under this Section shall have the effect of an acquittal of the accused *with whom the offence has been compounded.*

(7) No offence shall be compounded except as provided by this Section.

Synopsis.

Other Topics.

Note 11, Pt. 2.
No reference to District Magistrate or police. See Note 12, Pt. 5.
Non-applicability to other laws. See Note 2, Pt. 9.
No withdrawal of warrant cases. See Note 3, Pt. 3.
No withdrawal of non-compoundable offences. See Note 5, Pts. 3, 7 and 8.
Non-compoundable offence changed into compoundable one on appeal. See Note 5, Pts. 16 and 17.
Offence under Section 143, I.P.C., and another offence. See Note 8, Pt. 2.
Offence under Section 147, I. P. C. See Note 8, Pt. 3.
Offence under Section 24, Cattle Trespass Act, and offence under Section 323, I. P. C. See Note 8, Pts. 4 and 5.
Onus of proof of composition. See Note 13, Pt. 1.
Police cannot withdraw complaint. See Note 12, Pt. 4.
Power of revision Court. See Note 16, F-N (2).
Record of reasons for sanction. See Note 12, Pt. 9.
Rejection of sanction on improper grounds. See Note 12, Pts. 10 to 16.
Resiling from compromise. See Note 4, Pt. 8; Note 12, Pt. 17 ; Note 17.
Section complete in itself. See Note 2, Pt. 4a; Note 19, Pt. 2 ; Note 5, Pt. 2.
Settlement in future—Not composition. See Note 4, Pt. 4.
Settlement of non-compoundable case. See Note 5, Pt. 1; Note 18, Pt. 10.
Stifling prosecution. See Note 2, Pts. 2, 6 and 7 ; Note 5, Pt. 1.
Substance and not form of petition. See Note 3, Pts. 6 to 9.

1. Legislative changes.

Difference between the Codes of 1861 *and* 1872:—

The Code of 1861 contained no provision such as that found in this Section and it was not settled whether there might be a compromise in a criminal case.[1]

Section 188 of the Code of 1872 provided that in the case of offences *which may lawfully be compounded*, injured persons may compound the offences out of Court or in Court with the permission of the Court. What those offences were "which may lawfully be compounded," were not mentioned in the Section ; for that information one had to refer to the exception to Section 214 of the Indian Penal Code.

Difference between the Codes of 1872 *and* 1882:—

Section 345 of the Code of 1882, gave a tabulated list that was intended to be exhaustive of the offences that were compoundable. The Code also for the first time introduced a distinction between offences compoundable with the permission of the Court and those compoundable without such permission. In keeping with this amendment to the procedure Code and almost simultaneously with it, an amendment was made to Section 212, of the Penal Code by Act VIII of 1872, substituting for the original exception, referred to above, the exception that now finds place in the Section, reading thus : "The provisions of Sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded."

Changes introduced in 1898:—

Sub-section 5 was newly added.

Amendments introduced in 1923:—

(*a*) Section 508 Indian Penal Code, was added to the list of offences compoundable without leave of Court.

(*b*) A number of offences were added to the list of offences compoundable with the leave of Court under sub-section 2.

(*c*) Sub-section 4 was amended making it clear that the age of majority is 18 years. (There was a doubt regarding this before—*vide* Note 10). The leave of the Court in the case of composition on behalf of persons under disability, has also been made a necessary condition.

(*d*) Sub-section 5-A was newly added. (*See* Note 16).

Section 345—Note 1.

1. (1912) 40 Cal 113 (117) : 15 Ind Cas 259 (259), *Majibar Rahman* v. *Muktashed Hossein.*

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(*e*) Sub-section 6, has been amended so as to make it clear that the effect of a composition is to acquit only the accused with whom the offence has been compounded thereby setting at rest the controversy on this point also. *Vide* Note 18.

2. Scope and principle.

The law makes a difference between various classes of offences and allows compromise in some and no compromise in others.[1] Competence to accept satisfaction for wrong done to oneself which follows from the general rule of freedom of transactions is subject to limitations, those limitations corresponding generally with classes of wrongs in which, though a personal injury is sustained, a civil suit is not allowed or is allowed only after the public interest has been satisfied. In such a case the institution of a prosecution is a duty which cannot be neglected in consideration of any private advantage.[2]

The principle of English Law is that the composition of an offence is illegal, if the offence is one of public concern, but lawful if the offence is of a private nature and for which damages may be recovered in a civil action. This principle was adopted in this country also, but there was before the Code of 1882, an uncertainty as to what exactly were the cases which were compoundable.[3]

The tabulation of offences in this Section now removes all uncertainty[4] and must be taken as a complete guide and test on the matter.[4a] The policy of the legislature adopted in this Section is that, in the case of certain minor offences where the interests of the public are not vitally affected, the complainant should be permitted to come to terms with the party against whom he complains, the offences being specified in the Section.[5] Where an offence with which a particular person is charged is compoundable, he is at liberty to come to a settlement with the prosecution and the settlement so arrived at cannot be considered to be one, the consideration for which is illegal.[6] Where a case has once been brought to Court and the parties have adjusted the matter between themselves lawfully, it cannot be said that they are hushing up the matter.[7]

The provisions of the Section are not limited to cases, wherein the accused *pleads guilty*. Such a view would limit the scope of the Section to those comparatively few cases in which the accused is advised that defence would be hopeless.[8]

The Section does not apply to offences punishable under laws *other than the Penal Code*.[9]

3. Withdrawal and composition compared.

An act of compounding is different from the withdrawal of a complaint made to a Magistrate. A withdrawal must be by intimation to the Magistrate and the complainant is required to satisfy the Magistrate that there are sufficient

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Note 2.

1. (1898) 3 Cal W N 5 (5), *Amir Khan* v. *Amirjan*.
2. (1876) 1 Bom 147 (153), *Reg* v. *Rahimat*.
3. (1876) 1 Bom 147 (148, 149), *Reg* v. *Rahimat*.
4. (1912) 8 Nag L R 97 (105) : 16 Ind Cas 555 (559), *Kishan Lal* v. *Aman Singh*.

4a (1913) 14 Cri L Jour 292 (293) : 6 Sind L R 284, *Imperator* v. *Mulo*.
(1894) Ratanlal 699, *Queen-Empress* v. *Naran*.

5. (1921) 1921 Bom 166 (166) : 45 Bom 346 : 22 Cri L Jour 55, *Emperor* v. *Alibhai Abdul*.
6. (1930) 1930 Oudh 196 (198) : 1930 Cri Cas 957 : 4 Luck 669, *Saktay Sah* v. *Mahadin*.
7. (1929) 1929 Pat 512 (512) : 1929 Cri Cas 272 : 31 Cri L Jour 607, *Singheswar Prasad* v. *Ali Hasan*.
8. (1909) 10 Cri L Jour 228 (228) : 2 Sind L R 16, *Emperor* v. *Lilaram*.
9. Sel Cas 78 (Oudh), *Queen-Empress* v. *Gunbar*.

grounds for permitting him to withdraw it.[1] A withdrawal is permissible in all summons cases. Composition is only permitted in respect of specified offences some of which are summons cases and others not, the offences being mentioned in this Section. Again, withdrawal is the act of one party to the proceeding, *viz.*, the complainant, whereas the composition of an offence obviously requires the co-operation of both parties. Permission is necessary in the case of withdrawal, because it is the act of one party alone. Complainants otherwise would be at liberty to bring frivolous and vexatious complaints and withdraw them calmly when they have caused the accused enough of annoyance and degradation. There is no such abuse of process to be guarded against in a composition, it being the act of both the parties.[2] Withdrawals are confined to summons cases ; warrant cases cannot be withdrawn.[3] A complaint can be withdrawn only by the complainant, who may not necessarily be the person injured.[4] The word "compound" means to withdraw for a consideration, and not merely to withdraw.[5]

Whether a petition is one for withdrawal or compromise is to be judged from the fact, whether the accused consented to it or not. The substance and not merely the form of the petition should be considered.[6] When the complainant put in a petition before the Court not asking for permission to withdraw but saying that he did withdraw against one of the accused as there had been an apology, and he wished the case to proceed only against the other accused; it was held, that it was not a case of mere withdrawal but was one of composition;[7] and where the complainant wrote out and gave to the accused a document as follows : "This is to say that Mr. John came to me and offered an unconditional apology; I beg to withdraw the case against him," the document was held to mean that the offence was compounded and not merely withdrawn.[8] It is open to the Magistrate to question the complainant to satisfy himself whether an application is in fact one for composition or for withdrawal.[9]

4. What amounts to composition.

A composition is an arrangement or settlement of differences between the injured party and the person against whom the complaint is made.[1] A mere application by the complainant for permission to withdraw the case because his witnesses had turned round, is not a composition of the offence.[2] Neither was there any composition held to have been arrived at when the petition for "compounding" stated that it would be of no advantage to the complainant to prosecute her complaint as it was presented under a misunderstanding of circumstances.[3]

The compounding of an offence supposes an arrangement whereby the

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Note 3.

1. (1894) 21 Cal 103 (113), *Murrey* v. *Empress.*
2. (1888) 1888 Pun Re Cr No. 19, page 35 (36), *Empress* v. *Khushali Ram.*
   (1924) 1924 Lah 595 (596) : 5 Lah 239 : 25 Cri L Jour 629, *Anantia* v. *Emperor.*
   (1916) 1916 Pat 200 (202) : 18 Cri L Jour 107 (109), *Bayan Ali* v. *Emperor.*
3. (1889) Ratanlal 461 (461), *Queen-Empress* v. *Lilladhur.*
   (1927) 1927 Bom 410 (411) : 51 Bom 512 : 28 Cri L Jour 581, *Dajiba Ramji Patel* v. *Emperor.*
4. (1878) 2 Bom 653 (653), *In re Muse Ali Adam.*
5. (1892-1896) 1 Upp Bur Rul 219, *Queen-Empress* v. *Nga Po Gaung.*
6. (1924) 1924 Lah 595 (598) : 5 Lah 239 : 25 Cri L Jour 629, *Anantia* v. *Emperor.*
7. (1924) 1924 Lah 595 (596) : 5 Lah 239 : 25 Cri L Jour 629, *Anantia* v. *Emperor.*
8. (1923) 1923 All 474 (476) : 45 All 145 : 24 Cri L Jour 758, *John* v. *Emperor.*
9. (1916) 1916 Pat 200 (202) : 18 Cri L Jour 107 (109), *Bayan Ali* v. *Emperor.*

Note 4.

1. (1921) 1921 Bom 166 (167) : 45 Bom 346 : 22 Cri L Jour 55, *Emperor* v. *Alibhai Abdul.*
2. (1902) 4 Bom L R 718 (720), *Emperor* v. *Asmal Hasan.*
3. (1927) 1927 Bom 410 (411): 51 Bom 512: 28 Cri L Jour 581, *Dhajiba Ramji Patel* v. *Emperor.*

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parties have *settled* their differences and not a mere arrangement to settle their disputes *in future* as the result of some action either by themselves or third parties.[4] An incomplete arrangement will not amount to an actual acquittal within the meaning of the law.[5]

Pending a criminal case, the parties entered into an agreement referring their disputes to arbitration. No arbitration took place, but it was argued that the very signing of the *muchlika* for reference to arbitrators amounted to a composition. It was held, however, that the *muchlika* was only one step towards the composition and that there would have been a composition only if the *muchlika* had been carried out and an award had been arrived at according to its terms.[6]

A Magistrate is not bound to recognise a reference to arbitration and wait for the award, but it will be reasonable for him to do so. If he, however, chooses to wait and there is an award, the award may amount to a composition.[7] Where parties entered into a sort of compromise previously before a muktear to whom the case had been sent for local inquiry, but on the records being sent to the Magistrate both parties resiled from the agreement, and then on the Magistrate's summoning the accused, the latter sought to have the so-called compromise recognised, it was held that he could not take advantage of the compromise previously entered into before the local enquiry officer.[8]

As to the effect of an agreement to be bound by the evidence on oath of a certain witness, *see* the undermentioned case.[9]

5. The offence must be compoundable.

It is against public policy to compound a non-compoundable offence.[1] The Legislature has laid down in this Section the tests for determining the classes of offences which concern individuals only as distinguished from those which have reference to the interests of the State, and Courts of law cannot go beyond that test and substitute for it one of their own.[2] It is the duty of a criminal Court to refuse to allow the withdrawal of the prosecution if the case is non-compoundable.[3]

A Magistrate should consider all the circumstances and make up his mind that only a compoundable offence is proved before he allows a compounding.[4] Where the evidence taken by a Magistrate clearly disclosed a non-compoundable offence it was held that he had no authority to allow the offence to be compounded

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4. (1925) 1925 Mad 1211 (1212): 26 Cri L Jour 1594, *Ramalinga Iyer* v. *Budda Varadarajulu Iyer*.
5. (1919) 1919 Mad 879 (881): 41 Mad 685: 19 Cri L Jour 359, *Kumarasamy Chetty* v. *Kuppusami Chetty*.
6. (1925) 1925 Mad 1211 (1211): 26 Cri L Jour 1594, *Ramalinga Iyer* v. *Budda Varadarajulu Iyer*.
   [See also (1926) 1926 Cal 266 (267): 26 Cri L Jour 1584, *Srish Chandra Ghose* v. *Abani Nath Hazra*.]
7. (1925) 1925 Mad 1211 (1212): 26 Cri L Jour 1594, *Ramalinga Iyer* v. *Budda Varadarajulu Iyer*.
8. (1918) 22 Cal W N 172*n* (172*n*), *Anand Chandra* v. *Chandra Mohan*.
9. (1888) 13 Bom 389 (391), *Queen-Empress* v. *Murarji Gokuldas*. Procedure under Oaths Act, Ss. 8 to 11 does not apply to criminal proceedings, the reason being that in such proceedings the complainant or the accused is not a party within the meaning of S. 8 of the said Act.

Note 5.

1. (1918) 22 Cal W N 172*n* (172*n*), *Anand Chandra* v. *Chandra Mohan*.
   (1926) 1926 Cal 59 (63): 53 Cal 51, *Dwijendranath Mullick* v. *Gopiram Govindram*.
   (1929) 1929 All 456 (458), *Sadhu Kandu* v. *Mt. Jhinka Kuer*.
   (1912) 40 Cal 113 (118): 15 Ind Cas 259 (260), *Rahman* v. *Muktashed Hossein*.
2. (1904) 28 Bom 326 (328), *Dalsukhram Hargovandas* v. *Charles De Bretton*.
3. (1914) 1914 Oudh 278 (279): 17 Oudh Cas 213, *Lachman Das* v. *Narain*.
4. (1894) Ratanlal 699 (700), *Queen-Empress* v. *Naran*.
   (1903) 16 C P L R 178 (179), *Sitaram* v. *Hiralal*.

and in doing so had usurped jurisdiction not vested in him.[5] *See also* undermentioned cases.[6] The withdrawal from the prosecution in a case in which the offence charged is non-compoundable has not the effect of an acquittal;[7] and an agreement entered into between the complainant and the accused for the refund of money embezzled by the latter was not allowed to be pleaded as a bar of prosecution for the offence.[8]

To determine whether a case is compoundable or not, the offence with the commission of which the accused were charged in the complaint or with which the Court charged them should be looked into.[9] Where the offence, so far as was then known, believed, and alleged, was punishable under Section 323, it was held that the composition was legal.[10] If a complaint alleges circumstances constituting a compoundable offence, as also other circumstances alleging a non-compoundable offence, it has to be seen what are the essential circumstances.[11]

The question of a case being compoundable or not must be decided with reference to the state of facts existing at the date of the application to compound. It is not possible for the Court to see what the ultimate result of the case will be.[12] Where a Magistrate allowed the non-compoundable offence of rioting to be compounded upon a mere surmise, based on no evidence, that the case might in the end turn out to be one of a compoundable offence, it was held that he had no such power.[13]

Though the complainant accuses a person of a compoundable as well as of a non-compoundable offence, if the Magistrate issues a summons to the accused for the compoundable offence alone, a composition may be effected.[14] Conversely, if in the trial of a compoundable offence, an offence which is not compoundable is by oversight mentioned in the summons, it does not deprive the parties of their right to compound.[15]

Where accused was convicted of a non-compoundable offence but on appeal was acquitted of that but the appellate Court considered that he should be convicted of a compoundable offence of which he had not been tried by the Magistrate, it was held that he should be allowed an opportunity of compounding the offence if he can, before being convicted of the same.[16] Where this opportunity was not allowed, the High Court allowed it in revision.[17]

(1900-02) 1 Low Bur Rul 349 (349), *Crown* v. *Konoo.*

5. (1900) 2 Weir 151 (151), *In re Abdul Ally Sahib.*
(1902) 4 Bom L R 718 (720), *Emperor* v. *Asmal Hasan.*

6. (1887) Ratanlal 331 (332), *Queen-Empress* v. *Dhondi.*
(1879) 1879 Pun Re Cr No. 30, page 82 (82). *Empress* v. *Rahim Bakhsh and Jaimal Singh.*
(1871-74) 7 Mad H C R App 34 (34).
(1919) 1919 Pat 545 (546): 20 Cri L Jour 552, *Guru Prasad Sahu* v. *Ajodhya Nath Parhi.*
(1913) 14 Cri L Jour 77 (78): 37 Bom 369, *Emperor* v. *Ranchhod Bawla.*

7. (1888) Ratanlal 391 (392), *Queen-Empress* v. *Moti Das.*
(1875) 1 Bom 64 (66), *Reg* v. *Devama and Somshekar.*
(1893-1900) 1893-1900 Low Bur Rul 240, *Queen-Empress* v. *Po Ba.*

8. (1886) 1 Weir 462 (462), *In re Ponnambalam Pillai.*
(1883) 1 Weir 465 (465), *Zamindar of Yettiyapuram* v. *Ramaswami Nadan.*

9. (1930) 1930 Oudh 196 (198): 1930 Cri Cas 957: 4 Luck 669, *Saktay Sah* v. *Mahadin.*

10. (1884) 1884 All W N 13 (14), *Empress* v. *Unkar.*

11. (1929) 1929 All 456 (458), *Sadhu Kandu* v. *Mt. Jhinka Kuer.*

12. (1925) 1925 Nag 395 (395): 26 Cri L Jour 1428, *Mt. Rani* v. *Mt. Jaiwanti.*

13. (1907) 6 Cri L Jour 336 (336, 337): 1907 Pun Re Cr No. 11, *Emperor* v. *Hira Singh.*

14. (1916) 1916 Cal 917 (917, 918), *Mahomed Ismail* v. *Samad Ali Bhuyan.*

15. (1921) 1921 Pat 75 (75): 22 Cri L Jour 493, *Kadir Akram* v. *Emperor.*

16. (1900) 3 Oudh Cas 314 (315), *Girwar Singh* v. *Queen Empress.*

17. (1910) 11 Cri L Jour 496 (497): 13 Oudh

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6. Consideration.

The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification not necessarily of a pecuniary character, to act as an inducement of his desiring to abstain from a prosecution.[1]

The composition spoken of in this Section is in the nature of a contract, but monetary consideration is not necessary.[2] It has even been suggested that a lawful composition may be effected within the scope of this Section without the passing of any consideration, the only essential thing required being that some arrangement should have been arrived at between the parties, which settles their differences.[3] The Court is not concerned with the nature or value of the consideration. If the complainant considers that his grievance is redressed by the mere fact of respectable persons having intervened, though he has received no money payment or even a direct apology from the accused, he is nevertheless at full liberty to compound the prosecution.[4] For instance, where a mere apology was the consideration, *see* the following case.[5]

7. Free will is necessary.

Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which a Court requires for the proof of any agreement which is in issue, and unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition.[1]

8. Compoundable offences.

Under Section 188 of the Code of 1872, which did not give a list of compoundable offences, it was held that, the test for determining whether an offence was compoundable or not was, that wherever a word such as "voluntarily," "intentionally," "fraudulently," etc., was an essential ingredient of the offence, it was not compoundable, but that where the offence was one irrespective of the intention and for which a civil action might be brought at the option of the persons injured, instead of criminal proceedings, it was compoundable.[1]

Cas 161, *Ram Sarup* v. *Emperor*.

Note 6.

1. (1894) 21 Cal 103 (112, 116), *Murray* v. *Empress*
   (1924) 1924 Lah 595 (598): 5 Lah 239: 25 Cri L Jour 629, *Anantia* v. *Emperor*. Consideration—Apology.
2. (1916) 1916 Mad 854 (855): 16 Cri L Jour 803 (804): 39 Mad 946, *Mahomed Kanni* v. *Pattani Inayattulla Sahib*.
3. (1896) 1896 Pun Re Cr No. 9, page 21 (23), *Haidayat Ali* v. *Empress*.
4. (1909) 10 Cri L Jour 228 (229): 2 Sind L R 16, *Emperor* v. *Lilaram*.
5. (1923) 1923 All 474 (476): 45 All 145: 24 Cri L Jour 758, *John* v. *Emperor*. Instance where the consideration for the compounding was an apology by the accused.

Note 7.

1. (1894) 21 Cal 103 (115), *Murray* v. *Empress*.

Note 8.

1. (1876) 1 Bom 147 (154), *Reg* v. *Rahimat*.

The following are cases in which the offence was held to be not compoundable:—

(1876) 1 Bom 147 (157), *Reg* v. *Rahimat*. Hurt and grievous hurt.
(1874) 6 N W P H C R 302 (305), *Queen* v. *Madan Mohan*. (Do.)
(1893-1900) 1893-1900 Low Bur Rul 240. *Queen-Empress* v. *Po Ba*. (Do.)
(1876) 1 Bom 147 (158) (Foot-note), *Reg*. v. *Rahimat*. Criminal breach of trust—Defamation, cheating and enticing away a woman.
(1880) 6 Cal L R 392 (392), *In re a reference from the Chief Presidency Magistrate*. Criminal breach of trust.
(1871-1874) 7 Mad H C R App 34 (34). Offence under S. 404.
(1876) 1 Mad 191 (192), *Reg* v. *Muthavan*. Enticing away a married woman.
(1880) 3 All 283 (285), *Raunak Husain* v. *Harbans Singh*. Offences under Ss. 417, 419, 465 and 468.

In the following cases the offences were held to be compoundable:—

(1867) 7 Suth W R Cr 33 (34), *Empress* v. *Shibnarain Palodhee*. Wrongfully

The essence of an offence under Section 143 is the combination of several persons united in the purpose of committing a criminal offence and that purpose in itself constitutes a distinct offence from the criminal offence which these persons agree to commit. So though the law may allow the latter offence to be compounded, the effect of such composition is not to annul the common object charged, and the prosecution under Section 143 will not fall to the ground but may be proceeded with.[2]

The offence of rioting under Section 147 of the Penal Code, being an offence against the public tranquility, primarily concerns the State more than the individual and that is probably one reason why that offence is not included by the Legislature in the category of compoundable offences.[3]

An offence under Section 21 of the Cattle Trespass Act is not compoundable. But where that offence was charged along with an offence under Section 323 and the parties effected a compromise in respect of the latter offence, it was held that, the Magistrate, if he thought fit to do so, was entitled to deal with the compromise as a withdrawal of the complaint in respect of the offence under the Cattle Trespass Act, because a case in respect of the latter offence being a summons case would result in an acquittal if no evidence were adduced.[4]

See also the following cases.[5]

9. Who can compound.

Any person may set the criminal law in motion, but it is only the person specified in Section 345 who can compound the offence.[1] Hence, a husband may be a complainant when the offence is defamation of his wife by imputations of her chastity, but it is only the wife who is entitled to compound the offence.[2] Similarly in the case of the offence of abduction, though the complaint may have been preferred by another person, *e. g.*, the father of the girl in whose custody the girl may have been at the time of the abduction, still it is only the husband who is

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restraining another may be lawfully compounded.

(1874) 22 Suth W R Cr 26 (27), *Empress* v. *Gopee Mohun Mitter*. Kidnapping.

Sel Cas 74 (Oudh), *Queen-Empress* v. *Sidha*. Offences under S. 335 or S. 338, I. P. C.

(1868) 5 Bom H C R Crown Cas 27 (28), *Reg* v. *Ramlo Jerio*. Offences under S. 498.

(1868) 5 Bom H C R Crown Cas 28 (28) (Note), *In re Jamni*. (Do.)

(1865) 4 Suth W R Cr 31 (31), *Queen* v. *Smith*. (Do.)

(1873) 10 Bom H C R Crown Cas 68 (68), *Reg.* v. *Jetha Bhala*. Hurt. [See however (1876) 1 Bom 147 (157.)]

2. (1923) 1923 Mad 592 (592) : 46 Mad 257 : 24 Cri L Jour 114, (*Mathi*) *Venkanna* v. *Emperor*.
[See however (1913) 14 Cri L Jour 458 (459) : 20 Ind Cas 618 (Cal), *Sheikh Basireddi* v. *Sheikh Khayrat Ali*. Read carefully; there is no real conflict between this and 1923 Mad 592.]

3. (1918) 1918 Mad 494 (495) : 18 Cri L Jour 329 (330), *In re Malayil Kottayil Koyassan Kutty*.

(1907) 6 Cri L Jour 336 (337) : 1907 Pun Re Cr No. 11, *Emperor* v. *Hira Singh*.

4. (1919) 1919 All 31 (31) : 42 All 202 : 21 Cri L Jour 305, *Emperor* v. *Julua*.

5. (1887) Ratanlal 330 (330), *Empress* v. *Vithoba*. S. 506, Latter part.

(1913) 14 Cri L Jour 462 (463) : 20 Ind Cas 622 (Rang), *R. S. Sarma Iyer* v. *Emperor*. S. 452, I. P. C.

(1901) 28 Cal 652 (663), *Dwarkanath Mondul* v. *Beni Madhab Banerjee*. S. 406, I. P. C.

(1912) 16 Cal W N 246*n* (246*n*), *Sasadhar Sanyal* v. *Soshee Bhushan*. S. 406, I. P. C.

(1924) 1924 All 209 (209) : 46 All 91 : 25 Cri L Jour 1005, *Brij Behari Lal* v. *Emperor*. S. 420, I. P. C.

(1897) 22 Bom 889 (890), *In re Motiram*. Mischief.

(1914) 1914 Oudh 264 (264) : 17 Ind Cas 18 : 15 Cri L Jour 230, *Ramphal* v. *Emperor*. Offence under S. 211, I. P. C., cannot be lawfully compounded.

Note 9.

1. (1927) 1927 Bom 410 (411) : 51 Bom 512 : 28 Cri L Jour 581, *Dajiba Ramji Patil* v. *Emperor*.

2. (1891) 14 Mad 379 (381), *Chellam Naidu* v. *Ramaswami*.

(1872-1892) 1872-1892 Low Bur Rul 617, *Queen-Empress* v. *Nga Pau Gale*.

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competent to compound the offence.[3]

The offence of hurt can be compounded only by the person to whom the hurt is caused, and neither his heirs nor any other person can compound the offence.[4] The offence of criminal trespass can be compounded by the person in whose possession the property was,[5] and the offence of wrongful restraint by the person restrained.[6]

But where a person sends another man to Court to represent him in filing a complaint, the Court is perfectly justified in accepting the latter's statement that he desires to compound the offence with the assumption that he is authorized by the former to compound it, and under the circumstances, it is not incumbent on the Court, before allowing the case to be compounded and acquitting the accused to make any inquiry into his authority.[7]

10. Minor.

A minor cannot compound a case. The age of majority contemplated by this Section is not to be regulated by the personal law of the party concerned. The effect of this Section read with Section 3 of the Indian Majority Act is that a person under 18 years of age cannot lawfully compound the offences declared to be compoundable by the former Section.[1]

A husband committed the offence of hurt against his wife, a minor. She, at the suggestion of her father with whom she was living, filed a complaint against her husband. It was held that the father of the girl was competent to compound the offence on her behalf.[2]

11. Composition under sub-section 1.

In cases falling under sub-section 1, no leave of the Court is necessary for compounding[1] and in such cases the Magistrate has no option but is bound to allow the compromise.[2] Parties are entitled to compound such offences unconditionally and when a *razinama* is filed by them, it is not for the Magistrate to inquire

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3. (1922) 1922 Lah 177 (178) : 23 Cri L Jour 690, *Mir Alam* v. *Emperor*.
(1924) 1924 Lah 330 (331) : 24 Cri L Jour 780, *Mahbub Ali Khan* v. *Emperor*.

4. (1915) 1915 All 443 (443): 37 All 419 : 16 Cri L Jour 586, *Emperor* v. *Rahmat*.
(1892) 2 Weir 418 (418), *In re Gangamma Dorayya*.
(1915) 1915 Mad 635 (635) : 37 Mad 385, *Mottai Reddy* v. *Thanappa Reddy*.
(1917) 1917 All 377 (378) : 18 Cri L Jour 729, *Lala* v. *Emperor*.
(1909) 10 Cri L Jour 473 (474) : 31 All 606, *Emperor* v. *Sultan Singh*.

5. (1895) 22 Cal 123 (130), *Chandi Prasad* v. *Evans*.
(1924) 1924 Mad 40 (40) : 24 Cri L Jour 824, *Avudayappa Mudaliar* v. *Emperor*.

6. (1927) 1927 All 375 (376) : 49 All 484 : 28 Cri L Jour 495, *Mrs. F. M. Torpey* v. *Emperor*.

7. (1924) 1924 All 778 (779) : 26 Cri L Jour 98, *Harbans* v. *Emperor*.
[See however (1923) 24 Cri L Jour 120 (123) : 71 Ind Cas 248 (250) (Peshawar), *Harnam* v. *Sain Dass*. It is not mentioned in this case whether the prosecution by the complainant was on behalf of herself or on behalf of the husband of the girl abducted.]

Note 10.

1. (1891) 1891 Pun Re Cr No. 17, page (58), *Shib Singh* v. *Empress*.

2. (1929) 1929 Nag 278 (279) : 1929 Cri Cas 454 : 30 Cri L Jour 960, *Emperor* v. *Bhaiyalal*.

Note 11.

1. (1921) 1921 Cal 403 (404) : 22 Cr L Jour 301, *Hem Chandra* v. *Girindra Chandra Chaudhuri*.

2. (1886) 1886 All W N 167 (167), *Empress* v. *Ramgopal*.
(1884) 1884 All W N 256 (256), *Empress* v. *Corrie*.
(1902) 2 Weir 418 (419), *In re Gangamma Dorayya*.
(1893-1900) 1893-1900 Low Bur Rul 484, *Queen-Empress* v. *Nga San Hla*.
(1910) 11 Cri L Jour 638 (639) : 1910 Pun Re Cr No. 30, *Emperor* v. *Sundar Singh*.
(1897-1901) 1 Upp Bur Rul 350, *King-Emperor* v. *Dhera Mal*.
(1893) 1893 All W N 245 (245), *Empress* v. *Khuda Bakhsh*.

whether the complaint was frivolous or vexatious.[3] The mere fact that the accused has been sent up by the police, does not prevent the person mentioned in column 3 of the Schedule to this Section from compounding the offence.[4]

Where the offence is compoundable by parties without the leave of the Court and it is so compounded and a deed of composition is filed by all the parties present in Court, the only verification necessary is to see whether the parties signed it and understood its contents ; the Magistrate should not adjourn the case for verification or call for further proof of the compromise but should, without unnecessary delay, acquit the accused.[5]

Where the Court has drawn up a charge of an offence compoundable without the sanction of the Court and after this charge has been read and explained to the accused and pleaded to, a petition of composition is presented to it, the Court should, at once, accept the petition and acquit the accused ; it has no power at that stage to alter the charge ; the composition has the effect of an acquittal and is complete immediately the complainant puts it forward in Court.[6] Where a Magistrate records a compromise he becomes "*functus officio*," and an order stating that the parties should again appear on another date, is of no effect.[7]

In cases falling under sub-section 1 in the absence of any express provision *contra*, the natural interpretation is that the composition is not limited to acts done in Court or to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court.[8] So far at least as offences falling under sub-section 1 are concerned, there is no necessity for the composition to be effected in Court in criminal trials, any more than in civil suits.[9]

12. Compositions under sub-section 2.

In cases governed by sub-section 2, no effect can be given to a compromise as a plea in lieu of conviction unless the Court has sanctioned the compromise. Without the sanction the so-called compromise arrived at between the parties is of no effect. The jurisdiction of the Court to try the offence is unaffected and there is no rule of law which would enable the Court in a case falling under sub-section 2 to order an enquiry into the factum of compromise alleged by one party and denied by the other.[1]

An agreement to compound an offence falling within this sub-section can only be effected with the Court's permission after the institution of criminal proceedings.[1a] Where an agreement to compound has been arrived at, the operation of a composition is suspended till the Court sanctions it. But where the composition has been made out of Court and at a certain stage in the proceedings, the Court gives its sanction thereto, the composition is not bad.[2]

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3. (1909) 9 Cri L Jour 186 (187) (Bom), *In re Harkisan Das Haridas.*
4. (1884) 10 Cal 551 (553), *Empress* v. *Nowabjan.*
5. (1899) 3 Cal W N 322 (323), *Kusum Bewa* v. *Bechu Bewa.*
   (1930) 1930 All 409 (410) : 1930 Cri Cas 525 : 52 All 254 : 31 Cri L Jour 1215, *Jhangtoo Barai* v. *Emperor.*
   (1914) 1914 Bom 258 (259) : 16 Cri L Jour 88, *Emperor* v. *Gana Krishna Walunj.*
   (1899) 3 Cal W N 548 (550), *Mahomed Ismail* v. *Faizuddi.*
6. (1914) 1914 Lah 561 (563) : 1914 Pun Re Cr No. 29 : 16 Cri L Jour 81 (FB), *Hasta* v. *Emperor.*
7. (1921) 1921 Pat 290 (291) : 22 Cri L Jour 675, *Amar Ali* v. *Emperor.*
8. (1916) 1916 Mad 854 (855) : 16 Cri L Jour 803 (804) : 39 Mad 946, *Mahomed Kanni Rowther* v. *P. Inayathulla.*
9. (1913) 14 Cri L Jour 292 (293) : 6 Sind L R 284, *Imperator* v. *Mulo.*

Note 12.

1. (1928) 1928 Lah 232 (234) : 9 Lah 400 : 29 Cri L Jour 585, *Naurang Rai* v. *Kidar Nath.*
1a (1912) 8 Nag L R 97 (102) : 16 Ind Cas 555 (559), *Kishan Lal* v. *Aman Singh.*
2. (1919) 1919 Mad 879 (881, 882) : 41 Mad 685 : 19 Cri L Jour 359, *Kumaraswami Chetty* v. *Kuppuswami Chetty.*

Sec. 345 Note 12

The only Court which has power under Section 345, sub-section 2, is the Court before which the prosecution is pending.[3] A police officer is not competent to entertain an application for withdrawal of a complaint, permitting the withdrawal of a complaint being a judicial act the exercise of which is vested in the Magistrate by Sections 248 and 345, and the police have no authority to interfere in such matters.[4]

The judicial officer charged with the duty of determining judicially matters which come before him should himself decide the petition for withdrawal of a complaint and should not refer it to the District Magistrate or the police for their opinion.[5] It is the duty of the Magistrate in each case, which is compoundable with his permission, to decide whether or not he should allow the compromise, and the responsibility rests with him.[6]

In granting permission, the Court should exercise a sound and reasonable discretion. Permission is not to be granted as a matter of course.[7] Magistrates are bound to consider all facts before acceding sanction; they ought not to permit an offence to be compounded until they are satisfied that such permission may be legitimately granted.[8] The Magistrate should record his reasons to enable the High Court to determine if the discretion has been exercised properly.[9] Where an application for leave to compound an offence under Section 325 was rejected by a Bench of Magistrates on improper grounds, the High Court in revision remanded the application to the trial Court for disposal according to Section 345, sub-section 2.[10] But the High Court will not interfere with the discretion of the trial Court in refusing permission unless the permission has been improperly withheld.[11]

The following are instances wherein the withholding of permission was held to have been improper:—

1. Where the permission was refused because a third party, who had received no injury from the accused, had refused to allow the composition.[12]
2. Where the offence related to public property but the matters were such as could not be suitably unravelled in a criminal case and the compromise was arrived at, at an early stage.[13]
3. Where the permission was refused on the ground that petitioner was a clerk in the Collectorate.[14]
4. Where parties, who are nearly related to one another and have succeeded

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3. (1893-1900) 1893-1900 Low Bur Rul 392, *Tayya* v. *Maung Ba Hlaing*.
   (1875) Ratanlal 91 (91).
4. (1892-1896) 1 Upp Bur Rul 42.
5. (1926) 1926 Cal 590 (591): 27 Cri L Jour 545, *Azizur Rahman* v. *Emperor*.
   (1930) 1930 Lah 272 (272): 1930 Cri Cas 304: 32 Cri L Jour 20, *Partap Singh* v. *Emperor*.
   (1932) 1932 Mad W N 1088 (1089), *Subba Rao* v. *Ahmad Beari*.
   (1935) 1935 Lah 226 (227): 1935 Cri Cas 357: 35 Cri L Jour 1372, *Sultan* v. *Emperor*. Reference to District Magistrate for instructions is improper.
6. (1922) 1922 Lah 138 (138): 23 Cri L Jour 85, *Sewa Singh* v. *Emperor*.
7. (1893-1900) 1893-1900 Low Bur Rul 392, *Tayya* v. *Maung Ba Hlaing*.
   (1901) 1 Upp Bur Rul 83, *Queen Empress* v. *Nga Tun Mya*.
8. (1909) 4 Ind Cas 999 (1000) (Lah), *Mt. Ganeshi* v. *Hassan Din*.
9. (1902) 1 Low Bur Rul 349 (349), *Crown* v. *Kunoo Meah*.
   (1892-1896) 1 Upp Bur Rul 43, *Queen Empress* v. *Nga Po Saung*.
10. (1906) 3 All Jour 211*n* (211*n*), *Prya Das* v. *Badri*.
11. (1933) 1933 Mad W N 245 (245), *Kumaru Pillai* v. *Emperor*.
12. (1914) 1914 Oudh 167 (167): 17 Oudh Cas 92: 15 Cri L Jour 567, *Lalla* v. *Emperor*.
13. (1925) 1925 Pat 583 (583): 26 Cri L Jour 1345, *Nehal Ahmed Khan* v. *Emperor*.
14. (1929) 1929 Pat 512 (512): 1929 Cri Cas 272: 31 Cri L Jour 607, *Singheshwar Pra-*

in patching up their quarrels.[15]

5. Where the offence is not a serious one and the compromise is arrived at, at an early stage.[16]

On the other hand, where a compromise was arrived at at a late stage, was retracted by the complainant and one of the offences charged was a non-compoundable one, it was held that the Magistrate had not acted improperly in refusing permission.[17]

In cases falling under Sections 324 and 325, all circumstances should be taken into consideration before sanctioning compromise and the Magistrate should bear in mind that such an offence is punishable not only for the satisfaction of the person injured but for the protection of society. The degree of prevalence of such offences at a particular time and place may fitly be taken into consideration in determining whether a compromise should be allowed.[18] Where all the circumstances were not considered, the compromise was set aside by the High Court, in revision.[19]

In allowing a compromise, a Magistrate may impose a condition as to payment of some compensation to the injured man.[20]

The mere fact that a petition for compromise is filed in Court (but is not allowed) is no ground for the reduction of a sentence.[21]

13. Proof of composition.

Where an accused person alleges that the offence of which he is charged has been compounded, the *onus* is on him to show that there has been a real and valid composition with the person entitled to compound.[1] Before a composition can be allowed, the Court must be satisfied that it is legal and valid in law.[2] Where a compromise is alleged by one party and denied by the other, the Magistrate must try the issue.[3] An order of the Magistrate, acquitting the accused without inquiry into the truth of the compromise alleged by him, is bad in law and may be set aside.[4]

14. Stage at which a compounding may be effected.

An offence, which is compoundable without the permission of the Court, may be compounded even before the filing of a complaint.[1] A case may be compounded

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sad v. *Ali Hasan.*

15. (1922) 1922 Cal 191 (191): 24 Cri L Jour 355, *Aminulla* v. *Emperor.*
(1929) 1929 Nag 278 (279): 1929 Cri Cas 454: 30 Cri L Jour 960, *Emperor* v. *Bhaiyalal.*

16. (1922) 1922 Lah 138 (138): 23 Cri L Jour 85, *Sewa Singh* v. *Emperor.*

17. (1929) 1929 Bom 375 (376): 1929 Cri Cas 322: 31 Cri L Jour 353, *Hanmant Srinivas Kulkarni* v. *Emperor.*

18. (1900-02) 1 Low Bur Rul 349 (350), *Crown* v. *Kunoo Meah.*

19. (1914) 1914 Sind 134 (134): 7 Sind L R 200: 15 Cri L Jour 553, *Emperor* v. *Ramzan Bachal.*

20. (1922) 1922 Lah 138 (138): 23 Cri L Jour 85, *Sewa Singh* v. *Emperor.*

21. (1911) 12 Cri L Jour 243 (243): 10 Ind Cas 773 (Rang), *Emperor* v. *Mya Din.*

Note 13.

1. (1893) 21 Cal 103 (112, 116), *Murray* v. *Empress.*
(1927) 1927 Bom 410 (411): 51 Bom 512: 28 Cri L Jour 581, *Dajiba Ramji Patel* v. *Emperor.*

2. (1929) 1929 Bom 375 (376): 1929 Cri Cas 322: 31 Cri L Jour 353, *Hanmant Srinivas Kulkarni* v. *Emperor.*

3. (1919) 1919 Mad 879 (880): 41 Mad 685: 19 Cri L Jour 359, *Kumaraswamy Chetty* v. *Kuppuswamy Chetty.*
(1931) 1931 Lah 402 (402): 1931 Cri Cas 642: 32 Cri L Jour 1034, *Madari* v. *Emperor.*
(1916) 1916 Mad 854 (855): 16 Cri L Jour 803 (804): 39 Mad 946, *Mohammad Kanni Rowther* v. *P. Inayatulla.*
(1913) 14 Cri L Jour 292 (293): 6 Sind L R 284, *Imperator* v. *Mulo.*

4. (1932) 1932 Sind 7 (8): 1932 Cri Cas 39: 25 Sind L R 341: 33 Cri L Jour 109, *Abduljabar* v. *Emperor.*

Note 14.

1. (1919) 1919 Mad 879 (881, 882): 41 Mad 685: 19 Cri L Jour 359, *Kumaraswamy Chetty* v. *Kuppuswamy.*
(1927) 1927 All 375 (376): 49 All 484: 28

Sec. 345 Notes 14—16

at any time before judgment is pronounced.[2] The fact that the prosecution evidence has been closed and that a charge has been framed, is no bar to the composition as the offence can be compounded at any time before the passing of the sentence.[3] After conviction, however, there can be no composition except with the leave of the appellate Court.[4] Where an order is made by a District Magistrate under Section 435, calling for the record and proceedings before a Magistrate with a view to withdrawing the case and transferring it to another Magistrate, the jurisdiction of the former Magistrate is suspended and he is not, therefore, entitled to record a composition of the offence and acquit the accused, though at that time the case has not actually been transferred from his file.[5]

15. Composition after committal or conviction.

A committal, once made by a Magistrate, cannot be annulled by his allowing the prosecutor to file a compromise.[1] After conviction, a composition can be effected only with the leave of the appellate Court.[2] In the undermentioned case,[3] leave was granted by the High Court in appeal on the date of judgment.

Where an accused is tried and convicted of an offence which is compoundable, but on appeal the conviction is set aside and a re-trial ordered, it is open to the complainant and accused to compound the case in the same manner as they might have done prior to the conviction, and no leave of the appellate Court is necessary.[4]

A compromise entered into after the hearing of the appeal, is too late and does not come within Section 345.[5]

16. High Court's powers in revision.

Before the introduction of sub-section 5-A by the Amending Act of 1923, divergent views were held as to whether a High Court had power to apply the powers granted in Section 345 to cases in revision ; some cases holding that the High Court had no such power[1] and other cases taking the opposite view.[2] The

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Cri L Jour 495, *F. M. Torpey* v. *Emperor.*

2. (1918) 1918 Cal 238 (238) : 45 Cal 816 : 19 Cri L Jour 732, *Aslam Mea* v. *Emperor.*
3. (1928) 29 Cri L Jour 1058 (1059) : 112 Ind Cas 562 (Lah), *Muhammad Ali* v. *Emperor.*
4. [See Note 15.]
5. (1925) 1925 Bom 247 (247) : 49 Bom 533 : 26 Cri L Jour 996, *Maruthi Vithu, In re.*

Note 15.

1. (1865) 2 Suth W R Cr 57 (57), *Empress* v. *Gogunsein.*
2. (1920) 1920 Mad 245 (245) : 20 Cri L Jour 832, *In re Pedakanti Chinna Naidu.*
   (1915) 1915 All 8 (9) : 37 All 127 : 16 Cri L Jour 247, *Ramchandra* v. *Emperor.*
   [See (1934) 1934 Sind 122 (122) : 1934 Cri Cas 963 : 28 Sind L R 109 ; 36 Cri L Jour 210, *Jumo Sherkhan* v. *Emperor.* Court will be reluctant to grant leave where the conviction or committal is considered right.]
   [But see (1879) 2 All 339 (340), *Empress* v. *Thomson.* Case under Code of 1872.]
3. (1925) 1925 Cal 14 (17) : 52 Cal 347 : 26 Cri L Jour 401, *Martindale* v. *Emperor.*
4. (1906) 4 Cri L Jour 35 (35) (All), *Umrai* v. *Makbulan.*
5. (1933) 1933 All 434 (436) : 1933 Cri Cas 740 : 34 Cri L Jour 926, *Emperor* v. *Chatterji.*

Note 16.

1. (1916) 1916 Mad 483 (484) : 16 Cri L Jour 750 : 39 Mad 604, *Sankar Rangayya* v. *Sankar Ramayya.*
   (1915) 1915 All 8 (9) : 37 All 127 : 16 Cri L Jour 247, *Ramchandra* v. *Emperor.*
   (1920) 1920 All 169 (169) : 42 All 474 : 21 Cri L Jour 447, *Ram Baran Singh* v. *Emperor.*
   (1917) 1917 All 377 (378) : 18 Cri L Jour 729, *Lala* v. *Emperor.*
   (1917) 1917 Cal 705 (706) : 17 Cri L Jour 339 : 43 Cal 1143, *Akshoy Singh* v. *Rameshwar.*
   (1914) 1914 Cal 901 (901) : 15 Cri L Jour 728, *Adhar Chandra Dey* v. *Subodh Chandra Ghose.*
   (1919) 1919 Lah 471 (472) : 1919 Pun Re Cr No. 35 : 20 Cri L Jour 87, *Emperor* v. *Harnam Singh.*
   (1923) 1923 Pat 89 (90) : 23 Cri L Jour 80, *Audhi Rai* v. *Emperor.*
2. (1910) 11 Cri L Jour 203 (203) : 32 All 153,

introduction of sub-section 5-A leaves the position free from doubt and explicitly confers on the High Court, acting in the exercise of its powers of revision under Section 439, to allow any person to compound offences which may lawfully be compounded.[3]

17. Rescission of compromise.

A composition once effected cannot be withdrawn. It is entirely immaterial whether the terms of the compromise have been carried out or not, the sole question being whether there was a composition or not ; a breach of the agreement might give rise to other remedies.[1]

18. Effect of compromise.

When a case is compounded, it results not merely in a *discharge*, but in an *acquittal* and until such order of acquittal is properly set aside, the accused cannot be prosecuted again for the same offence[1] or for any other offence for which a different charge from that which was compounded might have been framed.[2]

Ram Piyari v. *Emperor*.

(1922) 1922 All 488 (488) : 45 All 17 : 24 Cri L Jour 854, *Shibbo* v. *Emperor*.

(1913) 14 Cri L Jour 46 (46) : 18 Ind Cas 270 (All), *Nagi Ahmad* v. *Emperor*. Power of revision Court doubted; but on the authority of 11 Cri L Jour 203, compromise allowed.

(1922) 1922 Lah 138 (138) : 23 Cri L Jour 85, *Sewa Singh* v. *Emperor*.

(1914) 1914 Oudh 167 (167) ; 17 Oudh Cas 92 : 15 Cri L Jour 567, *Lalla* v. *Emperor*.

(1924) 1924 Oudh 260 (261) : 24 Cri L Jour 590, *Chhotai* v. *Emperor*.

(1904) 1 Cri L Jour 509 (511) (Lah), *Nidhan Singh* v. *Emperor*.

(1910) 11 Cri L Jour 496 (497) : 13 Oudh Cas 161, *Ram Sarup* v *Emperor*.

3. (1924) 1924 All 209 (209) : 46 All 91 : 25 Cri L Jour 1005, *Brij Behari Lal* v. *Emperor*.

(1929) 1929 Nag 278 (279): 1929 Cri Cas 454: 30 Cri L Jour 960, *Emperor* v. *Bhaiyalal*.

(1930) 1930 Lah 272 (272): 1930 Cri Cas 304: 32 Cri L Jour 20, *Partap Singh* v. *Emperor*.

(1925) 1925 Pat 583 (584) : 26 Cri L Jour 1345, *Nihal Ahmad Khan* v. *Emperor*.

(1929) 1929 Pat 512 (512): 1929 Cri Cas 272: 31 Cri L Jour 607, *Singheswar Prasad* v. *Ali Hasan*.

(1926) 27 Pun L R 231 (231), *Nizam Din* v. *Emperor*.

(1929) 1929 Cal 96 (96) : 55 Cal 1190 : 30 Cri L Jour 484, *Titan Paramanick* v. *Chittan Paramanick*.

(1934) 1934 Lah 317 (317) : 1934 Cri Cas 549: 35 Cri L Jour 579, *Hakim Ali* v. *Emperor*. High Court can permit composition even in cases where Courts below have refused permission.

(1934) 1934 Sind 122 (122) : 1934 Cri Cas 963: 28 Sind L R 109 : 36 Cri L Jour 210, *Juma Sherkhan* v. *Emperor*. Where there has been a conviction and that conviction has been upheld in appeal, High Court will be slow to allow a compromise.

Note 17.

1. (1919) 1919 Mad 879 (880, 882) : 41 Mad 685: 19 Cri L Jour 359, *Kumaraswamy* v. *Kuppusamy*.

(1899) 3 Cal W N 322 (323), *Kusum Bewa* v. *Bechu Bewa*.

(1930) 1930 All 409 (410) : 1930 Cri Cas 525: 52 All 254 : 31 Cri L Jour 1215, *Jhangtoo Barai* v. *Emperor*.

(1913) 14 Cri L Jour 458 (459) : 20 Ind Cas 618 (Cal), *Sheikh Basireddi* v. *Sheikh Khayrat Ali*.

(1921) 1921 Cal 403 (405) : 22 Cri L Jour 301, *Hem Chandra Dutta* v. *Girindra Chandra Chaudhuri*.

(1925) 1925 Lah 159 (160) : 25 Cri L Jour 810, *Ram Richpal* v. *Mata Din*.
[But see (1904) 1 Cri L Jour 705 (706) (Lah), *Syad Ghulam Haidar Shah* v. *Syad Rukan Abdulla*.]

Note 18.

1. (1918) 1918 Mad 413 (413) : 41 Mad 323 : 19 Cri L Jour 176, *Muthia Naik* v. *Emperor*.

(1924) 1924 All 778 (779) : 26 Cri L Jour 98, *Harbans* v. *Emperor*.

(1893) 21 Cal 103 (112), *Murray* v. *Empress*.

(1910) 11 Cri L Jour 366 (368) : 6 Ind Cas 497 (Lah), *Emperor* v. *Harnam Singh*

(1907) 6 Cri L Jour 336 (337) : 1907 Pun Re Cr No. 11, *Emperor* v. *Hira Singh*.

(1913) 14 Cri L Jour 292 (293) : 6 Sind L R 284, *Imperator* v. *Mulo*.

(1934) 1934 Lah 317 (317): 1934 Cri Cas 549: 35 Cri L Jour 579, *Hakim Ali* v. *Emperor*.

2. (1890) Ratanlal 519 (520), *Queen-Empress* v. *Wali Asmul*.

Sec. 345 Note 18

Where at the time of compromise of the offence it was believed that the offence fell under Section 323, it was held that the discovery later that it fell under Section 325 would not enable the Magistrate to re-open the prosecution for that offence.[3] The composition of one offence will not, however, bar a prosecution for a distinct offence of which the accused might have been charged on the same facts.[4] Moreover, a composition has the effect of an acquittal only in respect of the offence which has been compounded and not of the other offences of which the accused is charged in the case[5] and only as between the person who is entitled to compound and the accused with whom the composition takes place.[6] There was a doubt prior to the amendment of the Code as to whether in the case of several accused the compounding of the offence against one or some of them alone affects the case against the others—some cases holding that it did not[7] and others that it did.[8] The controversy has been set at rest by the wording of the new Code, sub-section 6 of Section 345.[9]

If a non-compoundable case is dismissed on the parties coming to an amicable settlement, the dismissal does not amount to an acquittal but only to a discharge and does not bar the revival of the prosecution.[10] Where an order of acquittal has been passed on an invalid composition, it may be set aside in revision.[11] A Magistrate is not competent to award compensation to the accused where an offence is compounded under Section 345. Compensation can be awarded under Section 250 only when the acquittal is under Section 245 or Section 247; and although the effect of a composition is an acquittal, an acquittal under the operation of Section 345 is a very different thing from an acquittal under Sections 245 and 247.[12] But though the Magistrate cannot allow compensation, if the complaint was wholly false, he may consider whether a criminal prosecution for making a false complaint was desirable in the interests of justice.[13] In the case of a dispute between two brothers wherein the prosecution for theft was found to be false, it was held that the parties being brothers, the prosecution of the complainant under

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3. (1884) 1884 All W N 13 (14), *Empress* v. *Unkar*.
4. (1929) 1929 Bom 283 (285) : 1929 Cri Cas 38: 53 Bom 604 : 30 Cri L Jour 1059, *Manjubhai Gordhandas* v. *Emperor*.
5. (1930) 1930 All 92 (93) : 1930 Cri Cas 81 : 30 Cri L Jour 1149, *Hukum Singh* v. *Emperor*.
   (1925) 1925 Lah 464 (464) : 26 Cri L Jour 686, *Emperor* v. *Jarnally*.
6. (1930) 1930 Mad W N 692 (694), *Venkataswami Naidu* v. *Narappa Naicken*.
   (1923) 1923 Cal 168 (169) : 24 Cri L Jour 578, *Shib Chandra* v. *Rubbani*.
7. (1921) 1921 All 35 (35) : 43 All 483 : 22 Cri L Jour 353, *Chandan* v. *Emperor*.
   (1921) 1921 Bom 166 (167) : 45 Bom 346 : 22 Cri L Jour 55, *Emperor* v. *Alibhai*.
   (1920) 1920 Lah 108 (109): 1 Lah 169 : 21 Cri L Jour 437, *Ram Kishen* v. *Emperor*.
   (1921) 1921 Sind 101 (101) : 16 Sind L R 149 : 26 Cri L Jour 238, *Emperor* v. *Abdul Hakim*.
8. (1902-03) 7 Cal W N 176 (176), *Chandrakumar* v. *Emperor*.
   (1920) 1920 Pat 828 (828) : 20 Cri L Jour 824, *Shyam Behari* v. *Sagar Singh*.
   (1923) 1923 Pat 348 (348) : 23 Cri L Jour 432, *Sarajkumar* v. *Emperor*.
9. (1926) 1926 Lah 424 (424) : 7 Lah 344 : 27 Cri L Jour 576, *Emperor* v. *Mohna*.
   (1924) 1924 Lah 595 (596) : 5 Lah 239 : 25 Cri L Jour 629. *Anantia* v. *Emperor*.
   (1933) 1933 Mad W N 222 (222), *Thirumalai Naicken* v. *Emperor*.
10. (1875) 1 Bom 64 (66), *Reg.* v. *Devama*.
11. (1923) 24 Cri L Jour 120 (122) : 71 I. C. 248 (250) (Pesh), *Harnam* v. *Sain Dass*.
12. (1892) 7 C P L R Cri 2 (3), *Alopi* v. *Bhura*.
   (1894) Ratanlal 700 (700), *Queen-Empress* v. *Raoji*.
   (1898) Ratanlal 957 (957), *Empress* v. *Sangappa*.
   (1909) 9 Cri L Jour 186 (187) (Bom), *In re Harkisandas Haridas*.
   (1910) 11 Cri L Jour 638 (639) : 1910 Pun Re Cr No. 30, *Emperor* v. *Sunder Singh*.
   (1888) 1888 Pun Re Cr No. 19, page (37), *Empress* v. *Khushali Ram*.
   (1883) 1883 Pun Re Cr No. 24, page (57), *Himmat Singh* v. *Bukhtawar*. Dissent from in (1888) 1888 Pun Re Cr No. 24, page 35.
13. (1894) Ratanlal 700 (700), *Queen-Empress* v. *Raoji*.

Section 182 should not have been instituted.[14]

If a case is compounded, the composition does not prevent the complainant being charged under Section 211 if the complaint was false.[15]

Where a compromise has been entered into, orders passed in connection with the compromise by the Magistrate before whom the case was pending must be deemed to have been passed by him in his judicial capacity.[16]

19. Sub-section 7.

The provisions of sub-section 7 seem to be perfectly general and govern the composition of offences whether any steps have been taken or not to prosecute the offender.[1]

Section 345 contains provisions with regard to (a) persons who may compound ; (b) the nature of offences which may be compounded, (c) the stage at which composition is sought to be made and (d) permission of Court in certain cases. Sub-section 7 must be taken to mean that no offences shall be compounded except where the provisions of Section 345 are satisfied as to all these matters.[2]

20. Civil suit.

Where the offences were compoundable and the complainant had already sued the accused on the same cause of action and obtained adequate damages, it was held that in the circumstances of the case, it was not necessary in the ends of justice that he should again be put to trial in a criminal Court for the same offence.[1] The effect of the compounding of an offence which is compoundable apart from the acquittal of the accused would be that a suit for damages on the facts constituting the original offence would not lie.[2]

21. Procedure in non-compoundable cases where injured party declines to prosecute.

Once the criminal law is set in motion by the issue of process in a non-compoundable case, the Magistrate must require the complainant to carry his prosecution through to the end.[1] The legislature has not left it to the will of a Magistrate to proceed or not as he thinks fit, with cases which cannot be legally compounded. It requires him, when once the complaint for such an offence is before him, to make a complete inquiry and to see that the accused who is guilty is brought to punishment.[2]

In non-compoundable cases, once action has been taken the case will normally proceed and it is nowhere provided that a desire on the part of the complainant to refrain from further pursuing the case shall justify the arrest of further proceedings. The final responsibility of such cases, whether instituted on complaint or otherwise, rests with the State.[3]

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14. (1918) 1918 All 100 (100) : 19 Cri L Jour 730, *Chaitan Lal* v. *Emperor*.
15. (1884) 11 Cal 79 (81), *Empress* v. *Atar Ali*.
    (1888) 1888 Pun Re Cr No. 19, page (37), *Empress* v. *Khushali Ram*.
16. [See (1933) 1933 Cal 344 (345) : 1933 Cri Cas 416, *Hemchandra Ganguly, In re*.]

Note 19.

1. (1918) 1918 Nag 181 (183), *Warisali* v. *Mohammad Azimulla Khan*.
2. (1917) 1917 Cal 705 (707) : 43 Cal 1143 : 17 Cri L Jour 339, *Akshoy Singh* v. *Rameshwar Bagdi*.
   (1916) 1916 Mad 483 (485) : 39 Mad 604 : 16 Cri L Jour 750, *Sankar Rangayya* v. *Sankar Ramayya*.

Note 20.

1. (1924) 1924 Mad 31 (31) : 25 Cri L Jour 138, *Tiruvangadachariar* v. *M.S. Chockalingam Chetty*.
2. (1933) 1933 Bom 413 (414) : 57 Bom 678, *Sayamma* v. *Punamchand*.

Note 21.

1. (1881) 3 All 283 (286), *Raunuk Husain* v. *Harbans*.
2. (1874) 22 Suth W R Cr 83 (85), *Empress* v. *Dudraj Dusadh*.
3. (1927) 1927 Rang 174 (174) : 5 Rang 136 : 28 Cri L Jour 649, *Maung Thu Daw* v. *U Po Nyun*.

Sec. 346

346.* (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

Procedure of Provincial Magistrate in cases which he cannot dispose of.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

Synopsis.

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* (Code of 1882—S. 346—Same.)

(Code of 1872—S. 45, Paras 1 and 2.)

Procedure of Magistrate in cases beyond his jurisdiction.

45. If, in the course of a proceeding before a Magistrate, the evidence appears to him to warrant a presumption that the accused person has been guilty of an offence which such Magistrate is not competent to try,

or for which he is not competent to commit the accused person for trial;

he shall stay proceedings and submit the case to any Magistrate to whom he is subordinate or to such other Magistrate having jurisdiction, as the Magistrate of the District directs.

The Magistrate to whom the case is submitted shall either try the case himself, or refer it to any officer subordinate to him having jurisdiction; or he may commit the accused person for trial.

(Code of 1861—S. 276.)

How the subordinate Magistrate is to proceed in cases beyond his jurisdiction.

276. If, in the course of a trial before a Subordinate Magistrate, the evidence shall appear to him to warrant a presumption that the accused person has been guilty of an offence which such Magistrate is not competent to try, or for which he is not competent to commit the accused person for trial before the Court of Session, he shall stay proceedings and shall submit the case to the Magistrate to whom he is subordinate. The Magistrate to whom the case is submitted shall either try the case himself or refer it to any officer subordinate to him having jurisdiction, or he may commit the accused person for trial before the Court of Session. In any such case, such Magistrate or other officer as aforesaid shall examine the parties and witnesses, and shall proceed in all respects as if no proceedings had been held in any other Court.

Other Topics.

Applicability to European British subject. See Note 2, Pt. 5.
Committal on evidence taken by another Magistrate. See Note 5, Pts. 6 to 8.
Grounds for action. See Note 2, Pt. 1; Note 3, Pts. 1 to 4.
Ignoring evidence and circumstances. See Note 3, F-N (2) and Pt. 4.
Inquiry and evidence under Section 202. See Note 8.
Major and minor offences. See Note 3, F-N (3).
No waiver to *de novo* trial. See Note 5, Pt. 5a and F-N (5).
Non-observance—Not void. See Note 3, Pts. 6 and 7.
Reference back to same Magistrate. See Note 6, Pt. 2.
Sections 347 to 349—Effect. See Note 2, Pts. 2 to 4.
Sections 349 and 350 and this Section. See Note 5, Pts. 1 to 3 and 6 to 8.
Stage at which action can be taken. See Note 3, Pt. 8.
Township within District. See Note 6, Pt. 1.
Transfer to Magistrate with no jurisdiction. See Note 4, Pt. 3.
Want of sanction under Sections 195 and 476. See Note 3, Pt. 5.

1. Legislative changes.

Difference between the Codes of 1861 *and* 1872 :—

1. Section 276 of the Code of 1861 contemplated reference only by a "Subordinate Magistrate." The subsequent Codes have omitted the qualifying word "subordinate," so that now a reference may be made by any Magistrate.
2. Under the Code of 1861 a submission of a case could be made only to the Magistrate to whom the Magistrate submitting the same was subordinate. From the Code of 1872 onwards the Section has been altered so as to allow a reference to "such other Magistrate having jurisdiction as the Magistrate of the District (District Magistrate) directs."
3. There was a specific provision in the Code of 1861 requiring that the Magistrate to whom a case was submitted, or the officer subordinate to him, to whom it may be referred shall *examine the parties and witnesses* and proceed in all respects as if no proceedings had been held in any other Court. The later Codes have omitted this specific provision. As to the effect of this, *see* Note 5 below.

Difference between the Codes of 1872, 1882 *and* 1898 :—

1. Both the Codes of 1861 and 1872 restricted the application of the Section to cases which the Magistrate *was not competent to try or commit for trial.* Section 346 of the Code of 1882 and the present Section have removed such restriction. *See* Note 2.
2. Section 45 of the Code of 1872 applied even to Magistrates within the Presidency Towns. The Codes of 1882 and 1898 have restricted the application of the Section to trials before Magistrates *outside* the Presidency Towns.

2. Scope and applicability of the Section.

This Section enacts the procedure to be followed by Provincial Magistrates where, in the course of an enquiry or a trial, the evidence appears to warrant a presumption that the case is one,

1. which should be *tried* by some other Magistrate in the District, or
2. which should be *committed* for trial by some other Magistrate in the district.

The words "should be tried or committed for trial by some other Magistrate" do not necessarily mean that the Magistrate who is to take action under this Section has no *jurisdiction* to try the case himself. Even if he has such

Sec. 346 Notes 2—3

jurisdiction he may still be of opinion that it "should be tried" by some other Magistrate on grounds such as complexity of facts, convenience of parties, etc.[1]

The provisions of this Section should be construed so as not to overlap or conflict with Sections 347, 348 and 349, *infra*, which are specific provisions providing for particular classes of cases. Where, therefore, a case falls under Section 347, S. 348 or S. 349, the Court should only act under those Sections and not under this. Thus, where a person is accused as an old offender for offences under Chapter 12 or 17 of the Penal Code and the Magistrate is not of opinion that he can himself pass an adequate sentence in case the accused is found guilty, he should act under Section 348 and not under this Section.[2] Again where a Magistrate of a Second or Third Class is of opinion that the accused is guilty but that he ought to receive a sentence of whipping which he is not empowered to inflict, he should act under Section 349 and not under this Section.[3] Similarly where the Magistrate is of opinion that the case is one which ought to be tried by a Court of Session and he is himself empowered to commit the same to such Court, he should act under Section 347 and not proceed under this Section.[4]

This Section is not inapplicable to cases where the accused is a European British subject.[5]

3. Duty of the inferior Courts.

A Magistrate who finds that he has no jurisdiction to try a case cannot *discharge* an accused on that ground but should proceed under this Section.[1] Nor can he clutch at jurisdiction by trying for such offences only as he is competent to try even though other offences are disclosed during the trial which he is not competent to try.[2] Where, therefore, in the course of a trial for an offence which he is competent to try, the evidence discloses also an offence beyond his jurisdiction, he cannot ignore the latter and try for the former offence only.[3] Similarly, where the evidence discloses circumstances of aggravation which make the offence cognisable by a higher Court, he cannot ignore such circumstances and try for the minor offence only.[4] Where, however, the graver offence disclosed was one, for the trial

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Section 346—Note 2.

1. [See (1919) 1919 Mad 907 (910) : 42 Mad 83 : 19 Cri L Jour 997, *Crown Prosecutor* v. *Bhagvathi*. Case under S. 347 where the words "ought to be tried" have been given a similar interpretation.]
2. (1905) 2 Cri L Jour 820 (822) : 1 Nag L R 187, *Ladya son of Adku* v. *Emperor*. [But see 1894 All W N 200 (200), *Empress* v. *Chandra Ballab Joshi*. It is submitted that the decision is wrong.]
3. (1890) Ratanlal 499 (499), *Queen-Empress* v. *Fakira*. The figure "346" in the judgment is obviously a mistake for "349" as the contest will show.
4. (1902-03) 7 Cal W N 457 (460), *Amirkhan* v. *Emperor*.
5. (1911) 12 Cri L Jour 436 (437) : 7 Nag L R 93, *Emperor* v. *F. M. C. Nulty*.

Note 3.

1. (1881) 2 Weir 323 (323), *In re Munisami*.
2. (1881) 2 Weir 420 (421).
   (1865) 3 Suth W R Cri 28 (28), *Queen* v. *Shamsoondur Ghosal*.
   (1866) 5 Suth W R Cri 65 (65), *Queen* v. *Ramtahal Singh*. Magistrates are not at liberty to pass over material parts of evidence in cases before them and so to withdraw cases from the cognisance of proper tribunals.
3. [See (1886) Pun Re Cr No 30, page 73 (74), *Kaka* v. *Empress*.]
   (1897-1901) 1 Upp Bur Rul 84, *Queen Empress* v. *Nga Lu*. Magistrates must be careful to avoid taking cognisance of a major offence as a minor.
4. (1889) 13 Bom 502 (506), *Empress* v. *Gundya*.
   (1927) 1927 Mad 307 (308) : 28 Cri L Jour 164, *Kattuva Rowther* v. *Suppan Asari*.
   (1895) 19 Bom 340 (348), *In re Nagarji Trikamji*. It is an evasion of law to treat an aggravated offence as an ordinary offence.
   (1866) 6 Suth W R Cri 39 (40) (FB), *Queen Empress* v. *Ramcharan Kairee*. Splitting of offences so as to give oneself jurisdiction, is bad.
   (1911) 12 Cri L Jour 20 (20) : 8 Ind Cas 1103 (Mad), *P. S. Jamal Mahomed Rowther* v. *K. Moideensa Rowther*
   (1892-96) 1 Upp Bur Rul 231 (231), *Queen-*

of which sanction was necessary to be obtained, and such sanction had been refused, it was held that the trial for the lesser offence was not incompetent.[5]

But the fact that the Magistrate ignores the circumstances disclosing a graver offence for which he is not competent to try, and tries for the lesser offence, will not render the proceeding *void*, the reason being that the Magistrate is *competent* to try for the lesser offence.[6] The proceedings, therefore, will not be quashed where the accused is not prejudiced by such procedure and the sentence is not inadequate.[7]

A Magistrate is at liberty to stay proceedings at any time during the inquiry and submit it to the Magistrate to whom he is subordinate.[8]

This Section requires that when in the *course* of an inquiry or trial it is found that the offence is beyond the competence of the Magistrate to try or inquire into, the latter should stay the proceedings and refer them to a superior Magistrate. *A fortiori*, where even at the outset, the offence disclosed on the allegations is beyond his competence to try or inquire into, he cannot ignore aggravating circumstances and proceed in respect of such offence as is within his jurisdiction.[9]

See also Notes under Sections 28 and 207.

Where the trying Magistrate finds that the offence disclosed can only be tried by a Magistrate of a higher class, an order of the District Magistrate cannot confer jurisdiction on him.[10]

4. To whom the case should be submitted.

A Magistrate may submit a case under this Section to :

1. any Magistrate to whom he is subordinate,[1] or
2. such other Magistrate as the District Magistrate directs.

In either case it is essential that the Magistrate to whom the case is

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Empress v. *Nga Nyein*. Magistrates should not give themselves jurisdiction by trying cases under S. 354 which properly fall under Ss. 376 and 511.

(1900) 5 Cal W N 372 (373), *Otaruddi Manjhi* v. *Katiluddi Manjhi*. Magistrate cannot in order to acquire competence to try, split up a grave offence into smaller ones which, when combined constitute a major offence beyond his jurisdiction.
[See (1897-1901) 1 Upp Bur Rul 327 (327), *Queen-Empress* v. *Nga Mya*. Magistrate should not attempt to dispose of the case on the chance of offence being confined within his own jurisdiction.]

5. (1908) 7 Cri L Jour 6 (7) : 31 Mad 43, *Krishna Pillai* v. *Krishna Konan*.

6. (1889) 13 Bom 502 (506), *Empress* v. *Gundya*.
(1927) 1927 Mad 307 (309): 28 Cri L Jour 164, *Kattuva Rowther* v. *Suppan Asari*.
(1871-74) 7 Mad H C R App 5 (6).

7. (1889) 13 Bom 502 (506), *Empress* v. *Gundya*.
(1913) 14 Cri L Jour 640 (64[illegible]): 21 Ind Cas 688 (Mad), *In re Mohideen Batcha Sahib*.
(1931) 1931 Mad 494 (495): 32 Cri L Jour 971: 1931 Cri Cas 558, *Picha Kudumban* v. *Servaikara Thevan*.
(1868) 2 Weir 20 (21).
(1908) 7 Cri L Jour 215 (216) (Mad), *Narayana Naicken* v. *Tahsildar of Conjeevaram*. If the interests of justice have not suffered, the High Court will not interfere.
(1915) 1915 Mad 9 (10): 14 Cri L Jour 460, *In re Mohideen Batcha Sahib*.
[See (1898) 2 Weir 482 (483), *Re Kannachampet*. *Held*, that the procedure of the appellate Court in acquitting the accused was wrong.]

8. (1897-1901) 1 Upp Bur Rul 85, *King-Emperor* v. *Nga At*.

9. (1925) 1925 All 290 (291): 47 All 64: 26 Cri L Jour 586, *Raghunandan Prasad* v. *Emperor*. Complainant's statement determines jurisdiction, unless it has been clear at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress.

10. (1926) 1926 Cal 590 (592): 27 Cri L Jour 545, *Azizur Rahman* v. *Emperor*.

Note 4.

1. [For subordination of Magistrates, *see* S. 17, *ante*.]
(1868-69) 5 Bom H C R Crown Cas 47 (47), *Reg.* v. *Bhagubin Shabaji*.
(1866-67) 4 Bom H C R Crown Cas 34 (34), *Reg.* v. *Bagu valad Oswarietal*.

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submitted should be one *having jurisdiction* over it.[2]

Pending inquiry into a charge of house-breaking, the Second Class Magistrate of *B* Division was transferred to *A* Division. The case was, therefore, transferred to his file by the District Magistrate. In the course of inquiry the Second Class Magistrate found that the offence committed was *robbery* which was not triable by him and therefore he submitted the case to the Sub-divisional Magistrate of *A*. It was held that the order of the District Magistrate transferring the case to the Second Class Magistrate at *A* did not give any jurisdiction to the Sub-divisional Magistrate of *A* over the case (which arose in the territorial jurisdiction of the Court at *B*) and that the submission being thus not to a Magistrate "having jurisdiction" was bad.[3]

5. Trial must be de novo—Sub-section 2.

It is a general principle of criminal law, that it is only an authority, who has heard all the evidence, that is competent to decide, whether the accused is innocent or guilty.[1] The Criminal Procedure Code has, however, made exceptions to this general rule in Sections 349 and 350, *infra*. The exception enacted in the latter Section is almost a general rule by itself in that it provides that whenever any Magistrate ceases to exercise jurisdiction in a case and is succeeded by another (and under sub-section 3—this applies to cases transferred from one Magistrate to another) the latter can act on the evidence recorded by his predecessor, but the accused can claim a trial *de novo* and the High Court or the District Magistrate, as the case may be, may also, where the accused has been prejudiced by a conviction on such evidence, order a new trial or inquiry. Sub-section 2 of that Section expressly excepts proceedings under this Section from the operation thereof.[2] The reason is that Section 350 contemplates cases where, at the time the evidence is recorded, the Magistrate recording it *has jurisdiction* to do so, while in cases of submission under this Section on the ground that the Magistrate is not competent to try the case, the evidence is recorded by a Magistrate who is *not competent* to try the case.[3]

The general principle of law, namely, that a Magistrate cannot decide a case who has not heard all the evidence, therefore, applies to proceedings under this Section and consequently, the Magistrate to whom a case is submitted under sub-section 1 of this Section cannot act on the evidence recorded by the submitting Magistrate but must, if he tries the case, try it *de novo*.[4] If he refers the case to a Subordinate Magistrate for trial, the latter must also on the same principle, try it *de novo*.[5] The accused have no power to waive their right to such a trial.[5a]

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2. (1882) 4 Mad 327 (328), *Queen* v. *Adapa Venkanna*.
3. (1882) 4 Mad 327 (329), *Queen* v. *Adapa Venkanna*.

Note 5.

1. (1924) 1924 Nag 37 (37): 22 Nag L R 166: 24 Cri L Jour 738, *Baba* v. *Emperor*.
   (1923) 1923 Mad 327 (327): 24 Cri L Jour 413, *Natesa Naicken* v. *Raghavachari*.
   (1933) 1933 Sind 191 (191): 1933 Cri Cas 572: 27 Sind L R 266: 34 Cri L Jour 749, *Sher Khan* v. *Emperor*.
   (1905) 2 Cri L Jour 369 (370): 1905 Pun Re Cr No. 25, *Muhammad* v. *Emperor*.
2. (1933) 1933 Sind 191 (191): 1933 Cri Cas 572: 27 Sind L R 266: 34 Cri L Jour 749, *Sher Khan* v. *Emperor*.
3. (1918) 1918 Pat 676 (677): 19 Cri L Jour 625, *Ambika Singh* v. *Emperor*.
4. (1933) 1933 Sind 191 (191): 1933 Cri Cas 572: 27 Sind L R 266: 34 Cri L Jour 749, *Sher Khan* v. *Emperor*. Failure to do so vitiates the whole trial.
   (1897-1901) 1 Upp Bur Rul 85.
   (1905) 2 Cri L Jour 689 (690) (Lah), *Inayat Husain* v. *Emperor*.
   (1923) 1923 Mad 327 (327): 24 Cri L Jour 413, *Natesa Naicken* v. *Raghavachari*.
   (1928) 1928 Cal 183 (183): 55 Cal 65: 29 Cri L Jour 464, *Budhu Tatua* v. *Emperor*.
5. (1918) 1918 Pat 676 (678): 19 Cri L Jour 625, *Ambika Singh* v. *Emperor*. In such a case the accused have no power to waive their right to a trial *de novo*.

5a (1918) 1918 Pat 676 (678): 19 Cri L Jour

As regards the power of the Superior Magistrate acting under sub-section 2, to *commit* the case to the Sessions acting on the evidence recorded by the submitting Magistrate it has been held by the High Court of Calcutta that such a procedure is not illegal.[6] No reasons have been given for such a view, but it may be supported on the ground that the general rule prohibits only *decisions* by Magistrates who have not heard all the evidence, and that in *committing* the accused, there is no *decision* of the case.[7] The High Court of Bombay has also held that such commitment is not illegal.[8] But the reason given therefor, based on the assumption that Section 350 applies, but that only the proviso thereto does not apply, to determinations under sub-section 2 of this Section, is obviously incorrect in view of sub-section 2 of Section 350 which clearly enacts that "nothing *in this Section* applies to cases in which proceedings have been stayed under Section 346."

6. Sub-section 2—Reference to any Sub-Magistrate having jurisdiction.

Where a Sub-Divisional Magistrate in Burma proceeding under sub-section 2 of this Section transferred a case for trial to the Township Magistrate of *P* the offence having been committed in the township of *H*, it was held that there was nothing illegal in doing so, inasmuch as a township is not recognized by the Code as a local area for purposes of territorial jurisdiction, and under Section 12, sub-section 2, except as otherwise provided, the jurisdiction and powers of Magistrates extend throughout the District in which they are appointed.[1]

It has been held by a Full Bench of the High Court of Madras[2] that the Magistrate to whom proceedings are submitted under this Section, can in a proper case refer the case back to the very Magistrate who made the submission. In that case eight persons were accused before a Second Class Magistrate of having committed dacoity and one of them, the 5th accused, was alleged to have been armed with a deadly weapon. The Magistrate acting under sub-section 1 of this Section submitted the proceedings to the Magistrate to whom he was subordinate. The latter went into the case and, finding that there was no case against the 5th accused who was the only person charged with having a deadly weapon, dismissed the complaint against him, and referred the case back to the Magistrate who made the submission so far as the other accused were concerned. It was held that he was not incompetent to do so.

7. Commitment to Sessions.—*See* Note 5, *ante*.

8. "Inquiry," "Evidence"—Meaning of.

The word "inquiry" is not restricted to proceedings after the Magistrate himself begins to take evidence. Nor is the word "evidence" restricted to evidence

625, *Ambika Singh* v. *Emperor*.
(1904) 1 Cri L Jour 1056 (1057) (Nag), *Emperor* v. *Gokal*.
(1905) 2 Cri L Jour 369 (370): 1905 Pun Re Cr No. 25, *Muhammad* v. *Emperor*.
(1923) 1923 Mad 327 (327): 24 Cri L Jour 413, (*Paravada*) *China Venku Naidu, In re*. Consent of parties will not exempt the Magistrate from holding a *de novo* trial.
[But see (1870) 14 Suth W R Cr 3 (3), *Kopil Nath Sahi* v. *Koneeram*. Where the prisoners did not appeal or raise any objection at the trial on that ground, the High Court declined to interfere.]

6. (1907) 6 Cri L Jour 429 (430) (Cal), *Kamini Baurini* v. *Fakirchand Sarkar*.
7. (1916) 1916 Nag 115 (115): 18 Cri L Jour 35 (36): 12 Nag L R 146, *Emperor* v. *Ramprasad*.
8. (1889) Ratanlal 472 (472), *Queen-Empress* v. *Shesha*.

Note 6.

1. (1902) 1 Low Bur Rul 308 (309), *Crown* v. *La Pya*.
2. (1930) 1930 Mad 765 (766): 1930 Cri Cas 961: 54 Mad 16: 31 Cri L Jour 1010, *Polur Reddi* v. *Munusami Reddi*. Explaining 1923 Mad 51 and 1891 Ratanlal 554 and 1890 Ratanlal 499. In view of the above decision, 4 Mad 327 and 2 Weir 20 would seem to be no longer law.

Sec. 346 Note 8

taken by the Magistrate himself. Where a Magistrate directs an inquiry by the Police or another person under Section 202 he does so in the course of his own inquiry, and all facts and statements disclosed by such inquiry, including the report by the Police or other person, are "evidence" on which a Magistrate can act under this Section.[1]

Sec. 347

Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.

347.* (1) If, in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall * * * commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under S. 346.

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* (**Code of 1882—S. 347**—The words "stop further proceedings and" were omitted by Amending Act of 1923, otherwise the Section was the same.)

(**Code of 1872—S. 46, Para. 3; S. 221; S. 436, Para 3.**)

46. * * * * * *

Magistrate may, in the first instance commit accused for trial before Court of Session.

The Magistrate who originally dealt with the case may, if he is empowered to hold inquiries into cases triable by the Court of Session and to commit persons to take their trial before such Court, instead of submitting his proceedings to another Magistrate, commit the accused person for trial before the Court of Session instead of finding him guilty.

221. In any trial before a Magistrate, in which it may appear at any stage of the proceedings that from any cause the case is one which the Magistrate is not competent to try, or one which, in the opinion of such Magistrate, ought to be tried by the Court of Session or High Court; the Magistrate shall stop further proceedings under this Chapter, and shall, when he either cannot or ought not to make the accused person over to an officer empowered under S. 36, commit the prisoner under the provisions hereinbefore contained. If such Magistrate is not empowered to commit, he shall proceed under S. 45.

How the Magistrate is to proceed when, after commencement of trial, he finds the case beyond his jurisdiction.

436. * * * * * *

If in the case of a European British subject, the Magistrate, to whom he is forwarded, considers the offence to require a more severe punishment than he is competent to award under Chap. 7 of this Act, he may commit the offender to the Sessions Court.

(**Code of 1861—S. 256.**)

256. In any trial before a Magistrate, in which it may appear at any stage of the proceedings that from any cause the case is one which the Magistrate is not competent to try, or which, in the opinion of such Magistrate, ought to be tried by the Court of Session, the Magistrate shall stop further proceedings under this Chapter, and shall proceed in accordance with Chapter 12 of this Act for conducting the preliminary enquiry in cases triable by the Court of Session.

How the Magistrate is to proceed when after commencement of trial, he finds the case beyond his jurisdiction.

Note 8.

1. (1927) 1927 Mad 591 (591): 28 Cri L Jour 384, *T. R. Balakrishna Reddiar* v. *Emperor.*

Synopsis.

Other Topics.

Chapter 18—Procedure laid in. See Note 5, Pts. 1 to 4.
Commitment—Reasons for. See Note 4, Pts. 5 to 8, 13 to 18.
Cross-examination and witnesses—Right of. See Note 5, Pts. 12 to 17.
Reference to superior Magistrate. See Note 2, Pt. 2.
The stage at which committal can be ordered. See Note 3, Pt. 1.

1. Legislative changes.

Section 286 of the Code of 1861 and Section 221 of the Code of 1872 which correspond to Section 347 of the present Code, found a place in the Chapter relating to the trial of warrant cases; and the wording of it was such as to make it seem to be confined to "trial."

The Code of 1882 for the first time removed the Section to the Chapter dealing with general provisions as to enquiries and trials and by the insertion of the words "In any enquiry" made it clear that the Section applied not only to trials but also to enquiries. The reason for the change was possibly that according to some decisions a trial of a warrant case did not begin till the accused had been charged and his plea taken and in order to avoid all possible question as to the applicability of the provision to any stage of the proceedings before a Magistrate the leglislature inserted the words "in any inquiry."[1]

The corresponding Sections of the Codes of 1861 and 1872 provided that the Magistrate shall stop further proceedings "under this chapter" (namely the Chapter relating to trial of warrant cases) and commit under the provisions "hereinbefore contained." With the removal of the Section from the Chapter relating to trial of warrant cases and its insertion in its present place, the reference to the chapter became inappropriate and was therefore omitted in the Code of 1882. But it has been held that the omission was not intended to make any difference or to dispense with obligation of the Magistrate to follow the provisions of Chapter 18, the words "stop further proceedings" meaning only proceedings in the trial or enquiry in which the Magistrate is engaged.[2]

The Code of 1872 restricted the discretion of the Magistrate to such cases as the Magistrate could not or ought not to make over, to a Magistrate specially empowered under Section 36. This restriction has been removed by the Code of 1882.

The Code of 1898 has made no change in the Section.

The words "stop further proceedings" have been omitted by the Amending Act XVIII of 1923 and the omission sets at rest the conflict as to whether the Section is or is not subject to the provisions of Chapter 18.[3]

2. Scope.

This Section is supplementary to Chapter XVIII and refers to a case which a Magistrate has first taken up with a view to disposing it of himself, but which,

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Section 347—Note 1.

1. (1912) 13 Cri L Jour 877 (881): 6 Low Bur Rul 129, *Emperor* v. *Channing Arnold.*
2. (1912) 13 Cri L Jour 877 (888): 6 Low Bur Rul 129, *Emperor* v. *Channing Arnold.*
3. [See Note 5 (3).]

Sec. 347 Notes 2—4

he later finds, is one which ought to be tried by the Court of Session or the High Court ; in other words, is a case which comes under the second category of cases, referred to in Section 207. This Section lays down the procedure to be followed when such a position arises.[1]

The Section does not apply to a case where a Magistrate thinks from the first that the case ought to be tried by the Court of Session. In such a case the Magistrate must conform to the provisions of Section 208 from the start.[2]

In the application of this Section there is no distinction made between summons and warrant cases.[3]

Sections 346, 347 *and* 349.—A Magistrate taking up a case may try it himself if he has jurisdiction, or he may if he thinks he cannot inflict an adequate sentence, act under Section 346 or 349 and send it to a higher Magistrate, or he may, if he thinks that it is a proper case for a Court of Session, commit the accused under Section 347 ; or if he has no power to commit, send it under Section 346 to another Magistrate for the purpose of commitment.[4]

3. "Before signing judgment."

A Magistrate has power at any stage of the proceedings to decide that the case is one which he ought not to try and which ought to be committed to Sessions.[1] The discretion given to him by this Section is not taken away even though a charge may have been drawn up[2] or because the Magistrate has issued summons to the defence witnesses.[3] In a case where the Magistrate had as yet passed no order of discharge he was held competent to commit to Sessions.[4] But once *judgment is pronounced* the Magistrate cannot commit the case to the sessions because Section 403 would be a bar to further proceedings as was held in the undermentioned case decided with reference to Section 348[5] and as Section 369 prevents a Court from altering or reviewing its judgment after it has signed it, except where such review or alteration is specially provided for.[6]

4. "Ought to be tried."

If the evidence discloses an offence triable only by a Sessions Court, the Magistrate must commit the case to the sessions.[1a] But where the evidence discloses both an offence exclusively triable by a Sessions Court and an offence which the Magistrate himself can try, a trial and conviction by the Magistrate in respect of the latter offence is not illegal.[1b]

Note 2.

1. (1912) 13 Cri L Jonr 877 (885): 6 Low Bur Rul 129, *Emperor* v. *Channing Arnold.*
2. (1912) 13 Cri L Jour 877 (883): 6 Low Bur Rul 129, *Emperor* v. *Channing Arnold.*
3. (1920) 1920 Sind 55 (57): 14 Sind L R 85: 21 Cri L Jour 791, *Ghani Yakub* v. *Emperor.*
   [But see (1906) 3 Cri L Jour 94 (95) (All), *Emperor* v. *Dharam Singh.*]
4. (1919) 1919 Mad 907 (908): 42 Mad 83: 19 Cri L Jour 997, *Crown Prosecutor* v. *Bhagavathi.*

Note 3.

1. (1930) 1930 Cal 666 (667): 32 Cri L Jour 243: 1930 Cri Cas 1058, *Panchanan Sarkar* v. *Emperor.*
   (1898) Ratanlal 975, *In re Clive Durant.*
2. (1878) 3 Cal 495 (497), *Empress* v. *Kudrutoollah.*
3. (1915) 1915 Mad 947 (948): 15 Cri L Jour 704, *In re Sessions Judge, Madura.*
4. (1920) 1920 Mad 94 (95): 43 Mad 330: 21 Cri L Jour 91, *In re Gandi Apparaju.*
5. (1914) 1914 Mad 149 (149): 38 Mad 552: 15 Cri L Jour 188, *In re Kora Sellandi.*
6. [See Section 369 and Notes thereto.]

Note 4.

1a (1926) 27 Cri L Jour 871 (872): 96 Ind Cas 119 (Cal), *Hara Mohan Das* v. *Emperor.* Where facts found show that offence committed falls under S. 471, Penal Code, Magistrate should not convict accused under S. 196, but should commit him to Sessions for trial under S. 471.
   (1889) Ratanlal 476 (477), *Queen* v. *Jabania.* Magistrate not to clutch at jurisdiction by ignoring aggravating circumstances.

1b (1921) 1921 Cal 114 (115): 22 Cri L Jour

Sec. 347 Note 4

If the offence is one which is not exclusively triable by a Court of Session, the Magistrate could commit the accused to the Court of Session only, if he be of opinion that the case is one which *ought to be tried* by that Court.[1c] The Magistrate must use his discretion in determining whether a particular case should be committed or not, and every circumstance of aggravation must be carefully weighed.[1] The discretion given to the Magistrate by this Section being a judicial one it should be exercised with care and on some proper ground. The order of committal being a judicial order, the Magistrate should state his grounds for committing in order to enable the Court of Session or the High Court to judge whether the committal is a sound exercise of discretionary power.[2] The reasons given should be not only for not discharging the accused, but also for *committing* him to Sessions when the case is not exclusively triable by the latter.[3] Failure to give reasons for committal as required by Section 213 may be only an irregularity where the case is one which plainly ought to be tried by sessions, but where it is not exclusively triable by Sessions the failure amounts to an illegality.[4] If no reasons are given or if the reasons given are bad in law, the committal may be quashed.[5]

There is a conflict of opinion as to whether the only grounds on which a Magistrate could commit are want of jurisdiction in himself, or his inability to punish adequately. Decisions which have been in favour of restricting the discretion of the Magistrate to these two grounds are based on the view that Section 347 is controlled by Section 254 which lays down, that, in the trial of a warrant case where there is ground for presuming that the accused has committed an offence which the Magistrate is competent to try and which in his opinion could be adequately punished by him, he shall frame a charge against the accused.[6] The opposite view is that Section 347 is not controlled by Section 254 and that want of jurisdiction in the Magistrate or his inability to punish adequately are not the only grounds on which he may commit a case to the Sessions ; the Section is wide enough to include other grounds.[7] Thus a Magistrate though having power

666, *Kalicharan Kundu* v. *Emperor*. Offence under I. P. C. S. 477-A disclosed--Conviction by Magistrate in respect of offence under S. 408 not bad where such offence also appears to have been committed.
[See also (1904) 1 Cri L Jour 637 (638): 27 All 69, *Emperor* v. *Ishtiaq Ahmad*. Magistrate not bound to commit to Sessions merely because evidence disclosed another offence exclusively triable by Sessions Court where there was evidence to convict for the offence within his jurisdiction.

1c (1928) 1928 Pat 551 (552): 29 Cri L Jour 612, *Emperor* v. *Deo Narain Mallick*.

1. (1866) 2 Weir 19 (20).

2. (1928) 1928 Pat 551 (552): 29 Cri L Jour 612, *Emperor* v. *Deo Narain Mallick*.
(1909) 9 Cri L Jour 163 (164): 1 Ind Cas 104 (Bom), *Emperor* v. *Mahamad Khan Rajakhan Pathan*.
(1930) 1930 Lah 312 (313): 31 Cri L Jour 178: 1930 Cri Cas 344, *Emperor* v. *Karam Singh*.
[But see (1919) 1919 Mad 907 (908): 42 Mad 83 : 19 Cri L Jour 997, *Crown Prosecutor* v. *Bhagavathi*. Obiter.]

3. (1914) 1914 Bom 237 (238): 38 Bom 114 : 14 Cri L Jour 609, *Emperor* v. *Nanji Samal*.

4. (1914) 1914 Bom 237 (238): 38 Bom 114 : 14 Cri L Jour 609, *Emperor* v. *Nanji Samal*.

5. (1926) 1926 Bom 251 (252): 27 Cri L Jour 479, *Emperor* v. *Achaldas Jethamal*.
(1924) 1924 Sind 61 (64): 17 Sind L R 188 : 26 Cri L Jour 148, *Utilibai* v. *Emperor*.

6. (1897) 24 Cal 429 (431), *Empress* v. *Kayemullah Mandal*
(1919) 1919 All 366 (366): 41 All 454 : 20 Cri L Jour 273, *Empress* v. *Bindeshri Goshain*.
(1902) 4 Bom L R 85 (86), *Emperor* v. *Pema Ranchod*.
(1918) 1918 Nag 141 (142): 20 Cri L Jour 97, *Emperor* v. *Hanuman*.
(1914) 1914 Sind 94 (95): 8 Sind L R 23 : 15 Cri L Jour 664, *Diwanichand* v. *Emperor*.
(1918) 1918 Sind 60 (61): 11 Sind L R 79 : 19 Cri L Jour 319, *Emperor* v. *Ismail*.

7. (1919) 1919 Mad 907 (908, 910): 42 Mad 83 : 19 Cri L Jour 997, *Crown Prosecu-*

Sec. 347 Note 4

to try the case himself may commit it to Sessions if he thinks the gravity of the case requires that it be tried by such Court.[8]

There is nothing anywhere which compels a Magistrate to frame that charge which on the most heinous view of the circumstances indicated by the evidence is the gravest possible charge. It is left to the Magistrate to take a broad and commonsense view of the facts and to determine whether the correct charge to be framed is or is not one which necessitates a trial by a Court of Session.[9] A committal made under a misapprehension of the correct offence may be quashed.[9a] On the other hand a Magistrate should not ignore aggravating circumstances and himself try a case which, taking a reasonable view of the depositions must be regarded as involving the trial of the accused for a grave offence[10] or one in which complicated or difficult questions of law or fact arise which he is neither by training nor experience qualified to try.[11]

To decide whether he shall or shall not, commit the case to the Court of Session, a Magistrate has to consider the gravity of the offence, the punishment with which in his opinion it ought to be met and the Section under which he charges the accused person. He may also consider special difficulties in the case or its peculiar importance and other matters might enter into his consideration.[12]

The following have been held to be good grounds for committal :—

1. Desirability that the case be tried by jury, or the gravity of the case.[13]
2. The Magistrate having put himself in the position of a witness by a local investigation.[14]
3. The fact that in respect of the same transaction another party of accused is being tried by Sessions,[15] or that the facts constituting the

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tor v. *Bhagavathi.*
(1876) 1 Mad 289 (290) (F B), *In the matter of Chinnimarigadu.*
(1929) 1929 Bom 313 (319) : 53 Bom 611 : 30 Cri L Jour 1090, *Krishnaji Prabhakar Khadilkar* v. *Emperor.*
(1926) 1926 Bom 251 (252) : 27 Cri L Jour 479, *Emperor* v. *Achaldas Jethamal.*
(1925) 1925 Rang 207 (208) : 3 Rang 42 : 26 Cri L Jour 1389, *Emperor* v. *Ishahat.*
(1917) 1917 Lah 251 (251, 252) : 18 Cri L Jour 524 (525) : 1917 Pun Re Cr No. 13, *Emperor* v. *Ali.*
(1920) 1920 Sind 55 (56) : 14 Sind L R 85 : 21 Cri L Jour 791, *Ghani Yacub* v. *Emperor.*

8. (1928) 1928 Pat 551 (552) : 29 Cri L Jour 612, *Emperor* v. *Deo Narain Mullick.*
9. (1909) 9 Cri L Jour 163 (165) : 1 Ind Cas 104 (Bom), *Emperor* v. *Muhammad Khan Rajakhan Pathan.*

9a (1910) 11 Cri L Jour 54 (54) : 4 Ind Cas 812 (All), *Emperor* v. *Jagmohan.*

10. (1920) 1920 Cal 40 (42) : 21 Cri L Jour 10, *Moze Ali* v. *Emperor.*
(1884) 10 Cal 85 (86), *Empress* v. *Paramananda.*
(1878) 1 Cal L R 141 (142), *In the matter of Gopinath Shaha.*
(1868) 9 Suth W R Cr 5 (5), *Turan Telee* v. *Bhuttoo Dome.*
(1867) 7 Suth W R Cr 11 (11), *Mahub Ghose* v. *Bullye Metea.*
(1866) 5 Suth W R Cr 65 (65), *Queen* v. *Ramtahal Singh.*
(1901) 24 Mad 675 (677), *King-Emperor* v. *Ayyar.*
(1889) 13 Bom 502 (505), *Queen-Empress* v. *Gundya.*
(1888) Ratanlal 382 (383), *Queen-Empress* v. *Rupya.*
(1897-1901) 1 Upp Bur Rul 328, *Emperor* v. *Nga Po San.*
(1897-1901) 1 Upp Bur Rul 327, *Queen-Empress* v. *Nga Mya.*
(1886) 1886 Pun Re Cr No. 30, page 73 (74), *Kaka* v. *Empress.*

11. (1932) 1932 Rang 193 (194) : 10 Rang 495 : 1932 Cri Cas 935 : 34 Cri L Jour 187, *Emperor* v. *Maung Chit Sen.*
12. (1917) 1917 Bom 33 (34) : 42 Bom 172 : 19 Cri L Jour 342, *Emperor* v. *Bhimaji Venkaji Nadgir.*
(1932) 1932 Bom 63 (63) : 1932 Cri Cas 87 : 56 Bom 61 : 33 Cri L Jour 262, *Hari Moreshvar Joshi* v. *Emperor.*
13. (1929) 1929 Bom 313 (316) : 53 Bom 661 : 1929 Cri Cas 124 : 30 Cri L Jour 1090, *Krishnaji Prabhakar Khadilhar* v. *Emperor.*
14. (1912) 13 Cri L Jour 688 (688) : 16 Ind Cas 336 (Cal), *Fazar Ali* v. *Mazharulla.*
15. (1917) 1917 Lah 251 (251) : 18 Cri L Jour 524 (525) : 1917 Pun Re Cr No. 13,

offence form part of the same transaction with another offence triable by Sessions.[16] The Lahore view, however, is that an apparent connexion of one case with another is no ground for committal.[17] But this view is not accepted in Madras although it is recognized that the rule that a case and counter-case should, if practicable, be tried by the same Court is not a rigid one which should be followed at all costs.[18]

The following have been held not to be sufficient grounds for committal :—

1. The mere wish of parties[19] or the fact that the accused wants to have the benefit of a trial by jury.[19a]
2. The mere fact that the case has caused a sensation in a particular community.[20]
3. The terms of a Government resolution.[21]

If a committal would result in an unwarrantable waste of time without advantage to anybody and the Magistrate is competent to try the case he acts properly in not committing.[22]

It has been held in the undermentioned cases[23] that where an offence appears to be deserving of a greater punishment than the Magistrate can inflict he should commit the case. On the other hand it has been pointed out that where the Sub-Magistrate has no jurisdiction but the District Magistrate has, the former would be well advised to submit the case to the latter rather than to commit, so that the valuable time of the Sessions Court may be saved.[24] When two or more persons are jointly indicted and the jurisdiction of the Magistrate is ousted in the case of one of them the proper course is to commit both or all for trial before a Court of Session.[25]

5. "Under the provisions hereinbefore contained."

Before the amendment of this Section it contained the words "stop further proceeding." These words gave rise to conflict of opinion, one view being that they permitted the Magistrate to disregard the provisions of Chapter 18 and to commit the case to Sessions immediately he formed the opinion that the case should be committed;[1] the other view was that Section 347 did not in any way override the provisions of Chapter 18 or dispense with the obligation of following them, the words "stop further proceedings" meaning to stop proceeding with the case as a trial and to proceed to commit to Sessions.[2] The conflict has been set at rest in

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Emperor v. *Ali.*

16. (1920) 1920 Sind 55 (57) : 14 Sind L R 85 : 21 Cri L Jour 791, *Ghani Yacub* v. *Emperor.*
17. (1930) 1930 Lah 312 (313) : 31 Cri L Jour 178 : 1930 Cri Cas 344, *Emperor* v. *Karam Singh.*
18. (1932) 1932 Mad 502 (504, 505) : 33 Cri L Jour 765 : 1932 Cri Cas 506, *Lakshminarayana* v. *Suryanarayana.*
19. (1926) 1926 Bom 251 (252) : 27 Cri L Jour 479, *Emperor* v. *Achaldas Jethamal.*
    (1917) 1917 Bom 33 (34) : 42 Bom 172 : 19 Cri L Jour 342, *Emperor* v. *Bhimaji Venkaji Nadgir*
19a (1932) 1932 Bom 63 (64) : 1932 Cri Cas 87 : 56 Bom 61 : 33 Cri L Jour 262, *Hari Moreshvar Joshi* v. *Emperor.*
20. (1926) 1926 Bom 251 (252) : 27 Cri L Jour 479, *Emperor* v. *Achaldas Jethamal.*
21. (1917) 1917 Bom 33 (34) : 42 Bom 172 : 19 Cri L Jour 342, *Emperor* v. *Bhimaji Venkaji Nadgir.*
22. (1925) 1925 Pat 755 (759) : 27 Cri L Jour 313, *The Bengal Nagpur Railway Co., Ltd.*, v. *Shaik Makbul.*
23. (1892) 16 Bom 580 (583, 586), *Narayan Bhau Bartake* v. *Tatia Ganpatro Deshmukh.*
    (1889) 11 All 393 (395), *Queen-Empress* v. *Khalak.*
24. (1865) 2 Suth W R Cr Letters 19 (19).
25. (1868) 1 Weir 448 (449).

Note 5.

1. (1898) Ratanlal 975 (975), *In re Clive Durant.*
    (1908) 8 Cri L Jour 221 (223) : 36 Cal 48, *Phanindra Nath Mitra* v. *Emperor*
2. (1912) 13 Cri L Jour 877 (882) : 6 Low Bur Rul 129, *Emperor* v. *Channing*

Sec. 347 Note 5

favour of the latter view by the omission of the words in question.[3]

The Magistrate must, therefore, follow the procedure in Chapter 18, for it can scarcely be disputed that the words "under the provisions hereinbefore contained" must relate to those provisions in Chapter 18 which define the procedure to be followed in inquiries into cases triable by Sessions.[4]

The Magistrate need not, however, re-commence the inquiry or take evidence *de novo*. It is only required that the further proceedings necessary for commitment shall be taken as directed in Chapter 18.[5] From the moment the Magistrate decides to commit, what has hitherto been a trial becomes an enquiry under Chapter 18.[6] The charge already framed must be set aside in order that the Magistrate may get back to the stage at which preliminary case proceedings may be applied.[7]

But it is only in respect of the offence for which the accused is to be committed that the proceedings are taken out of Chapter 21. The other proceedings must remain covered by that Chapter. So, where a Magistrate, having taken cognisance of a case frames charges, comes to the conclusion that so far as one of the charges is concerned the accused should be committed and as regards the other the offence is not proved, he is entitled under Section 347 to commit for the former charge, but this does not affect his obligation to acquit the accused of the latter charge.[8]

Though the Magistrate need not commit proceedings *de novo*, once he decides to commit, he must not deprive the accused of any right which he might have exercised under Chapter 18, had the case been treated from the outset as a preliminary enquiry.[9] Where the accused has had no opportunity of adducing evidence before the committal, the committal should be quashed.[10] Also, where the evidence had not been read over to the witnesses as required by Section 208 read with Section 360 it was held that it was not a mere formal omission but one that may deprive the accused of the valuable right to contradict the witnesses during the Sessions trial by reference to their prior statements.[11]

After the Magistrate has decided to commit the case, is the accused entitled to cross-examine the witness? If the accused has cross-examined the witnesses before the Magistrate decides to commit, he has no further right of cross-examination, after the charge is amended. For the amended charge is framed under Section 210 which does not allow the accused the right of further cross-examina-

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Arnold.
(1912) 13 Cri L Jour 778 (780) : 36 Mad 321, *The Sessions Judge of Coimbatore* v. *Immudi Kumara.*
(1914) 1914 Mad 643 (644) : 15 Cri L Jour 366, *In re Chinnavan.*
(1931) 1931 All 434 (435) : 1931 Cri Cas 706 : 53 All 692 : 32 Cri L Jour 849, *Ram Ghulam* v. *Emperor.*
(1924) 1924 Sind 61 (62) : 17 Sind L R 188 : 26 Cri L Jour 148, *Utilibai* v. *Emperor.*

3. (1932) 1932 Mad 502 (503) : 33 Cri L Jour 765 : 1932 Cri Cas 506, *Lakshminarayana* v. *Suryanarayana.*
(1931) 1931 Bom 517 (518) : 33 Cri L Jour 68 : 1931 Cri Cas 949, *K. R. Bhat* v. *Emperor.*

4. (1929) 1929 Mad 862 (863) : 1929 Cri Cas 602 : 52 Mad 995 : 31 Cri L Jour 273, *Damodaran* v. *Emperor.*

5. (1880) 2 All 910 (912), *Empress of India* v. *Ilahi Baksh.*
(1869) 1 N W P H C R 307 (311), *Government Prosecutor* v. *Ameer-ood-deen.*

6. (1930) 1930 Cal 666 (667) : 32 Cri L Jour 243 : 1930 Cri Cas 1058, *Panchanan Sarkar* v. *Emperor.*
(1933) 1933 Cal 354 (357) : 60 Cal 643 : 1933 Cri Cas 490 : 34 Cri L Jour 611, *Sudhindra Kumar Roy* v. *Emperor.*

7. (1932) 1932 Mad 502 (504) : 33 Cri L Jour 765 : 1932 Cri Cas 506, *Lakshminarayana* v. *Suryanarayana.*

8. (1925) 1925 Oudh 547 (548) : 26 Cri L Jour 520, *Bishambar Nath* v. *Emperor.*

9. (1931) 1931 All 434 (435) : 53 All 692 : 1931 Cri Cas 706 : 32 Cri L Jour 849, *Ram Ghulam* v. *Emperor.*

10. (1932) 1932 Mad 502 (503) : 33 Cri L Jour 765 : 1932 Cri Cas 506, *Lakshminarayana* v. *Suryanarayana.*

11. (1929) 1929 Mad 862 (864) : 1929 Cri Cas 602 : 52 Mad 995 : 31 Cri L Jour 273,

tion.[12]

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During the examination of the first witness for the prosecution the Magistrate intimated to the accused his intention of committing him to a Court of Session but the accused declined to cross-examine the witnesses and after the charge was framed he prayed that he might be allowed to do so; it was held that he was not entitled to do so.[13] But it is surmised that if the accused, though having had the opportunity to cross-examine does not avail himself of it because the enquiry having been originally under Chapter 21 he was led to believe that he would have the right of cross-examination after the charge is framed, the accused should not be prejudiced by the conversion of the trial into a preliminary enquiry and should be afforded an opportunity of cross-examination.[14] When the application to cross-examine is made before the Magistrate frames a charge and decides to commit the case, it must of course be granted.[15]

In the undermentioned case[16] it was held that the accused would be allowed to cross-examine the witnesses if his application was made before the prosecution closed its case, but not if the application was made after. Referring to this decision, however, a recent Calcutta case has held that such a distinction did not exist.[17]

In order that a committal may be quashed on the ground that the provisions of Chapter 18 have not been followed, it must be shown that the accused has been *prejudiced* by the irregularity.[18] But before the committal, the accused is entitled to claim that provisions relating to enquiries before the commitment shall be observed irrespective of any question as to prejudice.[19]

Since the effect of the Magistrate's decision to commit is to convert the proceedings into a preliminary enquiry, it follows that if there be a change of Magistrates before the actual committal, the accused will not be entitled to a *de novo* enquiry as proviso (a) of Section 350 applies only to trials and not to enquiries.[20]

348. Whoever, having

348.* (1) Whoever, having

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* (Code of 1882—S. 348.)

348. Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall ordinarily, if the Magistrate before whom he is accused considers him an habitual offender, be committed to the Court of Session or High Court, as the case may be ; or, in districts

Trial of persons previously convicted of offences against coinage, stamp-law or property.

12. (1931) 1931 All 434 (435): 53 All 692 : 1931 Cri Cas 706 : 32 Cri L Jour 849, *Ram Ghulam* v. *Emperor*. 1924 All 665, to the contra, not approved.
(1924) 1924 All 665 (666): 25 Cri L Jour 798, *Mohan Lal* v. *King-Emperor*.
13. (1929) 1929 Cal 593 (595): 1929 Cri Cas 222: 57 Cal 44 : 30 Cri L Jour 1107, *G. V. Raman* v. *Emperor*.
14. (1929) 1929 Cal 593 (596): 57 Cal 44 : 1929 Cri Cas 222 : 30 Cri L Jour 1107, *G. V. Raman* v. *Emperor*,
(1932) 1932 Mad 502 (504): 1932 Cri Cas 506 : 33 Cri L Jour 765, *Lakshminarayana* v. *Suryanarayana*. Obiter.
15. (1924) 1924 Cal 780 (780): 51 Cal 442 : 26 Cri L Jour 63, *Jyotsna Nath Sikdar* v. *King-Emperor*.
16. (1912) 13 Cri L Jour 688 (688): 16 Ind Cas 336 (Cal), *Fazar Ali* v. *Mozharulla*.
17. (1929) 1929 Cal 593 (595): 57 Cal 44 : 1929 Cri Cas 222 : 30 Cri L Jour 1107, *G. V. Raman* v. *Emperor*.
18. (1931) 1931 Bom 517 (518): 33 Cri L Jour 68, *K. R. Bhat* v. *Emperor*.
(1914) 1914 Mad 643 (644): 15 Cri L Jour 366, *In re Chinnavan*.
19. (1929) 1929 Mad 862 (864): 52 Mad 995 : 1929 Cri Cas 602 : 31 Cri L Jour 273, *Damodaran* v. *Emperor*.
20. (1930) 1930 Cal 666 (667): 32 Cri L Jour 243 : 1930 Cri Cas 1058, *Panchanan Sarkar* v. *Emperor*.

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Trial of persons previously convicted of offences against coinage, stamp-law or property.

been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment, for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall be committed to the Court of Session or High Court, as the case may be, unless the Magistrate before whom the proceedings are pending is of opinion that he can himself pass an adequate sentence if the accused is convicted.

Provided that, if the District Magistrate has been invested with powers under Section 30, the case may be transferred to him instead of being committed to the Court of Session.

Trial of persons previously convicted of offences against coinage, stamp-law or property.

been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall, *if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused*, be committed to the Court of Session or High Court, as the case may be, unless the Magistrate *is competent to try the case and* is of opinion that he can himself pass an adequate sentence if the accused is convicted:

Provided that, if *any Magistrate in the district* has been invested with powers under Section 30, the case may be transferred to him instead of being committed to the Court of Session.

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in which the District Magistrate has been invested with powers under Section 30, placed on his trial before such Magistrate.

(Code of 1872—S. 315.)

315. Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall ordinarily, if the Magistrate considers him an habitual offender, be committed to the Court of Session.

Trial of previously convicted persons.

Provided that, in districts in which the Magistrate of the District has been invested with powers under Section 36,* the accused person may be placed on his trial before such Magistrate

Proviso.

* [1872—S. 36=1898—S. 30.]

(Code of 1861—Nil.)

(2) When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under Section 209.

Synopsis.

Other Topics.

Committal to the District Magistrate. See Note 11, Pt. 3.
Discretion of Magistrate. SeeNote 7, Pts. 5, 5a.
Magistrate cannot convict, See Note 7, Pt. 5d.
Second offence should be after previous conviction. See Note 4, Pt. 3.
When the Magistrate can commit. See Note 9, Pts. 2 and 3.

1. Legislative changes.

1. The words "if the Magistrate before whom . . . committing the accused" in sub-section 1 are new. The amendment has been made on the lines of Section 209. [1]
2. In the same sub-section the words "is competent to try the case" have been introduced in order "to make it clear that the Section does not empower the Magistrate to pass a sentence in a case which he is not competent to try." [2]
3. The words "any Magistrate in the District" in the proviso to the same sub-section have been substituted for the words "the District Magistrate." By reason of the amendment a case of an old offender may now be transferred not only to a District Magistrate empowered under Section 30, but also to any *other* Magistrate in the District specially empowered under that Section.
4. Sub-section 2 is new.

2. Scope of the Section.

Section 75 of the Penal Code provides for enhanced punishment or punishment of a different kind for offences under Ch. XII, (offences relating to coin or Government stamp) and Ch. XVII (offences against property) of the said Code where the accused has been previously convicted for a similar offence. There are also local or special laws which provide for enhanced punishment or punishment of a different kind, on a second conviction for certain classes of offences specified

Section 348—Note 1.

1. Select Committee Report of 1916, Clause 80. 2. Select Committee Report of 1922, Clause 90.

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therein. *See* for an illustration, Section 23 of the Criminal Tribes Act (Act VI of 1924).

This Section specifies the tribunal to which old offenders in respect of the offences specified should be sent for trial by the Magistrates before whom they are charged. The object underlying the Section is that the accused should be tried by a tribunal which could award him a punishment adequate to the circumstances of his case.

In order that this Section may apply :

1. both the offences, for which the accused has been previously convicted and that for which he is being tried, must fall under one or other of the Chapter XII or Chapter XVII of the Penal Code, and
2. both must have been offences punishable with imprisonment for a term of three years or upwards.

The above conditions are the same as those necessary for the applicability of Section 75 of the Penal Code and the cases bearing on the latter Section have therefore been referred to in the following Notes as an aid to the interpretation of this Section.

3. Previous conviction should have been under Ch. XII or Ch. XVII of the Penal Code.

As has been seen in Note 2 above, the previous conviction should have been one for an offence under Chapter XII or Chapter XVII of the Penal Code.[1] From this the following propositions follow :—

1. An *attempt* (to commit an offence) punishable under Section 511 of the Penal Code not being an offence under Chapter XII or Chapter XVII of the Penal Code, a previous conviction therefor will not count for the purposes of this Section.[2] Nor conversely, will a previous conviction under Chapter XII or XVII of the Penal Code can be reckoned against an accused when the *subsequent* offence with which he is charged is an *attempt* punishable under Section 511.[3]
2. A previous conviction under any local or special law, is not a conviction for an offence *under the Penal Code* and will not count for the purposes of this Section.[4] The Sind Judicial Commissioner's Court has, however, held that where an offender is dealt with under a special law which provides that certain offences punishable under

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Note 3.

1. (1875) 1 All 637 (639), *Empress of India* v. *Megha.*
   (1877) 1 Weir 39 (39).
   (1923) 1923 Lah 286 (286) : 24 Cri L Jour 944, *Fattu* alias *Badra* v. *The Crown.* Conviction under S. 411, I. P. C.—Previous conviction under S. 369 cannot be taken into account under S. 75, I. P. C.
2. (1888) 1 Weir 36 (36).
   (1888) 1 Weir 37 (37), *In re Motawel Pakuran.*
   (1881) 3 All 773 (775), *Empress of India* v. *Ramdayal.*
   (1893-1900) 1893-1900 Low Bur Rul 496, *Nga Pru Tun* v. *Queen-Empress.*
   (1895) 17 All 123 (125), *Queen-Empress* v. *Barosa.*
   (1895) 17 All 120 (123), *Queen-Empress* v. *Ajudhia.*
   (1880) 5 Bom 140 (143), *Empress* v. *Navna Rahim.*
   (1907) 5 Cri L Jour 85 (85) : 1906 Pun Re Cr No. 14, *Jhamman Lal* v. *Emperor.*
   (1887) 14 Cal 357 (358), *Queen-Empress* v. *Sricharan Bauri.*
   (1874) 21 Suth W R Cr 35 (35), *Queen* v. *Damu Haree.*
   (1884) 1884 Pun Re Cr No. 34, page 59 (60), *The Empress* v. *Fattu.*
3. (1907) 5 Cri L Jour 85 (85) : 1906 Pun Re Cr No. 14, *Jhamman Lal* v. *Emperor.*
4. (1893-1900) 1893-1900 Low Bur Rul 378, *Queen-Empress* v. *Nga Tha Kaing.* Previous conviction under Lower Burma Villages Act.
   (1904) 1 Cri L Jour 1061 (1062) : 1904 Pun Re Cr No 17, *King-Emperor* v. *Khan Muhammad.* Previous convic-

the Penal Code are punishable under that law, Section 75 of the Penal Code will not apply.[4a] *See also* the following cases.[4b]

3. A previous conviction given *before the Penal Code came into force* cannot be taken into account for the purposes of this Section.[5]

4. "Having been convicted."

The words "having been convicted . . . . . shall be guilty of an offence" in Section 75 of the Penal Code have been held to imply that the previous conviction should have been *before* the commission of the offence with which the accused is subsequently charged.[1] The reason is that a man should be treated as an old offender only if it can be shown that the first conviction had no effect on him. It cannot be said that the first conviction had no effect in a case where such conviction was after the commission of the offence for which the accused is subsequently tried.[2] This Section uses the words "is again *accused* of an offence etc," but it is conceived that the said principle will equally apply to the interpretation of this Section also. Consequently this Section will not apply unless the offence with which a person is "again accused" was committed after the previous convictions.[3] Under S. 75 of the Penal Code the previous conviction must have been by a Court in British India or by a Court or tribunal in the territories of any Native Prince or State in India acting under the general or special authority of the Governor General in Council or of any Local Government. A conviction by a Court in a Native State not acting under any such authority cannot be reckoned for the purposes of that Section.[4] *See also* the following case.[5]

5. "Punishable under . . . . of the Indian Penal Code."

It is to be noted that for the application of this Section it is not necessary that the previous *sentence* should have been three years or upwards ; it is sufficient that the *offence* of which the accused was convicted is *punishable* under the Penal

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tion under Punjab Frontier Crimes Regulation on verdict of a Jirga.

4a (1917) 1917 Sind 17 (19) : 11 Sind L R 46 : 18 Cri L Jour 909 (910), *Mazar Attamahomed* v. *Emperor.*

4b (1893) 7 C P L R Cr 24 (26), *Empress* v. *Lalsing*, Conviction in Berar Assigned Districts passed under the I. P. C , in accordance with an executive notification of the Governor-General of India in Council is not a conviction under the I. P. C., for purpose of S. 75, I. P. C., but such conviction can be taken into consideration for determining the measure of punishment to be awarded for the later offence.

(1933) 1933 Pesh 6 (9): 1933 Cri Cas 148, *Emperor* v. *T. B. A. W. Johnson.* District Magistrate passing sentence under Frontier Province Regulation —Such sentence can be taken into consideration.

5. (1866-67) 4 Bom H C R Crown Cases 11 (12), *Reg* v. *Kushya bin Yesu.*

(1865) 4 Suth W R Cr 9 (10), *Queen* v. *Hurpaul.*

(1865) 5 Suth W R Cr 66 (67), *Queen* v. *Pubon.*

(1882) 10 Cal L R 392 (392), *Budhun Rajwar* v. *Empress.*

(1868) 1868 Pun Re Cr No. 31, page 89 (90), *Hurkishen* v. *The Crown.*

(1877) 1 Weir 39 (39). Prior conviction under Reg. IV of 1821.

Note 4.

1. (1875) 1 All 637 (639), *Empress of India* v. *Megha.*

(1882) 1882 Pun Re Cr No. 39, page 65 (65), *Gobind* v. *Empress.* Previous conviction 14 days after commission of subsequent offence—Section not applicable.

(1918) 1918 Low Bur 121 (121): 9 Low Bur Rul 77, *Po So* v. *Emperor.*

(1875) 1 Weir 39.

2. (1866) 5 Suth W R Cr 66 (67), *Queen* v. *Pubon.*

3. [See (1879) Ratanlal 143 (144), *Queen* v. *Appa.*]

4. (1919) 1919 All 63 (63): 42 All 136: 21 Cri L Jour 144, *Bhanwar* v. *Emperor.*

(1905) 2 Cri L Jour 749 (750): 1 Nag L R 137, *Ghasia Teli* v. *Emperor.* Previous conviction by the Nandgaon State.

(1913) 14 Cri L Jour 527 (527): 1913 Pun Re Cr No. 17, *Bahawal* v. *Emperor.*

5. (1933) 1933 Pesh 6 (9): 1933 Cri Cas 148, *Emperor* v. *T. B. A. W. Johnson.* Previous conviction before Court martial cannot be taken into con-

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Code with imprisonment for three years or more. *See also* Note 3, above.

6. "For a term of three years or upwards."

Where the subsequent offence, though falling under Chapter XII or XVII of the Penal Code is punishable with imprisonment for *less* than three years (*e. g.* Section 403, I. P. C.), this Section will not apply.[1]

7. "Shall be committed."

It is the duty of the Magistrate to commit the accused to the Sessions Court or to the High Court as the case may be, if the conditions of the Section are satisfied,[1] *viz.*,

(*a*) that the accused has been *previously convicted* of an offence of the kind referred to in the Section ;

(*b*) that the Magistrate is satisfied that there are *sufficient grounds* for committing the accused, and,

(*c*) that the Magistrate is either *not competent* to try the case or is of opinion that he cannot himself pass an *adequate sentence* if the accused is convicted.

The prosecution and the Magistrate should, therefore, ascertain and take notice of any circumstances showing that the accused is an habitual offender who ought, under this Section, to be committed.[2] For this purpose, the Magistrate must, either as a preliminary matter or at any rate before framing a charge, determine whether there has been a previous conviction : having decided that point, he will have to consider whether in the circumstances of the case his powers enable him to pass a sufficiently severe sentence. If they do not so permit, but the evidence does not warrant the discharge of the accused, he must frame a charge under Section 210 and commit him for trial under Chapter 18 of the Code.[3] When an old convict for theft is again found prowling about at night and seems to be again under these circumstances guilty of stealing, he has created against himself a presumption of criminal habit which, if unrebutted, would justify a Magistrate in applying ordinarily the rule of this Section.[3a]

The fact that the property stolen was small in value is no reason by itself for not committing the accused and for passing a small sentence on him.[4] On the other hand, the Court should, as was held by Macleod, C. J., in *King-Emperor* v. *Gala Mana*,[5] exercise a wise discretion in making the penalty fit the crime, and should not ordinarily consider petty offenders liable to such heavy punishment as to necessitate their committal to the Court of Session. Thus, it has been held that the lapse of a long time since the previous conviction together with the fact that

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sideration under S. 75, Penal Code.

Note 6.

1. (1893-1900) 1893-1900 Low Bur Rul 496, *Nga Pru Tun* v. *Queen-Empress.*
   (1911) 12 Cri L Jour 439 (440): 11 Ind Cas 623 (Lah), *Chandaria* v. *Emperor.*

Note 7.

1. (1899) 2 Weir 422 (422), *In re Mari Naicken.*
   (1878) 1878 Pun Re Cr No. 18, page 45 (45), *The Crown* v. *Subhan.*
   (1899) 2 Weir 423 (423), *In re Dasari Ramudu.*
   (1864) 2 Bom H C R Crown Cases 126 (127), *Reg* v. *Ganu Ladu.*
   (1873) 19 Suth W R Cri 37 (37), *Doobri Hulwai* v. *A dumb person.*
   (1894) Ratanlal 704, *Queen-Empress* v. *Ganpat.*
   (1872-1892) 1872-1892 Low Bur Rul 335 (335), *Queen-Empress* v. *Nga Ne Dun.*
2. (1889) Ratanlal 461, *Queen-Empress* v. *Karim.*
3. (1914) 1914 Mad 149 (149): 38 Mad 552: 15 Cri L Jour 188, *In re Kora Sellandi.*

3a (1881) 1881 All W N 153 (153), *Empress* v. *Budha.*

4. (1887) 1887 All W N 194 (194), *Empress* v. *Jhanda.*
   (1903) 1903 Pun Re Cr No. 28, page 72 (73), *Crown* v. *Nur Din.*
5. (1924) 1924 Bom 453 (453): 26 Cri L Jour

the accused has been leading a blameless life in the interval will make the application of Section 75, I. P. C., inappropriate.[5a] *See also* the following cases.[5b]

The Magistrate has no jurisdiction, if the conditions of the Section are satisfied, to do anything but commit the case to the Sessions or to transfer it to a duly empowered Magistrate.[5c] He has thus no power to *find the accused guilty*.[5d] Accordingly, where the accused had been previously convicted for an offence under Chapter XVII of the Penal Code and the Magistrate noted his opinion that a more severe punishment than he could impose was required, it was held that he would be acting *ultra vires* if he found the accused guilty.[6] Where, however, the fact, of the previous conviction is not known to the Magistrate at the trial and he tries the case and passes a sentence not inadequate for a first offence, he cannot be said to have acted with any material irregularity.[7]

But where there were previous convictions against the accused and the Magistrate without questioning or calling for proofs of those convictions held that they were not proved, and convicted and sentenced the accused, the omission was held to amount to a material error, the conviction and sentence were set aside and the case remanded to the Magistrate with a view to proceed under this Section.[7a]

8. Magistrate cannot act under Section 349.

It follows from what has been stated in Note 7 above that in cases where the accused is liable to enhanced punishment under Section 75 of the Penal Code and the Magistrate thinks he cannot pass an adequate sentence, he must act under Section 348 and not under Section 349.[1]

Where, in such a case, he acts irregularly under Section 349, it is open to the District Magistrate to take the case on his own file or transfer it to that of some

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759, *King-Emperor* v. *Gala Mana*.

5a (1926) 1926 Lah 617 (617): 27 Cri L Jour 944, *Ishar Singh* v. *Emperor*. S. 75 should not be applied if the previous conviction was recorded 12 years back.

(1927) 1927 Lah 647 (647): 28 Cri L Jour 160, *Khushdil* v. *Emperor*.

(1908) 7 Cri L Jour 293 (294) (Lah), *Kasim Ali* v. *Emperor*. *Held*, that the case was not one for the application of S. 75, I. P. C.

(1935) 1935 Mad W N 1294 (1295), *Chinnathambi Gounden* v. *Emperor*.

(1929) 1929 Lah 278 (278): 30 Cri L Jour 376, *Kunj Lal* v. *Crown*. S. 75, I. P. C. is directed against habitual offenders. Where the subsequent offence was committed after a lapse of nine years during which time the accused was leading a blameless life, *held* that S. 75 could not be invoked in such a case.

5b (1908) 8 Cri L Jour 478 (480): 4 Low Bur Rul 282, *Emperor* v. *Po Thwe*.

(1933) 1933 Mad W N 1259 (1260), *Kuppuswami Chetty* v. *Emperor*.

5c (1916) 1916 Low Bur 65 (66): 34 Ind Cas 313 (314): 17 Cri L Jour 201, *Emperor* v. *Po Yin*.

(1872) 1872 Pun Re Cr No. 31, page 41 (41), *Bahadur Khan* v. *Crown*.

[See (1889) 11 All 393 (395), *Queen-Empress* v. *Khalak*.]

[See also (1872-1892) 1872-1992 Low Bur Rul 335 (335), *Queen-Empress* v. *Nga Ne Dun*. Subordinate Magistrate should not attempt to deal with an old offender, against whom there are two previous convictions under S. 380, I. P. C.]

5d (1914) 1914 Mad 149 (149): 38 Mad 552: 15 Cri L Jour 188, *In re Kora Sellandi*. Magistrate ought merely to frame a charge and then commit the accused to the Sessions but not find the accused guilty.

6. (1916) 1916 Low Bur 65 (66): 34 Ind Cas 313 (314): 17 Cri L Jour 201, *Emperor* v. *Po Yin*.

7. (1905) 2 Cri L Jour 228 (229) (Lah), *Emperor* v. *Maidhan*. A case referred under S. 438 for enhancement of sentence.

7a (1874) 1874 Pun Re Cr No. 12, page 21 (21), *The Crown* v. *Santu*.

Note 8.

1. (1908) 8 Cri L Jour 478 (480): 4 Low Bur Rul 282, *Emperor* v. *Po Thwe*.

(1916) 1916 Low Bur 65 (66): 34 Ind Cas 313 (314): 17 Cri L Jour 201, *Emperor Po Yin*.

(1899) 2 Weir 423 (423), *Dasari Ramudu In re*.

(1935) 1935 Mad W N 1293 (1294), *Emperor* v. *Basava Appa Rao*.

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First Class Magistrate, the proceedings in either case being taken *de novo*.[2]

9. "Unless he can himself pass an adequate sentence."

Where the Magistrate thinks that the circumstances of the case permit him to pass an adequate sentence, he should try and dispose of the case himself.[1] It is only where, in the exercise of his discretion he is of opinion, that a higher punishment than what he is empowered to award is necessary that he is bound to commit the accused to the Court of Session. If, in the exercise of his discretion he thinks he can award an adequate sentence and tries the case himself, he cannot be said to have acted without jurisdiction, although a more adequate sentence could have been passed by his committing the accused to the Sessions Court.[2] An opinion has been expressed in the undermentioned case[3] to the effect that even where the Magistrate considers that the circumstances of the case permit him to pass an adequate sentence, he *may commit the accused to the Sessions Court for trial*. It is submitted that this view cannot be accepted as correct on principle. Where the law authorises a Magistrate to try a case and to award the necessary punishment, he is bound, under *general principles of law*, to try the case himself, unless there is any specific provision authorising him to deal with it in a different manner. There is no provision authorising a Magistrate to commit the accused to the Court of Session in cases where he considers he can pass an adequate sentence himself and it is not permissible to argue, from the provision that a Magistrate shall commit under a particular set of circumstances, that he can also commit the accused under a different set of circumstances.

Old offenders should ordinarily be charged before first class Magistrates to enable adequate sentences being passed without the necessity of always committing the accused to the Court of Session or the High Court.[4]

10. Transfer to Magistrate specially empowered.

A Magistrate may at any stage of the proceedings without framing a charge send the accused to the Magistrate of the District to be placed upon his trial. Assuming that a charge should be drawn up before sending the case to the Magistrate of the District such charge may be drawn up whenever the Magistrate finds the offence proved which may be at any stage ; the evidence of one witness may suffice.[1]

See also Note 11, *infra*.

11. Procedure before specially empowered Magistrate.

Before the amendment of Section 350 it was held in some cases that as that Section could not be held to cover a case of transfer from one Court to another, a specially empowered Magistrate to whom a case is transferred under Section 348 cannot act on the evidence already recorded by the transferring Magistrate but must hear the case *de novo*.[1] Since the amendment of Section 350 by the addition of Clause 3 this is no longer good law.

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2. (1899) 2 Weir 422 (422), *Mari Naicken, In re.*

Note 9.

1. (1899) 2 Weir 423 (424), *Dasari Ramudu, In re.*
2. (1873) Ratanlal 70 (72), *Reg* v. *Annaji Krishna.*
   [See also (1880) 2 Weir 31 (32). The Magistrate has a discretion to try the case himself.]
3. (1914) 1914 Mad 149 (149) : 38 Mad 552 : 15 Cri L Jour 188, *In re Kora Sellandi.*
   The word "not" has been misprinted for the word "so" in the unauthorised reports.
4. (1899) 2 Weir 422 (422), *Mari Naicken, In re.*

Note 10.

1. (1873) 1873 Pun Re Cr No. 12, page 13 (14), *In re, A reference from the Commissioner, Lahore.*

Note 11.

1. (1902) 15 C P L R Cr 66 (68), *Emperor* v. *Kasim.*

But, though the combined effects of Sections 348 and 350 of the Cr. P. Code entitle a Magistrate to rely on the evidence already recorded, he cannot at the same time proceed to re-commence the enquiry and also rely upon the previously recorded evidence.[2]

There is no provision for *committing* an accused person to the Magistrate of the district to be tried as at a Court of Session. The Magistrate of the district must try the accused as a Magistrate invested with special powers.[3]

349.* (1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under Section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

Procedure when Magistrate cannot pass sentence sufficiently severe.

(1-A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all

* (Code of 1882—S. 349—Same as that of 1898 Code.)

(Code of 1872—S. 46, Paras 1 and 2.)

46. Whenever a Magistrate of the second or third class, having jurisdiction, finds an accused person guilty, and considers that he ought to receive a more severe punishment than such Magistrate is competent to adjudge, he may record the finding and, if sentence has not been passed, may submit his proceedings, and forward the accused person, to the Magistrate of the District or to the Magistrate of the division of the District, to whom he is subordinate.

Procedure when Magistrate cannot pass sentence sufficiently severe.

The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties, and re-call and examine any witness who has already given evidence in the case; and may summon any further witnesses and take their evidence; and shall pass such judgment, sentence or order in the case as he deems proper, and as is according to law: Provided that he shall not exceed the powers ordinarily exercisable by him under Section 20 of this Act.

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(Code of 1861—S. 277.)

277. In any case tried by a Subordinate Magistrate having jurisdiction, in which the accused person is found guilty, such Magistrate shall consider the offence established against the accused person to call for a more severe punishment than he is competent to adjudge, he shall record the finding and submit his proceedings to the Magistrate to whom he is subordinate, and such Magistrate shall pass such sentence or order in the case as he may deem proper and as shall be according to law. In any such case, the Magistrate to whom the proceedings are submitted, may examine the parties, and re-call and examine any witness who shall already have given evidence in the case, and he may call for or take any further evidence.

In what cases Subordinate Magistrate shall not pass sentence, but may refer the case to the Magistrate.

How the Magistrate is to proceed in such cases.

(1905) 2 Cri L Jour 820 (823) : 1 Nag L R 187, *Ladya* v. *Emperor.*

2. (1927) 1927 Lah 238 (238) : 28 Cri L J 302, *Kartar Singh* v. *Emperor.*

3. (1873) 1873 Pun Re Cr No. 12, page 13 (14), *In re A reference from the Commissioner, Lahore.*

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the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and re-call and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law :

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under Sections 32 and 33.

Synopsis.

Other Topics.

1. Legislative changes.

Changes introduced in the Code of 1872 :—

1. For the words "Subordinate Magistrate," occurring in the Code of 1861 (Section 277) the words "Magistrate of the second or third class" were substituted.
2. The words "shall record the finding and submit his proceedings" were altered into "*may* record the finding and *if sentence has not been passed, may* submit his proceedings."
3. The words "forward the accused" were newly added.
4. Before the words "sentence or order" in paragraph 2 the word "judgment" was introduced.
5. A proviso limiting the power of the superior Magistrate to those ordinarily exercisable by him under Section 20 of that Act was newly added.

Changes introduced in the Code of 1882 :—

1. For the words "finds an accused person guilty" in the first paragraph the words "is of opinion that the accused person is guilty" were substituted.

2. The words "after hearing the evidence for the prosecution" in the first paragraph were introduced.
3. For the words "record the finding" the words "record the opinion" were substituted.
4. The proviso was amended by the substitution of the words "shall not inflict a punishment more severe than . . . . . under Sections 32 and 33" for the words "shall not exceed the powers ordinarily exercisable . . . . . under Section 20 of this Act."

Changes introduced in 1898 :—

No change has been effected except the numbering of the first and second paragraphs of the old Section as sub-sections 1 and 2.

Changes introduced in 1923 :—

Sub-section 1-A has been introduced by this Amending Act. It is similar in terms to sub-section 2 of Section 348 and is intended to secure identity of treatment to all accused.

2. Scope of the Section.

It is a general principle of law that only an authority who has heard the evidence is competent to decide whether the accused is innocent or guilty.[1] This Section creates an *exception* to this rule in that it provides that the Magistrate to *whom the proceedings are submitted* under this Section may pass such judgment, sentence or order in the case as it thinks fit even on the evidence recorded by the referring Magistrate.[2] As such, it should be construed strictly.[3]

In order that the Section may apply, the following conditions must be satisfied :—

(1) The Magistrate submitting proceedings should have *jurisdiction* to try or commit the case.[4]
(2) He must be of opinion, after hearing the evidence, that the accused is guilty and that he ought to receive a punishment, different in kind from, or more severe than, that which he is empowered to inflict, or that he ought to be required to execute a bond under Section 106.
(3) He should *record* such opinion.[5]

This Section must be read subject to the provisions of Section 348 and when a case falls under that Section, the Court should proceed only thereunder and not under this Section.[6]

3. Who can make a reference under this Section.

This Section does not apply to *First* Class Magistrates.[1] According to the Chief Court of Lower Burma, it does not also apply to Magistrates trying cases *summarily*, the reason being that the procedure of this Section is obviously un-

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Section 349—Note 2.

1. (1924) 1924 Nag 37 (37) : 22 Nag L R 166 : 24 Cri L Jour 738, *Baba* v. *Emperor*.
2. (1924) 1924 Nag 37 (37) : 22 Nag L R 166 : 24 Cri L Jour 738, *Baba* v. *Emperor*.
   (1905) 2 Cri L Jour 369 (370) : 1905 Pun Re Cri No 25, *Muhammad* v. *Emperor*.
   (1891) 2 Weir 690 (690), *Sundaraiyar* v. *Tiruvengada Naicker*. Joint Magistrate *withdrawing* case to his file cannot dispose of case on evidence recorded by Magistrate from whom the case is withdrawn.
3. (1924) 1924 Nag 37 (37) : 22 Nag L R 166 : 24 Cri L Jour 738, *Baba* v. *Emperor*.
4. [See Note 4, *infra*.]
5. [See Note 5, *infra*.]
6. (1891) 2 Weir 423 (423), *In re Dasari Ramudu*.
   (1908) 8 Cri L Jour 478 (480) : 4 Low Bur Rul 282, *Emperor* v. *Po Thwe*.
   (1891) 2 Weir 422 (422), *In re Mari Naicken*.

Note 3.

1. (1885) 7 All 414 (419, 423) (F B), *Empress* v. *Pershad*.
   (1908) 8 Cri L Jour 475 (475) : 4 Low Bur Rul 277, *Emperor* v. *Jalal Khan*.

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suited to cases tried summarily.[2] The High Court of Allahabad seems to hold a contrary view.[2a]

It is in the discretion of the Subordinate Magistrate to decide whether he will send up a case or not under this Section. An order by a superior Magistrate directing a Subordinate Magistrate to send up a case under this Section is *ultra vires*.[3] A District Magistrate is not competent to forbid, by circular, all Subordinate Magistrates in his District from taking up cases (which the Criminal Procedure Code says they may take up) if they think they shall have to act under this Section in disposing of the case.[4]

4. "Having jurisdiction."

A Magistrate has no power to refer, under this Section, a case which he has no jurisdiction to try. If he does so, his proceedings are illegal and void and will not empower the superior Magistrate to proceed under sub-section 2 of this Section.[1] But where the offence was one for which the Magistrate was not competent to *try* the accused, but for which he was empowered to *commit* him to the Court of Session, it was held that he was not entirely without jurisdiction and that the Magistrate to whom he referred the case, could, if he thought proper, commit the same to the Court of Session.[2]

5. Record of opinion.

As has been seen in Note 2 above, it is necessary that the Magistrate should *record his opinion* as to the guilt of the accused and the necessity for inflicting on him a punishment different in kind from or more severe than that which he is empowered to give, or the necessity for taking a bond from him under Section 106 of this Code.

Where a case was transferred by a Magistrate of the third class to a District Magistrate without any request to the latter to take up the case and without stating any of the three grounds mentioned in the Section, it was held that the transfer could not be considered to be one under this Section.[1]

6. Punishment "different in kind."

It has been held by the Judicial Commissioner's Court of Nagpur that a submission of proceedings for the purpose of taking action under Section 562 cannot be considered to be one under this Section inasmuch as the order under that Section directing the release of the accused on probation of good conduct is not a *punishment* at all, and is, therefore, not a "punishment different in kind" from that which the Magistrate is empowered to inflict.[1] In the undermentioned case[2] where the Sub-Magistrate convicted the two accused and sent up the third (a youth) under this Section because he could not deal with a juvenile offender, the High Court of Madras held that the case of *all* the three accused should have been referred and not that of the 3rd accused alone. It seems to have been assumed that a submission of proceedings in respect of an adolescent offender for being dealt with under Sec-

2. (1908) 8 Cri L Jour 475 (475) : 4 Low Bur Rul 277, *Emperor* v. *Jalal Khan.*

2a (1932) 1932 All 507 (507, 508): 33 Cri L Jour 472 : 1932 Cri Cas 595, *Gopal* v. *Emperor.*

3. (1891) 2 Weir 427 (427) : 9 Mad 377, *Empress* v. *Viranna.*

4. (1866) 3 Bom H C R Crown Cases 29 (31), *Reg* v. *Gunabin Ragnak.*

Note 4.

1. (1899) 1 Bom L R 27 (29), *Queen-Empress* v. *Sita Ram.*

2. (1886) 13 Cal 305 (307), *Abdul Waheb* v. *Chandia.*

Note 5.

1. (1890) 12 All 66 (68), *Empress* v. *Radha.*

Note 6.

1. (1924) 1924 Nag 37 (38) : 22 Nag L R 166 : 24 Cri L Jour 738, *Baba* v. *Emperor.*

2. (1928) 29 Cri L Jour 624 (624) : 109 Ind Cas 816 (Mad), *Murugesa Koundan* v.

tion 562 may be done under this Section. The actual decision was, however, to the effect that one of the accused *alone* could not be sent up under this Section.

7. "More severe."

Where a Magistrate of the Third Class who is empowered to inflict a fine not exceeding 50 Rupees, convicted certain persons of theft, but sent them up to a superior Magistrate under this Section recommending the infliction of a fine of Rs. 15 on them, it was held that the submission was improper inasmuch as the proposed fine could be inflicted by the Third Class Magistrate himself and as the Section did not apply unless the referring Magistrate was of opinion that he *was not competent* to inflict the punishment deserved by the accused.[1]

8. "Or that he ought to be required to execute a bond under Section 106."

When a Magistrate is of opinion that the accused ought to be required to execute a bond under Section 106 he ought not to convict and sentence the accused before referring the case under this Section, for Section 106 requires that the conviction and order for furnishing security should be passed by one and the same Magistrate.[1] If he convicts the accused, his recommendation that an order for furnishing security be passed will be without jurisdiction and any order of the superior Magistrate under Section 106 will also be without jurisdiction. It does not necessarily follow, however, that the conviction will be defective.[2] Similarly where a Second Class Magistrate sent up a case to a joint Magistrate as he was of opinion that an order under Section 106 was necessary, and the latter passed the order under that Section, but returned the case to the Sub-Magistrate for conviction, it was held that the joint Magistrate acted without jurisdiction.[3]

9. Procedure of referring Magistrate.

"*Cannot convict.*"—The Magistrate submitting proceedings under this Section is required only to record his opinion that the accused is guilty[1] but cannot legally convict him.[2] In this feature, proceedings under Section 349 differ from proceedings under Section 562, because under Section 562 before the Magistrate submits a case he should first of all record a conviction.[2a] Where he does give a conviction, however, it is not necessary according to the High Court of Bombay, that it should be formally *quashed*. It will be treated as mere surplusage and as a legal nullity, so that the Magistrate to whom the case is sent can proceed with it without a reference to the High Court for the purpose of having the conviction formally quashed.[3] The High Court of Patna has, however, held that where a Magistrate convicts the accused before referring his case, "ordinarily, the case is one

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Emperor.

Note 7.

1. (1881) 1881 All W N 99 (99), *In re Phullu.*

Note 8.

1. (1894) 21 Cal 622 (625), *Mahmudi Sheikh* v. *Aji Sheikh.*
   (1909) 9 Cri L Jour 72 (74) : 35 Cal 1093, *Rohimuddi Howladar* v. *Emperor.*
   (1909) 10 Cri L Jour 309 (311) : 1909 Pun Re Cr No. 7, *Emperor* v. *Hardit Singh.*
2. (1910) 11 Cri L Jour 170 (171) : 5 Ind Cas 576 (Cal), *Lukhan Dosadh* v. *Bachi Singh.*
3. (1924) 1924 All 141 (142): 24 Cri L Jour 784, *Dukhi* v. *Emperor.*

Note 9.

1. (1888) Ratanlal 387 (387), *Queen-Empress* v. *Mahadu.*
   [See also (1891) 2 Weir 428 (429), *In re Raghova Naiko.*]
2. (1888) Ratanlal 387 (387), *Queen-Empress* v. *Mahadu.*
   (1928) 1928 Bom 240 (240) : 52 Bom 456 : 29 Cri L Jour 904, *Emperor* v. *Narayan Dhaku Bhil.*
   (1924) 1924 Pat 764 (765) : 3 Pat 1015 : 25 Cri L Jour 1276, *Prayag Gope* v. *Emperor.*
2a (1933) 1933 Mad [illegible] 729) : 1933 Cri Cas 1312: 57 Mad 85: 34 Cri L Jour 1045, *Public Prosecutor* v. *Malaipatti Guruappa Naidu.*
3. (1928) 1928 Bom 240 (240) : 52 Bom 456 :

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which should go back for re-trial owing to the trial Court not carrying out the provisions of Section 349."[4]

"*Forward the accused.*"—Under the Code of 1861 the Subordinate Magistrate was not required to forward either the accused or the witnesses to the District Magistrate ; he had only to submit his proceedings.[5] It was nevertheless held that the accused was entitled to be present before the District Magistrate to offer such reasons as he may have against the finding of the Sub-Magistrate or to offer his plea for a lenient sentence,[6] the proceedings before the superior Magistrate being a continuation of the proceedings before the referring Magistrate.[7]

"*Framing of charge.*"—It is not illegal or irregular for a Magistrate of the second or third class to frame a charge against the accused in a case in which he has jurisdiction to try, even though at the time of framing the charge he intends, if he is of opinion that the accused is guilty, to submit the proceedings under this Section to a superior Magistrate. Section 254 of the Code must be read as subject to Section 349.[8] To hold otherwise would be to limit the Section (apart from exceptional cases involving demand for security) to cases where the Magistrate at the time of framing the charge is of opinion that he can adequately punish, and sees reason to alter his opinion in consequence of something which comes to his notice after the charge is framed.[9]

10. Sub-section 1-A—Several accused.

It was held under the Code of 1882 that it was open to a Magistrate to send up one only of several accused for enhanced punishment and to convict the others himself[1] and in the absence of any appeal to him the District Magistrate to whom the case of only some accused was referred had no jurisdiction to set aside the conviction of others regarding whom no reference had been made[1a] though it was desirable that all the accused should be sent up.[2] Shortly prior to the coming into force of the Amending Act of 1923 it was doubted in the undermentioned case[3] whether in a case where the Magistrate considers it necessary to proceed against one of several accused under sub-section 1, he could validly forward all the other accused also.

Under the Section as now amended in 1923 it is clear that all the accused must be forwarded in such cases.[4] The failure to send up all the accused will not, however, vitiate the jurisdiction to try such of the accused as are *actually* sent up.[5]

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29 Cri L Jour 904, *Emperor* v. *Narayan Dhaku Bhil.* Distinguishing (1888) Ratanlal 387, *Q. E.* v. *Mahadu.*
[See also (1897) Ratanlal 945 (945), *Queen-Empress* v. *Chinnappa.* It might be taken to have been the record only of his opinion of their guilt]

4. (1924) 1924 Pat 764 (765) : 3 Pat 1015 : 25 Cri L Jour 1276, *Prayag Gope* v. *Emperor.*
5. (1866) 3 Bom H C R Crown Cas 29 (31), *Reg.* v. *Gunabin Ragnak.*
6. (1870) 7 Bom H C R Crown Cas 31 (34), *Reg.* v. *Rugha Naranji.*
7. (1867) 7 Suth W R Cr 38 (38), *Queen* v. *Gunesh Sircar.*
8. (1904) 1 Cri L Jour 1010 (1015) : 2 Low Bur Rul 285 (F B), *Emperor* v. *Hla Gyi.*
(1905) 2 Cri L Jour 464 (465) : 1905 Upp Bur Rul 33, *Emperor* v. *Nga Po Si.*
(1916) 1916 Low Bur 65 (66) : 17 Cri L Jour 201, *Emperor* v. *Po Yin.*
9. (1904) 1 Cri L Jour 1010 (1011): 2 Low Bur Rul 285 (F B), *Emperor* v. *Hla Gyi.*

Note 10.

1. (1894) 2 Weir 429 (430), *In re Nachian.*
1a. (1869) 1869 Pun Re Cr No. 5, page (5), *Crown* v. *Moninda.*
2. (1891) 2 Weir 428 (429), *In re Raghava Naiko.*
3. (1924) 1924 Nag 37 (38) : 22 Nag L R 166 : 24 Cri L Jour 738, *Baba* v. *Emperor.* Decided on 7th May 1923.
4. (1926) 1926 Sind 48 (48) : 18 Sind L R 216 : 26 Cri L Jour 1363, *Emperor* v. *Dodo.*
(1928) 29 Cri L Jour 624 (624) : 109 Ind Cas 816 (Mad), *Murugesa Koundan* v. *Emperor.*
5. (1926) 1926 Sind 48 (48) : 18 Sind L R 216 :

The Magistrate is required to forward only such accused as are in his opinion *guilty*. An order, referring the case of those accused who in his opinion are not guilty, is illegal, they being entitled to an acquittal under Section 258, sub-section 1.[6]

11. To whom reference can be made.

Under the Code of 1861 (Section 277) the Magistrate had to submit his proceedings to the Magistrate to whom he was *subordinate*.[1] Under the present Code he should submit his proceedings to the *District* Magistrate or to a *Sub-Divisional* Magistrate, who alone has jurisdiction to dispose of the matter.[2] The City Magistrate of Nagpur is not a Sub-Divisional Magistrate and no reference could be made to him under this section.[3] A Magistrate located in a division temporarily in the discharge of his public duties will be deemed to have validly referred his proceedings under this Section if he submits them to the Magistrate of that division of the District.[4]

12. Procedure of the Magistrate to whom a case is referred.

When proceedings are sent up to a superior Magistrate under this Section the whole case is opened up for him to deal with it according to his discretion.[1] He is not, however, *bound* to hold a trial *de novo*.[2] He may act on the evidence recorded by the referring Magistrate and adopt his opinion or he may re-examine the witnesses already examined and take further evidence.[3]

But the nature of the trial is not altered by the proceedings being submitted under this Section.[4] The superior Magistrate cannot, therefore, convict the accused sent up for an *aggravated form of offence*.[5] Nor could he, where the case was triable summarily, pass a sentence of imprisonment exceeding three months as prescribed by Section 262.[6]

Where the superior Magistrate examines the accused under sub-section 2, the examination should be reduced to writing as required by Section 364.[7]

Where a Magistrate acts irregularly under this Section, it is open to the District Magistrate to take the case on his own file or to transfer it to that of some First Class Magistrate, the proceedings in either case being taken *de novo*.[8]

13. "Shall pass such judgment, sentence or order."

The superior Magistrate must form his own judgment and pass sentence on the case referred to him.[1] The opinion of the referring Magistrate that the accused

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26 Cri L Jour 1363, *Emperor* v. *Dodo*.

6. (1926) 1926 All 176 (176) : 26 Cri L Jour 1630, *Sultan Muhammad Khan* v. *Emperor*.

Note 11.

1. (1869) 11 Suth W R Cr 7 (8), *In the case of Nidree Telhinee*.
(1868-69) 5 Bom H C R Crown Cas 47 (47), *Reg.* v. *Bhagu Bin Shabaji*.
[See also (1866-67) 4 Bom H C R Crown Cas 8 (8), *Reg.* v. *Kuberio Ratno*.]
2. (1914) 1914 Bom 217 (218) : 38 Bom 719 : 16 Cri L Jour 273, *Emperer* v. *Vinayak Narain*.
3. (1927) 1927 Nag 209 (210) : 28 Cri L Jour 489, *Rajaram* v. *Emperor*.
4. (1882) 4 All 366 (371), *Empress* v. *Kallu*.

Note 12.

1. (1887) Ratanlal 350 (353), *Queen-Empress* v. *Bapuda*.
(1897) Ratanlal 945 (945), *Queen-Empress* v. *Chinnappa*.
(1897) Ratanlal 948 (948), *Queen-Empress* v. *Kondi Malhari*.
2. (1926) 1926 Sind 48 (48) : 18 Sind L R 216 : 26 Cri L Jour 1363, *Emperor* v. *Dodo*.
3. (1891) 2 Weir 428 (429), *In re Raghava Naiko*.
4. (1932) 1932 All 507 (508) : 33 Cri L Jour 472 : 1932 Cri Cas 595, *Gopal* v. *Emperor*.
5. (1891) 2 Weir 21 (22), *High Court Proceedings*, 26 *October* 1885, *No.* 517.
6. (1932) 1932 All 507 (508) : 33 Cri L Jour 472 : 1932 Cri Cas 595, *Gopal* v. *Emperor*.
7. (1908) 7 Cri L Jour 177 (177) (Mad), *In re Venkataraya*.
8. (1891) 2 Weir 422 (422), *In re Mari Naicken*.

Note 13.

1. (1870) 5 Mad H C R App 43 (43).

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is guilty is not binding on the superior Magistrate and the latter may direct an acquittal or discharge.[2] But he must not confine himself to merely seeing whether the decision of the referring Magistrate was opposed to the evidence; he must consider whether the evidence is worthy of belief and pass such judgment, sentence or order as he deems proper.[3] Such judgment should conform to the requirements of Section 367 of the Code.[4]

The word "order" in sub-section 2, being associated with the word "judgment" and "sentence," what the Section contemplates must be taken to be a final order disposing of the case so far as the Magistrate is concerned.[5]

14. Committal to Sessions.

A Magistrate to whom the proceedings are submitted under this Section has power to commit the case to a Court of Session if necessary.[1] In the words of the Full Bench of the High Court of Madras: "the words of the Section enabling the Magistrate to pass such judgment, sentence or order, etc., expressly provide for the disposal of the case otherwise than by an acquittal or sentence ..... and it was quite competent to the Magistrate to whom the case was referred to say that either from the gravity of the matter or other sufficient reason the Sessions Court was the proper tribunal for the disposal of the case, and to make an order in accordance with that opinion."[2]

The undermentioned cases,[3] which held a contrary view were decided under the Codes of 1861 and 1872 and are no longer good law.

15. Whether superior Magistrate can quash proceedings.

A Magistrate to whom a case is submitted under this Section has no power to quash the proceedings of the referring Magistrate and send the case to another Magistrate for re-trial. If he considers that such proceedings are incorrect or illegal he should report them for orders under Section 438, *infra*.[1]

16. Whether superior Magistrate can return case.

A Magistrate to whom proceedings are submitted under this Section is not at liberty to return the case to the submitting Magistrate, but must dispose it of himself.[1] Where a case was returned by a Sub-Divisional Magistrate to the

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(1920) 1920 Mad 171 (172): 21 Cri L Jour 52, *In re Karuppiah Pillai.*

2. (1880) 4 Bom 240 (246), *Imperatrix* v. *Abdulla.*
(1902) 1 Low Bur Rul 141 (142), *Crown* v. *San E.*
(1882) 1882 Pun Re Cr No. 44, page 73 (74), *Musa* v. *Babri.*

3. (1893) Ratanlal 636 (637), *Queen-Empress* v. *Nawal Mal.*

4. (1920) 1920 Mad 171 (172): 21 Cri L Jour 52, *In re Karuppiah Pillai.*
(1893) Ratanlal 636 (637), *Queen-Empress* v. *Nawal Mal.*

5. (1880) 4 Bom 240 (245): *Imperatrix* v. *Abdulla.*
(1902) 1 Low Bur Rul 124 (125), *Queen-Empress* v. *Nga Khan.*
(1912) 13 Cri L Jour 16 (16): 36 Mad 470, *N. Ponnusawmy Naidu* v. *Emperor.*

Note 14.

1. (1886) 9 Mad 377 (378), *Empress* v. *Viranna.*
(1887) Ratanlal 350 (353), *Queen-Empress* v. *Bapudu.*
(1897) Ratanlal 945 (945), *Queen-Empress* v. *Chinnappa.*
(1880) 4 Bom 240 (247): *Imperatrix* v. *Abdulla.*
(1887) 13 Cal 305 (307), *Abdul Wahab* v. *Chandia.*
(1902) 1 Low Bur Rul 141 (141), *Crown* v. *San E.*

2. (1876) 1 Mad 289 (290) (F B), *In the matter of Chinnimarigadu.*

3. (1877) Ratanlal 130 (131), *Queen-Empress* v. *Lakshman.*
(1868) 10 Suth W R Cr 50 (51), *In the case of Bhikaree Mullick.*

Note 15.

1. (1900) 1900 Pun L R Cr page 37 (38), *Jawind Singh* v. *Empress.*

Note 16.

1. (1882) 1882 Pun Re Cr No. 33, page 40 (41), *Empress* v. *Bhana.*
(1886) 9 Mad 377 (378), *Empress* v. *Viranna.*
(1911) 13 Cri L Jour 16 (16): 36 Mad 470, *N. Ponnuswamy Naidu* v. *Emperor.*
(1892-96) 1 Upp Bur Rul 274, *Queen-Em-*

submitting Magistrate to pass such sentence as the latter was competent to pass, the conviction and sentence of the latter acting under such order were reversed and the Sub-Divisional Magistrate directed to dispose of the case himself.[2] Where, however, the case was returned for committal, although the procedure of the superior Magistrate was held to be incorrect, the committal was allowed to stand by the Madras and Calcutta High Courts as not being illegal.[3] The Bombay High Court, on the other hand, held, in a similar case, that the action of the Sub-Divisional Magistrate in returning the case to the Second Class Magistrate was illegal and annulled the order of the superior Magistrate; but nothing was said about the order of committal being illegal.[4]

It has been held in the undermentioned case[5] that there is nothing illegal in the action of a District Magistrate pointing out that the reference was informal since the inquiry was defective (statements of the accused not having been recorded), and requiring the defect to be supplied before the case was laid before him; and further that the proceedings of the submitting Magistrate being incomplete, he is not precluded, when he has remedied the defects, from coming to a different finding from that previously recorded and acquitting some of the accused whom he had formerly believed to be guilty. On the other hand, where a Magistrate recorded a plea of guilty and submitted the case and the same was returned to him with the remark that in warrant cases the accused could not be convicted on a mere plea of guilty, it was held that Section 349 does not give the superior Magistrate any power to return the case for supplying omissions and that if there had been any need for taking the accused's defence, the superior Magistrate ought to have done it himself.[6]

17. Transfer to another Magistrate.

The jurisdiction to deal with proceedings under this Section is conferred as has been seen already in Note 11, *ante*, upon District Magistrates and Sub-Divisional Magistrates, and upon no other Magistrates. A Sub-Divisional Magistrate to whom a case is submitted under this Section cannot, therefore, transfer it to a Magistrate who is not empowered to act under this Section.[1] But he can commit the case to a Court of Session or transfer to a District Magistrate who can act under the Section.[2]

18. Whether superior Magistrate can order re-trial.

It is open to the superior Magistrate to acquit the accused on the charge

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press v. *Nga Po Thit.*
(1889) Ratanlal 479 (480), *Queen-Empress* v. *Sitaram.*
(1886) 10 Bom 196 (197), *Empress* v. *Havia Tellapa.*
(1900-02) 1 Low Bur Rul 124 (125), *Queen-Empress* v. *Nga Khan.*
(1904) 1 Cri L Jour 137 (138): 26 All 344, *Emperor* v *Thakur Dayal.*

2. (1889) Ratanlal 479 (480), *Queen-Empress* v. *Sitaram.*
(1880) 6 Cal L R 276 (277), *Dula Faqueer* v. *Bhagirat Sircar.*
(1912) 13 Cri L Jour 16 (16): 36 Mad 470, *N. Ponnuswamy Naidu* v. *Emperor.*

3. (1886) 9 Mad 377 (378), *Empress* v. *Viranna.*
(1888) 2 Weir 428 (428), *In re Raghava Naiko.*
(1887) 14 Cal 355 (356), *Empress* v. *Chandu Gowala.*

4. (1886) 10 Bom 196 (197), *Queen* v. *Havia Tellapa.*

5. (1891) 2 Weir 426 (426), *H. C. Proceedings*, 15-7-1878, *No.* 1024.

6. (1907) 5 Cri L Jour 416 (417): 3 Low Bur Rul 279, *Emperor* v. *Taw Pya.*

Note 17.

1. (1914) 1914 Bom 217 (218): 38 Bom 719: 16 Cri L Jour 273 (273), *Emperor* v. *Vinayak Narayan.*
(1889-1890) 5 Mad H C Rul App 43*n* (43*n*).
(1905) 2 Cri L Jour 464 (465): 1905 Upp Bur Rul 33, *Emperor* v. *Nga Po Si.* Transfer by Sub-Divisional Magistrate to Head-Quarter Magistrate of the 2nd class.
(1882) 4 Mad 233 (233), *Queen* v. *Velayudam.*
(1881) 2 Weir 424 (424), *H. C. Proceedings*, 8-11-1870, *No.* 1971.

2. (1900-02) 1 Low Bur Rul 141 (141), *Crown*

Sec. 349 Notes 18—19

framed and order a fresh trial before a competent Magistrate on such Section as he thinks proper.[1]

But a Magistrate should not pass a sentence under Section 349 and then try the accused on another charge arising in the same case. If he wishes to do so, the proper course for him is to set aside the proceedings and direct a fresh trial before himself *ab initio*.[2]

19. Proviso.

When a case is sent up under this Section to a District or Sub-Divisional Magistrate, such Magistrate is not competent to inflict a punishment more severe than what he is empowered to inflict under Section 32 or Section 33.[1]

A District Magistrate acting under this Section must be regarded as a Magistrate not empowered under Section 30, Criminal Procedure Code, and hence cannot pass a sentence longer than what he is empowered to pass under Section 32, *viz.* two years.[2] Where he does pass a sentence in excess of those powers, an appeal will lie to the Sessions Court under Section 408 of the Code and not to the High Court.[3]

Sec. 350

350.* (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

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* **(Code of 1882—S. 350**—Same as that of 1898 Code.)

(Code of 1872—Ss. 328 and 329.)

328. Whenever any Magistrate, after having heard part of the evidence in a case, ceases to exercise jurisdiction in such case and is succeeded by another Magistrate who has and who exercises jurisdiction in such case, such last-named Magistrate may decide the case on the evidence partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and commence afresh:

Convictions on evidence partly recorded by one Magistrate and partly by other.

Provided that the accused person may, when the second Magistrate commences his proceedings, demand that the witnesses shall be re-summoned and re-heard, in which case the trial shall be commenced afresh:

Provided also that any Court of appeal or revision before which the case may be brought, or, in cases tried by Magistrates subordinate to the Magistrate of the District, the Magistrate of the District, without appeal, may set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court or Magistrate is of opinion that the accused person has been materially prejudiced thereby; and may order a new trial.

Commitments, on evidence partly recorded by one officer and partly by another, valid.

329. Whenever, from any cause, a Magistrate making an inquiry under chapter XV of this Act is unable to complete the proceedings himself, any other Magistrate having jurisdiction to inquire and to commit may complete the case and proceed as if he had recorded all the evidence himself.

(Code of 1861—Nil.)

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v. *San E.*

Note 18.

1. (1900-02) 1 Low Bur Rul 141 (142), *Crown* v. *San E.*
2. (1892-96) 1 Upp Bur Rul 241, *Queen-Empress* v. *Nga Paik Hmwe.*

Note 19.

1. (1903) 1903 Pun Re Cr No. 12, page (32), *Allah Bakhsh* v. *Emperor.*
2. (1907) 6 Cri L Jour 289 (290): 4 Low Bur Rul 53, *Nga Pya* v. *Emperor.*
   (1869) 1869 Pun Re Cr No. 16, page 31 (32), *Bhag Singh* v. *Crown.*
3. (1907) 6 Cri L Jour 289 (290): 4 Low Bur Rul 53, *Nga Pya* v. *Emperor.*
   (1873) 1873 Pun Re Cr No. 2, page 3 (3), *The Crown* v. *Rahim.*

jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and re-commence the inquiry or trial : Sec. 350

Provided as follows :—

(*a*) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard ;

(*b*) the High Court, or in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.

(2) Nothing in this Section applies to cases in which proceedings have been stayed under Section 346 *or in which proceedings have been submitted to a superior Magistrate under Section 349.*

(3) *When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of sub-section (1).*

Synopsis.

Other Topics.

Accused's statement taken by one Magistrate —Committal by successor—Admitted in Sessions under S. 287. See Note 5, Pt. 3.

Applicability to enquiries. See Note 2, Pts. 4 and 10 ; Note 2, F-N. (4) ; Note 10.

Applies to proceedings under S. 145. See Note 2, F-N. (4).

Applies to U. P. Municipalities Act. See Note 2, F-N. (4).

Case also transferred with the Magistrate. See Note 2, Pt. 12.

Consent of counsel immaterial. See Note 2, Pt. 7.

Death of Magistrate. See Note 2, Pt. 3; Note 4, Pt. 3.

Defamation — Examination of complainant afresh. See Note 15, Pt. 5.

De novo trial and mere re-hearing of witnesses. See Note 12, Pt. 1.

Details as to refusal—Needed. See Note 7, Pt. 5.

Sec. 350 Note 1

1. Legislative changes.

1. *Code of* 1861 :—The Code of 1861 contained no corresponding Section and hence when a Magistrate was transferred pending a part-heard case, the same had to be heard *de novo*.[1] But even under that Code, it was held that in inquiries preliminary to commitment it would be waste of time and a vexation to the witnesses to insist on their being examined again in all cases;[2] and in a case where at the express request of the accused the witnesses were not examined afresh but their depositions were only read over to them, it was held that there was no need for interference in the absence of prejudice to the accused.[3]

2. *Code of* 1872 :—Section 328 contemplated cases in which only *part* of the evidence had been recorded by the outgoing Magistrate; it did not contemplate cases where the *whole* of the evidence had been recorded by the first Magistrate.[4]

Under the First Proviso to Section 328 it would seem that where the accused exercised his option and had the witnesses re-summoned the trial had to commence afresh.

The case of one Magistrate succeeding another pending an enquiry preliminary to commitment, was provided for separately by Section 329 of the Code of 1872.

Section 350—Note 1.

1. (1869) 4 Mad H C R App 42*n* (43*n*).
(1870) 2 N W P H C R 468 (470), *Queen* v. *Kullian Singh.*
(1867) 8 Suth W R Cr 59 (59), *Queen* v. *Poorno Chundar Doss.*
2. (1867) 7 Suth W R Cr Letters 3 (4).
3. (1870) 13 Suth W R Cr 40 (41), *Purmessur Singh* v. *Soroop Audhikaree.*
4. See Note 2, Pt. 14.

3. *Code of* 1882 :—The wording of the Section is appropriately altered to cover not only cases where a *part* of the evidence has been recorded, but also cases where the *whole* evidence has been recorded by the outgoing Magistrate.

While under the Code of 1872 power to set aside the conviction on the ground of prejudice to the accused was given to *all Courts* of appeal and revision and to the District Magistrate, Section 350 of the Code of 1882 mentions only the High Court and the District Magistrate having such power.

4. *Act* 18 *of* 1923 :—The words "in which proceedings have been submitted . . . . . under Section 349" have been added and make it clear that such proceedings also are not covered by this Section. Sub-Section 3 has been added and sets at rest the question whether the provisions of the Section applied to cases where the Magistrate ceases to exercise jurisdiction by reason of the transfer of a case from his file. The amendment endorses the view that had been followed already by the majority of Courts, that such cases also come within the scope of the Section.

2. Scope and applicability of the section.

It is a general principle of law that only a person who *has heard the evidence in the case* is competent to decide whether the accused is innocent or guilty. This Section is an exception to that rule and has been introduced purely for administrative convenience.[1] It is obviously intended to meet the case of transfers of Magistrates from one District to another and to prevent the necessity of trying from the beginning all cases which may be part-heard at the time of such transfer.[2] It applies as much to cases in which a Magistrate ceases to exercise jurisdiction by reason of the *transfer of a case* to another Court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of *his own death or transfer* to another post.[3]

The Section is wide enough to cover every trial or enquiry under the Code[4] and is applicable to summons cases as well as warrant cases.[5] Its application is, however, limited to *Magistrates* and not to *Sessions Judges*, so that a Sessions Judge is not empowered to try a case partly on evidence not recorded by himself.[6] Not even the accused's consent will give the Sessions Judge such jurisdiction.[7] But

Note 2.

1. (1905) 2 Cri L Jour 820 (823) : 1 Nag L R 187, *Ladya* v. *Emperor.*
   (1889) Ratanlal 472 (472), *Queen-Empress* v. *Sesha.*
2. (1893) 20 Cal 870 (873), *Hardwar Singh* v. *Khega Ojha.*
3. [See Note 17.]
4. (1910) 11 Cri L Jour 440 (440) : 37 Cal 812, *Anu Sheikh* v. *Jitu Sheikh.*
   (1908) 9 Cri L Jour 278 (279) : 1 Ind Cas 336 (Cal), *Ali Mahomed Khan* v. *Tarak Chandra Banerji.* Proceedings under S. 145 are enquiries and S. 350 applies to them.
   (1924) 1924 Pat 786 (787) : 25 Cri L Jour 89, *Sondi Singh* v. *Sri Govind Singh.* Sub-section 1 applies to proceedings under S. 145.
   (1879) 4 Cal L R 452 (454), *Buroda Kant Roy* v. *Korimuddi Moonshee.* Applies to security proceedings.
   (1925) 1925 Oudh 228 (229) : 27 Oudh Cas 323 : 25 Cri L Jour 1380, *Baij Nath Sah* v. *Emperor.* (Do.)
   (1907) 6 Cri L Jour 1 (5) (Cal), *Wahid Ali Khan* v. *Emperor.*
   (1925) 1925 All 245 (245) : 25 Cri L Jour 651, *Basanti* v. *Emperor.* Applies to enquiries under U. P. Municipalities Act.
   [But see (1875) 23 Suth W R Cr 62 (62), *Guru Charn Sen* v. *Kali Nath Dass Biswas.* Decided with reference to S. 530 of Code of 1872.]
5. (1925) 1925 Oudh 228 (229) : 27 Oudh Cas 323 : 25 Cri L Jour 1380, *Baij Nath Sah* v. *Emperor.*
6. (1894) 7 C P L R Cr 1 (1), *Empress* v. *Kaluram.*
   (1874) 21 Suth W R Cr 47 (47), *Queen* v. *Gopi Noshyo.*
   (1881) 3 Mad 112 (113), *Tarada Baladu* v. *Queen.*
   (1890) 1890 Pun Re Cr No. 1, page (2), *Buta Singh* v. *Empress.*
   (1912) 13 Cri L Jour 861 (862) : 35 All 63, *Badri Prasad* v. *Emperor.*
   (1902) 26 Bom 50 (53), *Emperor* v. *Sakharam Pandurang.*
7. (1875) 23 Suth W R Cri 59 (60), *Queen* v. *Rughoonath Dass.*

Sec. 350 Note 2

where a Sessions trial had not begun, but only the preliminary proceedings of swearing in the jury and reading out of the charges to them had been gone through before a change of Judge took place, it was held that the successor could conduct the trial without going through the preliminary proceedings over again.[8]

The application of the Section is not confined to the single occurrence of one Magistrate succeeding another as may be suggested by the use of the word "second" in proviso (a). On principle, if a second Magistrate can act on evidence recorded by his predecessors, there seems to be no reason why a third Magistrate should not act on evidence recorded by his predecessors.[9]

Nor is there any distinction between cases where there has been a change of Magistrates in the course of the enquiry in the original Court and cases where the inquiry has been closed by one Magistrate in the original Court by an order of discharge and then re-opened by the Sessions Judge when another Magistrate has succeeded.[10]

This Section does not purport to deal with cases in which process has been issued by a Magistrate who has been transferred *before the cases have come up for hearing*. But it has been held that a similar rule must prevail and that if jurisdiction may as a matter of course be exercised by the successor after evidence has begun, there seemed no reason why it should not be exercised where it has not been commenced.[11]

Where a Magistrate is transferred pending a trial, but the case is also transferred to his file for completion by him, there is no necessity for a *de novo* trial, there being no change of Magistrates, and the judicial mind brought to bear on the case throughout being the same. Neither this Section nor any other provides for such a case.[12]

Similarly, where a Bench of Magistrates consisting of *A* and *B* hears a case but the depositions are recorded by *A* and subsequently the Bench is dissolved and the case is transferred to *A* alone sitting singly, this Section does not apply and he is not bound to re-hear the witnesses already examined by him.[12a] *See also* Note 14.

This Section does not permit of a commitment by a Magistrate upon evidence recorded partly by himself and partly by a Magistrate who has *not* ceased to exercise jurisdiction.[13]

Section 328 of the Code of 1872 was more restricted in its scope than the present Section, and did not allow of one Magistrate's deciding a case upon evidence *wholly* recorded by another.[14] But on principles analogous to Section 328, the

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(1890) 1890 Pun Re Cri No. 1, page (2), *Buta Singh* v. *Empress*. Defect is a fatal one and not a mere irregularity.
(1901) 26 Bom 50 (53), *Emperor* v. *Sakharam Pandurang*.
(1908) 8 Cri L Jour 121 (123) (Cal), *Durga Charan Sanyal* v. *Emperor*.
(1930) 1930 Rang 351 (354): 1930 Cri Cas 992: 32 Cri L Jour 115, *Nga San Tin* v. *Emperor*.

8. (1927) 1927 Bom 161 (162): 28 Cri L Jour 402, *Emperor* v. *Dorabji Pestonji Gora*.
9. (1924) 1924 Mad 227 (228): 47 Mad 245: 25 Cri L Jour 563, *V. Govindan Nair* v. *K. K. Krishnan Nair*.
10. (1931) 1931 Mad 488 (489): 1931 Cri Cas 552: 54 Mad 512: 32 Cri L Jour 635, *Nanireddigari Lakshmireddy* v. *Urganapalli Muni Reddy*.
(1927) 1927 Pat 5 (6): 27 Cri L Jour 1125, *Daroga Singh* v *Emperor*.
11. (1893) Ratanlal 652 (654), *Queen-Empress* v. *Govinda*.
12. (1898) 22 Mad 47 (48), *Queen-Empress* v. *Ahoballamatam*.
12a (1935) 1935 Cal 287 (288, 289): 1935 Cri Cas 392: 62 Cal 233: 36 Cri L Jour 857, *Abdul Hakim* v. *Fozu Mia*.
13. (1893-1900) 1893-1900 Low Bur Rul 52, *Queen-Empress* v. *Nga Shwe The*.
14. (1875) 23 Suth W R Cri 59 (60), *Queen* v. *Rughoonath Dass*.
(1877) Ratanlal 124 (125), *Queen-Empress* v. *Bhikaiji*.

High Court declined to interfere when the accused was not prejudiced.[15]

Where evidence has been recorded wholly or partly by a Magistrate who has no jurisdiction, and the case is then transferred to the file of a Magistrate having jurisdiction, this Section does not apply, and such evidence cannot be legally considered by the latter Magistrate; the trial must be held *de novo*.[16]

3. "Ceases to exercise jurisdiction."

Where a Magistrate is transferred from one district to another, his jurisdiction ceases in the former district, when the transfer takes effect,[1] and he can no longer be held to be the presiding officer of the Court from which he was transferred.[2] With his transfer his office *qua* the exercise of jurisdiction in any particular case in which he was engaged is vacated.[3]

But the words "ceases to exercise jurisdiction therein" do not mean that the Magistrate should have ceased to occupy the *particular post*, but mean that he should have ceased to exercise jurisdiction *in the enquiry or trial*.[4] Thus the words would apply even to cases where the Magistrate's connection with a part-heard case is terminated by the transfer of the *case* to the file of another Magistrate.[5]

A mere shifting of local areas from the jurisdiction of one Magistrate to that of another does not automatically remove cases from the file of the former, and the former will not automatically cease to have jurisdiction over such cases.[6]

Nor does a Magistrate cease to have jurisdiction in a case merely by absenting himself from a subsequent hearing.[7]

4. "Is succeeded."

When a new officer is appointed to any Magisterial office he becomes the successor of the outgoing Magistrate.[1] Further, when a case is transferred from the file of one Magistrate to that of another, the former is succeeded by the latter in the sense that the latter exercises the jurisdiction over the case which had been exercised by the Magistrate who had begun it.[2]

On the death of a Magistrate empowered under Section 30 of the Code, the District Magistrate, being the only remaining Magistrate in the district having powers under that Section, took upon his file a case which was being tried by the deceased Magistrate. It was held that the District Magistrate must be regarded as having *succeeded* the deceased within the meaning of this Section.[3]

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15. (1875) 24 Suth W R Cri 12 (13), *Ujal Mundul* v. *Namdar Mundal*.

16. (1928) 1928 Cal 183 (183) . 55 Cal 65 : 29 Cri L Jour 464, *Budhu Tatua* v. *Emperor*.

Note 3.

1. (1881) 3 All 563 (565, 566) (F B), *Empress* v. *Anand Sarup*.
   (1902) 15 C P L R Cri 15 (16), *Emperor* v. *Dhondu Singh*.
   (1896) 19 All 114 (115), *Balwant* v. *Kishen*.
   (1913) 14 Cri L Jour 239 (240) : 19 Ind Cas 335 (All) *Hira Lal* v. *Emperor*.
2. (1924) 1924 All 770 (771) : 46 All 851 : 25 Cri L Jour 1277, *Emperor* v. *Baldeo Prasad*.
3. (1910) 11 Cri L Jour 440 (440) : 37 Cal 812, *Anu Sheikh* v. *Jitu Sheikh*.
4. (1912) 13 Cri L Jour 218 (220) : 39 Cal 781, *Kudrutullah* v. *Emperor*.
   (1906) 4 Cri L Jour 140 (142) (All), *Emperor* v. *Syed Sajjad Husain*.
5. (1917) 1917 Upp Bur 11 (11) : 17 Cri L Jour 401 (401), *Barachi* v. *Emperor*.
   (1920) 1920 Pat 693 (694) : 22 Cri L Jour 82, *Rupa Singh* v. *Emperor*.
6. (1912) 13 Cri L Jour 203 (204) : 14 Ind Cas 203 (All), *Mt. Muhani* v. *Emperor*.
7. (1923) 1923 Oudh 163 (163) : 25 Cri L Jour 198, *Brij Bhukan* v. *Ram Kirat*.

Note 4.

1. (1893) Ratanlal 652 (654), *Queen-Empress* v. *Govinda*.
   (1909) 9 Cri L Jour 278 (280) : 1 Ind Cas 336 (Cal), *Ali Mahomed Khan* v. *Tarak Chandra Banerji*.
2. (1910) 11 Cri L Jour 440 (440) : 37 Cal 812, *Anu Sheikh* v. *Jiju Sheikh*.
3. (1917) 1917 Nag 63 (64) : 19 Cri L Jour 705, *Gorelal* v. *Emperor*.

Sec. 350 Notes 5—6

5. "May act on the evidence so recorded."

When the accused persons do not insist upon a *re-hearing* of the witnesses, a Magistrate succeeding another is entitled to act on the evidence recorded by his predecessor or partly by his predecessor and partly by himself.[1]

The undermentioned cases which held that when a case is remanded for further enquiry to another Magistrate by a revision Court, the Magistrate must hear the evidence over again, are not really restrictive of the scope of Section 350, but are based upon the interpretation therein placed on the words—" further enquiry " in Section 436.[1a]

But he cannot re-commence the enquiry and at the same time rely upon evidence already recorded.[2]

A statemeut of an accused was recorded by a Magistrate who was then transferred. The case was subsequently committed to Sessions by his successor. It was held that the statement, though not recorded by the committing Magistrate, could nevertheless, in view of Section 350, be admitted in evidence in the Sessions case under S. 287.[3]

6. Delivery of judgment of predecessor.

Section 350 gives a Magistrate jurisdiction under certain circumstances to *decide* a case upon evidence recorded by his predecessor, but does it give him a jurisdiction to deliver a judgment written by the latter? According to the Calcutta High Court it does not, the reason being that the Magistrate who makes himself responsible for the judgment, must always be the Magistrate who, before delivery thereof, had considered the evidence on record fairly and had also listened to the arguments, if any, of the accused.[1]

The High Court of Madras and the Chief Court of Oudh take the opposite view, *viz.* that there is no irregularity in a Magistrate's pronouncing the judgment of his predecessor,[2] at the same time, the former Court makes it clear that a Magistrate cannot be compelled to pronounce a judgment, of his predecessor and thereby adopt it as his own.[3] The Allahabad High Court has considered the procedure as being at most an irregularity curable under Section 537 in the absence of prejudice to the accused.[4]

Note 5.

1. (1912) 9 All L Jour (Notes) 3 (3).
   (1921) 1921 All 122 (122) : 43 All 450, *Ram Devi* v. *Govind Sahai.*
   (1921) 1921 Pat 472 (473), *Ramlakhan Mahto* v. *Emperor.*
   (1891) 5 C P L R Cr 20 (25), *Empress* v. *Ramdayal.*
   [See (1912) 13 Cri L Jour 120 (121) : 38 Cal 828, *Amodinidasee* v. *Darson.* Case withdrawn by Sub-Divisional Magistrate from Bench of Magistrates after some witnesses for prosecution had been examined—Sub-Divisional Magistrate discharging accused on ground that no evidence had been produced—*Held* that the Sub-Divisional Magistrate ought to have considered the evidence recorded by the Bench of Magistrates.]

1a (1912) 13 Cri L Jour 255 (255) : 14 Ind Cas 607 (All), *Ram Dial* v. *Emperor.*
   (1892) 6 C P L R Cr 11 (12), *Empress* v. *Dulzsha.*

2. (1903-04) 2 Low Bur Rul 17 (18), *King-Emperor* v. *Nga Pe.*
   (1927) 1927 Lah 238 (238) : 28 Cri L Jour 302, *Kartar Singh* v. *Emperor.*

3. (1926) 1926 Lah 271 (271) : 7 Lah 70 : 27 Cri L Jour 627, *Ghulam Jannet* v. *Emperor.*

Note 6.

1. (1924) 1924 Cal 55 (55) : 50 Cal 664 : 24 Cri L Jour 489, *Baisnab Charan Das* v. *Amin Ali.*
   (1926) 1926 Cal 537 (539) : 27 Cri L Jour 406, *Mahomed Rafique* v. *Emperor.*

2. (1908) 7 Cri L Jour 459 (459) (Mad), *In re Sankara Pillai* alias *Sankaranarayana.*
   (1933) 1933 Mad 251 (251) : 1933 Cri Cas 365 : 34 Cri L Jour 117, *Bhogale China Somayya, In re.*
   (1925) 1925 Oudh 62 (63): 28 Oudh Cas 109: 25 Cri L Jour 1075, *Chandika Prasad* v. *Emperor.*

3. (1917) 1917 Mad 340 (341) : 17 Cri L Jour 166 (167) : 40 Mad 108, *In re Savarimuthu Pillai.*

4. (1923) 1923 All 276 (277) : 24 Cri L Jour

There is, however, certainly no provision in the Code for delivery of a judgment written by a Magistrate *after* he had ceased to have jurisdiction in the district;[5] a judgment so written is in fact no judgment at all.[6]

7. Proviso (a).

The discretion given to a Magistrate by sub-section 1 to act or not to act in a *trial* upon evidence recorded by his predecessor is controlled by this proviso.[1] Under this proviso the accused is entitled to demand that witnesses already examined be re-called and re-heard.[2] Refusal by a Magistrate to re-summon witnesses required by the accused is a defect which is not curable by Section 537.[3]

But the proviso does not apply unless the accused *asks* for a re-hearing[4] and where a trial is impeached on the ground that a re-hearing was refused, it is insufficient to make a general allegation of such refusal, without any specific allegation as to the date when and the person to whom the application was made, and the order thereon.[5]

The mere fact that at the time of the framing of the charge the accused stated that he did not wish the witnesses to be re-called, should not deter the Magistrate's successor from acting under this Section,[6] and if a case is remanded for further inquiry, and in the meanwhile there is a change of Magistrates, the new Magistrate is bound to accede to the accused's request under this proviso, notwithstanding that the remand had been made only for recording further evidence.[7] In transferring a case it is doubtful whether a Magistrate could, either with or without the assent of the accused, impose a condition that there shall be no re-hearing of the witnesses.[8]

Should the accused or his pleader, in applying for a transfer, undertake not to exercise his right under this proviso, and should he repudiate such undertaking, the Magistrate to whom the case is transferred is bound to consider the accused's application for re-summoning and re-hearing the witnesses and is not controlled by any directions in this regard by the Court transferring the case to him.[9]

173, *Nur Muhammad Khan* v. *Emperor.*

5. (1924) 1924 Cal 55 (55) : 50 Cal 664 : 24 Cri L Jour 489, *Baisnab Charan Das* v. *Amin Ali.*

6. (1917) 1917 Cal 310 (310) : 18 Cri L Jour 10 (11), *Chandra Kishore Roy* v. *Emperor.*

Note 7.

1. (1930) 1930 Nag 59 (60) : 1930 Cri Cas 147 : 31 Cri L Jour 282, *Emperor* v. *J. B. Sane.*

(1934) 1934 Oudh 324 (325) : 1934 Cri Cas 877 : 35 Cri L Jour 1147, *Manzoor Ali* v. *Abdul Salam.* Right of accused to insist on having his case decided on evidence already recorded.

[But compare observations in (1935) 1935 Mad 318 (319) : 1935 Cri Cas 381 : 36 Cri L Jour 1265, *Mudda Veerappa* v. *Emperor.*]

2. (1900-02) 1 Low Bur Rul 139 (140), *U. Waradama* v. *Emperor.*

3. (1898) 25 Cal 863 (868), *Gomer Sirda* v. *Empress on the complaint of Ali Sheikh.*

(1903) 1903 Pun Re Cri No. 3, (pp. 9, 10), *Amir Khan* v. *Emperor.*

(1918) 1918 Low Bur 63 (63) : 9 Low Bur Rul 92 : 19 Cri L Jour 321, *Hnin Yin* v. *Than Pe.*

(1925) 1925 All 245 (245) : 25 Cri L Jour 651, *Basanti* v. *Emperor.*

(1921) 1921 All 35 (36) : 22 Cri L Jour 668, *Chajju* v. *Emperor.*

4. (1920) 1920 Pat 693 (694) : 22 Cri L Jour 82, *Rupa Singh* v. *Emperor.*

(1918) 1918 All 279 (281) : 40 All 307 : 19 Cri L Jour 378, *Ram Dass* v. *Emperor.*

5. (1923) 1923 Cal 320 (320) : 23 Cri L Jour 502, *Aziz Mandal* v. *Girish Chandra Choudhury.*

6. (1912) 14 Cri L Jour 175 (176) : 1912 Upp Bur Rul 151, *Nga Po Tein* v. *Emperor.*

7. (1927) 1927 Pat 5 (6) : 27 Cri L Jour 1125, *Daroga Singh* v. *King-Emperor.*

8. (1930) 1930 Lah 168 (170) : 1930 Cri Cas 174 : 31 Cri L Jour 257, *Harnam Singh* v. *Jagat Singh.*

9. (1918) 1918 All 279 (281) : 40 All 307 : 19 Cri L Jour 378, *Ram Dass* v. *Emperor.* Obiter.

Sec. 350 Notes 7—8

The accused's right is to have the witnesses re-summoned and *re-heard* and not merely that their former statements be read out to him.[10] He cannot be asked to pay the expenses of re-summoning the witnesses.[11]

The extent of the right of the accused is only to have the *witnesses re-called and re-examined.* He is not entitled under the proviso to claim a re-hearing on the ground that his *pleader's arguments* were not heard by the previous Magistrate.[12] Where, after a charge is framed in the trial of a warrant case, the case comes before a new Magistrate and the witnesses are re-summoned and re-heard as required by the accused, he is not entitled to have the prosecution witnesses re-called *again* for further cross-examination.[12a] It is open to an accused who has demanded the re-summoning and re-hearing of witnesses under this proviso, to ask that the evidence of any particular witness should not be taken afresh.[12b] Where witnesses for prosecution are re-summoned for examination at the instance of the accused under this proviso, the order in which they should be examined-in-chief rests with the prosecution.[12c]

This Section in no way affects the provisions of Section 33 of the Evidence Act, and if at the instance of the accused a *de novo* trial is conducted, but one of the witnesses cannot be re-summoned because he is dead, his evidence may nevertheless be admitted under Section 33 of the Evidence Act.[13]

8. Application for de novo trial, when to be made.

The time when the accused may apply under proviso (a) is when the second Magistrate *commences his proceedings*; that is, when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives for the prosecution and for the defence (if the accused are defended) are present in the Court for the hearing of the case.[1] An application after the judgment has been written by Magistrate and before it is pronounced by his successor, is not maintainable; the reason is that the mere pronouncing of a judgment is no part of the trial, as the trial is complete with the determination of the guilt or innocence of the accused.[2]

(1918) 1918 Nag 22 (26): 19 Cri L Jour 657, *Jangilal* v. *Emperor.*

10. (1920) 1920 Lah 344 (344): 22 Cri L Jour 119, *Mangal Singh* v. *Emperor.*

11. (1915) 1915 Low Bur 107 (1)(107): 15 Cri L Jour 687, *Elias* v. *Eza Kiel.*

(1935) 1935 Rang 108 (109): 1935 Cri Cas 317: 13 Rang 297: 36 Cri L Jour 953, *Maung Chit Tay* v. *Maung Tun Nyun.* Magistrate should, under discretion conferred by S. 544, *infra*, order the expenses of witnesses to be paid by the Government.

12. (1933) 1933 Mad 841 (842): 1933 Cri Cas 1518: 35 Cri L Jour 79, *Ramanna* v. *Emperor.*

12a (1935) 1935 Mad 258 (259): 1935 Cri Cas 332, *Edward Philbert* v. *Emperor.*

12b (1935) 1935 Mad 318 (319): 1935 Cri Cas 381: 36 Cri L Jour 1265, *Mudda Veerappa* v. *Emperor.* In such a case the Magistrate cannot hear the witness unless he decides to exercise his own option under the Section to re-summon witnesses and re-commence the proceedings.

(1934) 1934 Nag 209 (213): 1934 Cri Cas 980: 36 Cri L Jour 41, *Sheikh Ibrahim* v. *Emperor.* Previous depositions of particular witnesses taken as part of record with express consent of accused's pleader and after due consideration if accused would be prejudiced by such course—*Held* not illegal.

12c (1934) 1934 Nag 209 (211): 1934 Cri Cas 980: 36 Cri L Jour 41, *Sheikh Ibrahim* v. *Emperor.*

13. (1927) 1927 Lah 332 (333): 8 Lah 570: 28 Cri L Jour 451, *Lekal* v. *Emperor.* Disapproving of 1922 Lah 49.

Note 8.

1. (1898) 25 Cal 863 (865), *Gomer Sirda* v. *Queen-Empress.*

(1922) 1922 Lah 49 (54): 3 Lah 115: 23 Cri L Jour 330, *Sahib Din* v. *Emperor.*

2. (1933) 1933 Mad 251 (251): 1933 Cri Cas 365: 34 Cri L Jour 117, *Bhogole China Somayya, In re.*

[See also (1917) 1917 Mad 340 (341): 17 Cri L Jour 166 (167): 40 Mad 108, *In re Savarimuthu Pillai.* Question raised but not decided.

(1925) 1925 Oudh 62 (63): 28 Oudh

The option given to the accused can be exercised by him *only once*.[3] An accused who has asked for a re-hearing of the witnesses could change his mind and leave the Court free to exercise its statutory option to act upon the evidence already recorded.[4]

9. Who can demand de novo trial.

The proviso is entirely in the interests of the accused and it is for him to say who is to be re-summoned and re-heard. The *complainant* has no privilege under Section 350, and cannot demand a *de novo* trial.[1]

10. Proviso, if applicable to inquiries.

This proviso is limited to criminal *trials* and is not applicable to *enquiries*.[1] Thus it does not apply to enquiries preparatory to a commitment[2] or to proceedings in warrant cases before a charge is framed, such proceedings being held to amount only to enquiries.[3] The Lahore High Court, however, in the undermentioned case, seems to hold the view that the proviso is available to an accused even in proceedings prior to the framing of a charge.[4] The Sind Judicial Commissioner's Court has also held that a trial within the meaning of the proviso does not commence with the framing of the charge in warrant cases but commences when the accused appears or is brought before the Court under Section 252 and that, therefore, the proviso applies even to cases where a charge has not been framed.[4a]

As to whether proceedings under Chapter 8 of the Code are enquiries or trials within the meaning of this Section, there is a difference of opinion. In a Full Bench case of the Madras High Court, Ayling J., was of opinion that they were only enquiries, while Wallis J., was of the opinion that they were *trials*.[5] It was also held in an earlier Calcutta case that there was so much similarity in substance between inquiries into offences and inquiries for taking security that the proviso should be equally applicable to both.[6] Whether or not the proviso to Section 350 applies *suo vigore* to proceedings under Chapter VIII, it has been definitely held that the proviso is nevertheless applicable by virtue of the provisions of Section 117, Clause (2).[7]

Cas 109 : 25 Cri L Jour 1075, *Chandika Prasad* v. *King Emperor*.]

3. (1930) 1930 Nag 59 (60) : 1930 Cri Cas 147 : 31 Cri L Jour 282, *Emperor* v. *J. B. Sane*.

4. (1926) 1926 Mad 815 (816) : 27 Cri L Jour 659, *In re Arulay*.
[But see (1930) 1930 Nag 59 (60) : 1930 Cri Cas 147 : 31 Cri L Jour 282, *Emperor* v. *J. B. Sane*. Which seems to say that accused cannot change his mind.]

Note 9.

1. (1925) 1925 Mad 317 (317) : 26 Cri L Jour 526, *Kudigalapudigadu, In re*.
(1926) 1926 Mad 815 (816) : 27 Cri L Jour 659, *In re Arulay*.

Note 10.

1. (1923) 1923 Cal 483 (484) : 24 Cri L Jour 569, *Syed Sadak Reza* v. *Sachindra Nath Roy*.
(1920) 1920 Mad 337 (341, 342) : 43 Mad 511 : 21 Cri L Jour 402 (FB), *Yeluchuri Venkatachennayya* v. *Emperor*.
(1924) 1924 Pat 786 (787) : 25 Cri L Jour 89, *Sondi Singh* v. *Sri Govind Singh*.
(1931) 1931 Mad 488 (489) : 1931 Cri Cas 552 : 54 Mad 512 : 32 Cri L Jour 635, *Nanureddigari Lakshmi Reddy* v. *Uraganapalle Muni Reddy*. Obiter.

2. (1930) 1930 Cal 666 (668) : 1930 Cri Cas 1058 : 32 Cri L Jour 243, *Panchanan Sircar* v. *Emperor*.
(1909) 9 Cri L Jour 146 (146) : 32 Mad 218, *Palaniandi Goundan* v. *Emperor*.

3. (1923) 1923 Mad 660 (661) : 46 Mad 719 : 24 Cri L Jour 192, *Ramanathan Chettiar* v. *King Emperor*.

4. (1922) 1922 Lah 49 (54) : 3 Lah 115 : 23 Cri L Jour 330, *Sahib Din* v. *Emperor*.

4a (1934) 1934 Sind 106 (110) : 1934 Cri Cas 831 : 28 Sind L R 239 : 35 Cri L Jour 1261, *Labsing* v. *Emperor*. Transfer of Magistrate before framing of charge —Accused is entitled to have witnesses, already examined, re-called.

5. (1920) 1920 Mad 337 (341, 344) : 43 Mad 511 : 21 Cri L Jour 402 (FB), *Yeluchuri Venkatachennayya* v. *Emperor*.

6. (1879) 4 Cal L R 452 (454), *Buroda Kant Roy* v. *Korimuddi Moonshee*.

7. (1920) 1920 Mad 337 (342, 344) : 43 Mad

Sec. 350 Notes 11—12

11. Duty of Magistrate under Proviso (a).

This Section does not require that the Magistrate shall ask the accused if he wishes to exercise the right[1] though it would be desirable and proper that the accused should be informed of his rights under the proviso.[2] But the failure to do so is only an irregularity which is curable by Section 537.[3]

12. Re-commence the inquiry or trial.

It may be right to describe a fresh inquiry as a "*de novo trial*" when a Magistrate *suo motu* decides to re-commence the trial ; but when proviso (a) is brought into force there does not seem to be any question of "*de novo trial*," the right given to the accused being only to have *witnesses re-heard*.[1]

Whether the Magistrate acts *suo motu* and grants a *de novo* trial or accedes to the demand of the accused his duty is to re-summon and re-hear the witnesses and not merely to allow *further cross-examination*.[2] The object in granting a re-hearing is to enable the Magistrate who hears the case to judge of the credibility of the witnesses by their demeanour. This object is lost if the witnesses are not examined again but only cross-examined.[3] Where the Magistrate permitted the re-hearing of witnesses but the prosecution declined to examine them again, and the accused without raising any objection only cross-examined those witnesses, it was held that the provisions of Section 350 were not complied with and it was impossible to say that the accused were not prejudiced.[4] Merely reading one's depositions to the witnesses[5] or exhibiting them[6] is not re-hearing them.

When a superior Court directs an inquiry by a Magistrate other than the one who originally heard the case, the provisions of Section 350 debar it from directing that the case should be proceeded with from a particular stage.[7] Where such a direction was made and on the case going back it was found that the original Magistrate had been transferred, it was held that the directions did not apply to his successor.[8] The same may be said of transfers; the operation of Section 350 cannot be checked by any restrictions in the order of transfer.[9] As to instances where the High Court has ordered re-inquiry from a particular stage where the

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511 : 21 Cri L J 402 (F B), *Yeluchuri Venkatachennayya* v. *Emperor*.
(1925) 1925 Oudh 228 (229) : 27 Oudh Cas 323 : 25 Cri L Jour 1380, *Baij Nath Sah* v. *Emperor*.

Note 11.

1. (1912) 14 Cri L Jour 175 (176) : 1912 Upp Bur Rul 151, *Nga Po Tein* v. *Emperor*.
2. (1900-1902) 1 Low Bur Rul 238 (239), *Chit Tun* v. *Crown*.
(1902) 1 Low Bur Rul 287 (288), *Crown* v. *Chit Ye*.
(1897-1901) 1 Upp Bur Rul 87.
(1917) 1917 Upp Bur 11 (11) : 17 Cri L Jour 401 (401) : 2 Upp Bur Rul 108, *Barachi* v. *Emperor*.
3. (1884) 1884 Pun Re Cri No. 6, (p. 8), *Kesra Ram* v. *The Empress*.
(1903) 1903 Pun Re Cri No. 3, (p. 10), *Amir Khan* v. *Emperor*.

Note 12.

1. (1925) 1925 Mad 317 (317) : 26 Cri L Jour 526, *Kudigalapudigadu, In re*.
(1935) 1935 Mad 318 (319) : 1935 Cri Cas 381 : 36 Cri L Jour 1265, *Mudda Veerappa* v. *Emperor*.
2. (1926) 1926 Sind 158 (159) : 20 Sind L R 50 : 27 Cri L Jour 332, *Sidik* v. *Emperor*.
3. (1926) 1926 Sind 158 (159) : 20 Sind L R 50 : 27 Cri L Jour 332, *Sidik* v. *Emperor*.
(1918) 1918 Low Bur 63 (63) : 9 Low Bur Rul 92 : 19 Cri L Jour 321, *Hnin Yin* v. *Than Pe*.
(1925) 1925 Mad 1280 (1281) : 26 Cri L Jour 1596, *Narayana Reddi* v. *Elumalai Bojanna*.
4. (1907) 6 Cri L Jour 431 (432) (Cal), *Sobh Nath Singh* v. *Emperor*.
5. (1920) 1920 Lah 344 (344) : 22 Cri L Jour 119, *Mangal Singh* v. *Emperor*.
(1870) 13 Suth W R Cr 40 (41), *Purmessur Singh* v. *Soroop Audhikharee*.
(1918) 1918 Low Bur 63 (63) : 9 Low Bur Rul 92 : 19 Cri L Jour 321, *Hnin Yin* v. *Than Pe*.
6. (1923) 1923 Mad 32 (33) : 46 Mad 117 : 23 Cri L Jour 748, *K. K. Kumar Haji, In re*.
7. (1901) 28 Cal 594 (597), *Sheoprakash Singh* v. *W. D. Rawlins*.
8. (1898) 25 Cal 863 (864), *Gomer Sirda* v. *Queen-Empress*.
9. (1930) 1930 Mad 983 (984) : 1930 Cri Cas

accused undertakes not to ask for a *re-trial*, *see* the undermentioned cases.[10]

13. From what stage inquiry may be re-commenced.

When a Magistrate succeeding another elects to conduct a *de novo* trial, he cannot summarily dismiss the complaint under Section 203, it being no longer a question of deciding whether or not proceedings should be taken on the complaint.[1] Nor can he refer the matter to the police under Section 202. The inquiry which he can re-commence is the inquiry as defined in Section 4 which does not include a reference to the police.[2]

It has been held by the High Court of Madras that a Magistrate who re-commences an inquiry or trial does not thereby modify its nature or the stage at which it has arrived. Thus where the proceedings re-commenced are only an *inquiry*, they are re-commenced *as an inquiry*, and where they have developed into a *trial* stage they are re-commenced *as a trial*, *i. e.* a proceeding in which a charge has been framed ; in other words, a charge once framed is not wiped out or cancelled by a *de novo* trial.[3] A similar view has also been taken by the Allahabad High Court in a recent decision.[3a] The Chief Court of Oudh has held that whatever might be the interpretation as regards cases falling under the first sub-section proper, this principle will apply to cases of re-hearing under the proviso (a) and that a charge once framed is not wiped by granting such a re-hearing.[4] The Chief Court of the Punjab appears to be of the same view as that of the High Court of Madras.[5] On the other hand, the Judicial Commissioner's Courts of Nagpur[6] and Peshawar[7] and the Chief Court of Lower Burma,[8] have taken the view that, where a re-hearing is granted, all the previous proceedings, including the charge framed, are wiped out.

Where a number of accused persons are proceeded against some of whom are discharged and thereafter the proceedings are transferred to the file of another Magistrate, the order of discharge is not thereby cancelled.[9]

14. Case coming again before original Magistrate.

When a Magistrate is transferred and a case which was pending before him is taken up by his successor and the trial started afresh, the proceedings, which had already been taken before the transferred Magistrate, are wiped out and such

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1199 : 32 Cri L Jour 226, *Ramaswami Thevar* v. *M. Subban.*

10. (1904) 1 Cri L Jour 46 (49) (Cal), *Kishori Gir* v. *Ram Narayan Gir.*
(1925) 1925 Cal 172 (173): 26 Cri L Jour 313, *Nirmal Kumar Singh* v. *The Commissioner of Income-tax, Bengal.*
(1933) 1933 Nag 269 (270): 1933 Cri Cas 1003 : 34 Cri L Jour 1172, *Krishna Murari Lal* v. *Emperor.* Case transferred by High Court—Order made under S. 561-A that the proceedings must commence from examination of accused.

Note 13.

1. (1894) 7 C P L R Cri 36 (37), *Baliram* v. *Baldeo.*
2. (1886) 9 Mad 282 (282), *Sadagopachariar* v. *Raghavachariar.*
3. (1915) 1915 Mad 23 (24): 15 Cri L Jour 673: 38 Mad 585, *Tanguturi Sriramulu* v. *Nalam Krishna Row.*
(1933) 1933 Mad 841 (841): 1933 Cri Cas 1518: 35 Cri L Jour 79, *Ramanna* v. *Emperor.*
(1916) 1916 Mad 1048 (1049): 17 Cri L Jour 1 (2), *Bugtha Sinhadri Naidu* v. *Behava Sitarama Patrudu.*
3a (1935) 1935 All 834 (836): 1935 Cri Cas 980: 36 Cri L Jour 912, *Raza Husain* v. *Emperor.*
4. (1933) 1933 Oudh 86 (88): 1933 Cri Cas 168: 8 Luck 286: 34 Cri L Jour 124, *Kunwar Sen* v. *Emperor.*
5. (1903) 1903 Pun Re Cri No. 14, (pp. 38, 39), *The Crown* v. *Nathu.*
6. (1931) 1931 Nag 39 (40): 1931 Cri Cas 223: 27 Nag L R 13: 32 Cri L Jour 603, *Sheoraisai* v. *Dani.*
(1894) 7 C P L R Cri 36 (38), *Baliram* v. *Baldeo.*
7. (1933) 1933 Pesh 78 (79) : 1933 Cri Cas 1311: 35 Cri L Jour 170, *Abdul Hakim* v. *Haji Abdul Azizi.*
8. (1903-04) 2 Low Bur Rul 17 (18), *King-Emperor* v. *Nga Pe.*
(1918) 1918 Low Bur 63 (63): 9 Low Bur Rul 92: 19 Cri L Jour 321, *Hnin Yin* v. *Than Pe.*
9. (1899) 1 Bom L R 782 (783), *Queen-Empress*

Sec. 350 Notes 14—16

Magistrate has no jurisdiction on the case coming back to his file to proceed with the trial from the point where he himself had left it.[1] *See also* Note 2, Pts. 12 and 12a.

15. Proviso (b).

Prejudice to the accused.—A judgment arrived at by a Magistrate upon evidence not wholly recorded by himself is considered by the framers of the Code to be of such infirmity that it is liable to be set aside without an appeal, provided that the accused has been actually prejudiced thereby.[1]

It does not matter whether the accused did or did not object to the procedure, nor is it necessary to consider whether or not he had a reasonable opportunity of entering a protest thereto; the real question is whether he was prejudiced by the course adopted.[2] If he was, the conviction will be set aside;[3] if he was not, the High Court will refuse to interfere.[4]

In a case of defamation it was held that though the Magistrate's deciding the case upon evidence recorded by his predecessor was not without jurisdiction, still it was difficult to see how a Magistrate could adequately decide such a case without having had the complainant examined before him.[5]

Under the proviso a District Magistrate can set aside convictions by Magistrates subordinate to him. This would include First Class Magistrates even though no appeal lies to the District Magistrate from convictions by the former; for as pointed out in the undermentioned cases[6] which discussed the meaning of the words "inferior" and "subordinate" occurring in Sections 435 and 437, Section 17 makes all Magistrates in the district subordinate to the District Magistrate.

See also the undermentioned case.[7]

16. Sub-section 2.

It is a general principle of law that evidence taken by one Magistrate is not evidence in a trial before another, unless some provision of law expressly makes it so.[1] There is nothing in Section 346 enabling a Magistrate to whom the case is referred, to act on the evidence recorded by the referring Magistrate; and sub-section 2 of Section 350 expressly makes the provisions of the Section inapplicable

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v. *Fakira.*

Note 14.

1. (1925) 1925 Mad 174 (174): 26 Cri L Jour 510, *Sardar Khan Sahib* v. *Athanulla.*
   (1927) 1927 Mad 81 (82): 28 Cri L Jour 23, *Sriranga Chettiar* v. *Subramania Asari.*
   (1919) 1919 Pat 311 (311): 20 Cri L Jour 820, *Jago Singh* v. *Emperor.*
   (1919) 1919 Pat 578 (580): 20 Cri L Jour 638, *Daroga Choudhury* v. *Emperor.*
   (1934) 1934 Mad 475 (475): 1934 Cri Cas 801: 57 Mad 1019: 35 Cri L Jour 1363, *Ramalingam Pillai* v. *Emporor.*

Note 15.

1. (1875) 23 Suth W R Cr 59 (60), *Queen* v. *Raghunath Das.*
   (1912) 13 Cri L Jour 218 (220): 39 Cal 781, *Kudrutullah* v. *Emperor.* Prejudice must be shown.
2. (1918) 1918 All 56 (60): 41 All 116: 19 Cri L Jour 1004, *Mathura* v. *Emperor.*
3. (1917) 1917 Upp Bur 11 (11): 17 Cri L Jour 401 (402): 2 Upp Bur Rul 108, *Barachi* v *Emperor.*
   (1900-02) 1 Low Bur Rul 238 (240), *Chit Tun* v. *Crown.*
   (1892) 14 All 346 (347), *Queen-Empress* v. *Bashir Khan.*
4. (1884) 1884 Pun Re Cri No. 6, (p. 8), *Kesra Ram* v. *Empress.*
   (1875) 24 Suth W R Cr 12 (12), *The Queen* v. *Raghoo Dome.*
   (1889) 1889 All W N 161 (161), *Queen-Empress* v. *Bansi Singh.*
   (1905) 9 Cal W N 285*n* (286*n*).
5. (1909) 10 Cri L Jour 492 (493): 4 Ind Cas 67 (Cal), *Brindaban Chander Das* v. *Ishaqudin Choudhury.*
6. (1885) 7 All 853 (854), *Queen-Empress* v. *Laskari.*
   (1886) 12 Cal 473 (477) (F B), *Opendro Nath Ghose* v. *Dukhini Bewa.*
   (1884) 8 Mad 18 (19) (F B), *In the matter of the Petition of Padmanabha.*
7. (1884) 9 Bom 100 (102, 103), *Queen-Empress* v. *Pirya Gopal.*

Note 16.

1. (1923) 1923 Mad 327 (327): 24 Cri L Jour

to proceedings stayed under Section 346.[2] Hence, it follows that a Magistrate hearing a case sent to him under Section 346, must hear the same *de novo* and cannot act on evidence already recorded by the Magistrate who transferred the case.[3]

Under Section 349, *ante*, it is in the discretion of the superior Magistrate to whom a case is referred, to act or not to act upon evidence already recorded by the Subordinate Magistrate.[4] The addition of the words "or in which proceedings have been submitted to a superior Magistrate under Section 349" makes it clear that nothing in this Section will apply to cases submitted under Section 349. The discretion, therefore, that the superior Magistrate has under Section 349, is uncontrolled by the proviso to Section 350 and he, therefore, cannot be compelled to hold a *de novo* trial.[5]

17. Sub-section 3—Transfer of cases.

The earlier view was that the provisions of this Section did not apply where a change of Magistrates had occurred by a transfer or *withdrawal of a case* from the file of one Magistrate to that of another.[1] But latterly it was recognised that the Section applied even to such transfers or withdrawals.[2] The recent introduction of sub-section 3 gives effect to the latter view.[3]

It has been pointed out that, though Section 350 is applicable to cases transferred or withdrawn from the file of one Magistrate to that of another, it is desirable that the second Magistrate should commence the hearing *de novo*.[4]

413, *China Venku Naidu, In re.*
(1933) 1933 Sind 191 (191): 1933 Cri Cas 572: 27 Sind L R 266: 34 Cri L Jour 749, *Sher Khan* v. *Emperor.*
2. (1904) 1 Cri L Jour 1056 (1057): 17 C P L R Cri 159, *Emperor* v. *Gokal.*
3. [See Note 5 to S. 346.]
4. (1892) 2 Weir 428 (429), *In re Raghava Naiko.*
5. (1926) 1926 Sind 48 (48): 18 Sind L R 216: 26 Cri L Jour 1363, *King-Emperor* v. *Dodo.*
[See also Note 12 to S. 349.]

Note 17.

1. (1905) 2 Cri L Jour 820 (823): 1 Nag L R 187, *Ladya* v. *Emperor.*
(1890) 12 All 66 (68), *Queen-Empress* v. *Radha.*
(1889) 1889 All W N 130 (130), *Queen-Empress* v. *Angnu.*
(1900-02) 1 Low Bur Rul 287 (288), *Crown* v. *Nga Chit Tu.*
(1900) 2 Weir 152 (153), *In re Tota Venkanna.*
(1891) 2 Weir 690 (690), *In re Sundaraier.*
(1900-02) 1 Low Bur Rul 301 (301) (F B), *Crown* v. *Nga Ta Lok.*
(1897-1901) 1 Upp Bur Rul 87, *Queen-Empress* v. *Nga Po Min.*
(1875) 24 Suth W R Cri 53 (54), *Queen* v. *Khan Mahomed.*
(1907) 6 Cri L Jour 434 (438) (Cal), *The Deputy Legal Remembrancer* v. *Upendra Kumar Ghose.*
(1902) 15 C P L R Cri 66 (68), *Emperor* v. *Kasim.*
(1904) 17 C P L R Cri 159 (160), *Emperor* v. *Gokul.*
(1918) 1918 Nag 22 (25): 19 Cri L Jour 657, *Jangilal* v. *Emperor.*
(1870) 14 Suth W R Cr 3 (3), *Kopil Nath Sahi* v. *Koneeram.*
(1925) 1925 Mad 174 (175): 26 Cri L Jour 510, *Sardar Khan Sahib* v. *Athanlla.*
(1903) 6 Oudh Cas 192 (193), *Puran* v. *King-Emperor.*
2. (1909) 9 Cri L Jour 146 (146): 32 Mad 213, *Palaniandi Goundan* v. *Emperor.*
(1908) 7 Cri L Jour 220 (223): 35 Cal 457, *Mohesh Chandra Saha* v. *Emperor.*
(1912) 13 Cri L Jour 218 (220): 39 Cal 781, *Kudrutullah* v. *Emperor.*
(1917) 1917 Upp Bur 11 (11): 2 Upp Bur Rul 108: 17 Cri L Jour 401 (401), *Barachi* v. *Emperor.*
(1920) 1920 Pat 693 (694): 22 Cri L Jour 82, *Rupa Singh* v. *Emperor.*
(1914) 1914 All 45 (46): 36 All 315: 15 Cri L Jour 354, *Emperor* v. *Nanhua.*
(1918) 1918 All 279 (281): 40 All 307: 19 Cri L Jour 378, *Ram Das* v. *Emperor.*
(1919) 1919 Low Bur 50 (50): 20 Cri L Jour 496, *Ganga Chetty* v. *Emperor.*
(1918) 1918 Nag 142 (143): 20 Cri L Jour 41, *Akbar Ali* v. *Emperor.*
(1928) 29 Cri L Jour 229 (229): 107 Ind Cas 160 (Pat), *Channu Prasad Singh* v. *Emperor.*
3. (1930) 1930 Mad 983 (984): 1930 Cri Cas 1199: 32 Cri L Jour 226, *Ramaswami Thevan* v. *M. Subban.*
4. (1919) 1919 Low Bur 50 (51): 20 Cri L Jour 496, *M. Rahman* v. *Abdul Samad.*

Sec. 350-A

350-A. *No order or judgment of a Bench of Magistrates shall be invalid by reason only by a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under Sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.*

Changes in constitution of Benches.

Synopsis.

Other Topics.

Absence of some Magistrates but remaining enough to form the quorum. See Note 2, Pts. 1 and 2.

Absence of quorum—Effect. See Note 2, Pt. 3.

Judgment by Magistrate who had not heard. See Note 1, Pts. 1 to 4.

1. Scope of the Section.

Before the introduction of this Section into the Code by the Amending Act of 1923, it was uniformly held that where a judgment was delivered by the necessary quorum of Magistrates who had been present throughout the trial, the judgment would be perfectly valid though some other Magistrates had also been present at the earlier stages of the trial;[1a] but there was a difference of opinion on the question whether a judgment delivered by a Bench of Magistrates some of whom had not heard the whole of the evidence could be considered to be a valid judgment. According to one view the fundamental principle of law is that no person who has not heard the whole of the evidence is competent to pass or take part in passing the judgment in the case, and that a judgment so passed is a nullity.[1] Another view was that there was no such principle as that stated above and that the only question in each case was whether the accused was *prejudiced*

Section 350-A—Note 1.

1a (1904) 6 Cri L Jour 43 (44): 3 Nag L R 67, *Balbhadri Bani* v. *Tribhuban Nath.*

(1917) 1917 All 379 (379): 18 Cri L Jour 749 (749), *Khuda Buksh* v. *Emperor.* Where no quorum was enjoined, two were held sufficient.

(1914) 1914 Mad 139 (139): 38 Mad 797 : 15 Cri L Jour 549, *Venkatrama Iyer* v. *Swaminatha Iyer.*

(1923) 1923 Oudh 163 (164): 25 Cri L Jour 198, *Brij Bhukhan* v. *Ram Kirat.*

1. (1919) 1919 Sind 66 (66): 13 Sind L R 166 : 20 Cri L Jour 769, *Emperor* v. *Nihchal.*

(1921) 1921 Lah 135 (136): 2 Lah 237 : 22 Cri L Jour 740, *Girdhari* v. *Emperor.*

(1916) 1916 Mad 810 (811): 16 Cri L Jour 489 (489): 38 Mad 304, *In re Subramania Ayyar.*

(1919) 1919 Upp Bur 29 (29): 3 Upp Bur Rul 118: 20 Cri L Jour 336, *Nga Paik* v. *Nga Saw Hlaing.*

(1917) 1917 Low Bur 79 (79): 8 Low Bur Rul 463: 18 Cri L Jour 96, *Itala* v. *Emperor.*

(1896) 23 Cal 194 (195), *Damri Thakur* v. *Bhowani Sahoo.*

(1922) 1922 Lah 137 (138): 22 Cri L Jour 511, *Abdul Ghani* v. *Emperor.*

(1895) 18 Mad 394 (394), *Empress* v. *Basappa.*

(1891) 2 Weir 13 (13), *Renganathan, In re.*

(1921) 1921 Bom 44 (45) : 22 Cri L Jour 615, *Gangappa Irappa Sarwad* v. *Emperor.* Decided on the particular Government Notification.

(1878) 3 Cal 754 (755), *Sufferuddin* v. *Ibrahim.*

(1922) 1922 Oudh 21 (22): 25 Oudh Cas 182 : 23 Cri L Jour 696, *Sultan* v. *Shamsher.* One Magistrate recording evidence, others attending to other work.

by the course adopted.[2] In this view it was held that a Government notification under Section 16, Clause (c), which provided that "if any case is adjourned and the members at the adjourned sessions are not the same as sat at the first hearing of the case, the provisions of Section 350 of the Criminal Procedure Code will be held to apply to the case," was not *ultra vires*.[3] A third view was that such a Government notification was *ultra vires* of the powers of the Local Government under Section 16, Clause (c).[4]

The present Section now makes it clear that no change in the constitution of the Bench during the progress of a trial will affect the validity of the judgment passed, provided

firstly:—That the Bench by *which the judgment* is passed is *duly constituted*, and

secondly:—That the Magistrates constituting the same (*i. e.*, the Bench which passed the judgment) *have been present on the Bench throughout the proceedings.*

2. "Duly constituted under Sections 15 and 16."

A Bench of Magistrates will be "duly constituted under Sections 15 and 16" if

1. the individuals sitting as a Bench have all been *authorised* by the Local Government under Section 15 to sit together as a Bench, and
2. the *number* of such individuals is not less than the *quorum* fixed by rules framed by the Local Government under Section 16, Clause (c).

Suppose that *A*, *B*, *C*, *D* and *E*, are all authorised under rules framed under Section 15 to sit together as a Bench, and under the rules framed under Section 16, Clause (c), the *quorum* for a valid Bench is declared to be *two*. If now *A*, *B* and *C* sit together to hear a case, but *C* is absent during subsequent hearings thereof and *A* and *B* finally deliver judgment in the case, the judgment is perfectly valid notwithstanding the change in the personnel of the Bench in the course of the trial, inasmuch as *A* and *B* form a "duly constituted" Bench (*i. e.* they form the necessary *quorum*) and they have been present throughout the proceedings.[1a] In *Chiteshwar Dube* v. *Emperor*,[1] Niamatullah J., however, took the view that *all* the Magistrates who began to hear the case must be present at all the hearings irrespective of the *quorum*, in order to render the ultimate judgment valid. This view was dissented from by a bench of the same High Court in *Dasarath Rai* v. *Emperor*;[2] but Sulaiman, C. J., in the latter case, observed as follows:—"It is not easy to see how the constitution of the Bench can be changed, and at the same time the Magistrates constituting the Bench be present on the Bench throughout the proceedings." In making this observation, his Lordship does not appear to have laid the necessary emphasis on the words "duly constituted" used in the Section. A

(1886) 12 Cal 558 (559), *Ram Sunder De* v. *Rajab Ali*.
(1883) 13 Cal L R 212 (213), *Shambhu Nath Sarkar* v. *Ram Kamal Guha*.

2. (1918) 1918 All 56 (60): 41 All 116: 19 Cri L Jour 1004, *Mathura* v. *Emperor*.
[See also (1899) 2 Weir 18 (19), *In re Ramasami Aiyar*.
(1916) 14 All Cri L Jour 22*n* (22*n*), *Padarath* v. *Ramdas*.]

3. (1918) 1918 All 56 (60): 41 All 116: 19 Cri L Jour 1004, *Mathura* v. *Emperor*.
(1914) 1914 Oudh 345 (346): 17 Oudh Cas 142: 15 Cri L Jour 516, *Indar Dat* v. *Emperor*.

4. (1893) 20 Cal 870 (873), *Hardwar Sing* v. *Khega Ojha*.

Note 2.

1a (1932) 1932 Nag 95 (96): 1932 Cri Cas 447: 28 Nag L R 190: 33 Cri L Jour 559, *Nago* v. *Shankar*.
[See also (1898) 21 Mad 246 (249), *Karuppanna Nadan* v. *Chairman, Madura Municipality*.]

1. (1932) 1932 All 127 (127): 33 Cri L Jour 200: 1932 Cri Cas 152, *Chiteshwar Dube* v. *Emperor*.

2. (1934) 1934 All 144 (146, 147): 1934 Cri Cas 210: 56 All 599: 36 Cri L Jour 38, *Dasrath Rai* v. *Emperor*.

Sec. 350-A Notes 2—5

Bench may be constituted by several Magistrates appointed under Section 15, and there may be a change in the constitution of such Bench. But if the *duly constituted* Bench under Section 16, *i. e.*, the *quorum fixed*, passes the judgment, it would be valid provided the Magistrates constituting such *quorum* have been present on the Bench throughout the proceedings.

A Bench which consists of a number of Magistrates which is less than the *quorum* fixed, is not a duly constituted Bench and evidence recorded by it is not recorded by a Court.[3]

3. "And the Magistrates constituting the same have been present throughout the proceedings."

Where some of the Magistrates constituting the Bench who pass the judgment or order, have not been present throughout the proceedings, the judgment or order is invalid as contravening the provisions of this Section.[1]

4. Non-compliance with the Section—Effect of.

It has been held by the High Court of Allahabad[1] that this Section is, in terms, a saving clause, which does not directly prohibit or declare invalid the trial of a case in the absence of the conditions specified, but only indirectly or by implication assumes such trial to be irregular, and that a non-compliance therewith is only an irregularity curable by Section 537.

A contrary view, namely that such a compliance will render the judgment void and wholly illegal, has been held in the undermentioned cases.[2]

5. Transfer of a case from a Bench of Magistrates to a Magistrate.

Where a case pending and part-heard in the Court of a Third Class Bench of Magistrates was referred back under the rules to a *First* Class Magistrate, it was held that the latter can continue the case from the stage at which it was, when the transfer was made.[1] But where a case, which was partly heard by a *First* Class Bench of Magistrates under its *summary powers*, was, after an oral charge was framed, transferred to a Second Class Magistrate having no summary

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3. (1926) 1926 Sind 192 (192): 20 Sind L R 134: 27 Cri L Jour 542, *Emperor* v. *Gulu.*
(1892) 16 Mad 410 (414), *Empress* v. *Muthia.* Quorum 3, Judgment by 2, illegal.
(1919) 1919 Mad 274 (274): 20 Cri L Jour 823, *Tantravaki Bapiraja, In re.*

Note 3.

1. (1932) 1932 All 191 (192): 54 All 413: 1932 Cri Cas 207: 33 Cri L Jour 885, *Ram Khelawan* v. *Sheo Nandan.*
(1928) 1928 Oudh 212 (213): 29 Cri L Jour 310, *Suraj Bali* v. *Emperor.*
(1926) 1926 Lah 304 (304): 7 Lah 122: 27 Cri L Jour 463, *Banwari* v. *Emperor.*
(1932) 1932 Nag 95 (96): 28 Nag L R 190: 1932 Cri Cas 447: 33 Cri L Jour 559, *Nago* v. *Shankar.*
(1934) 1934 Oudh 85 (86): 35 Cri L Jour 417: 1934 Cri Cas 255, *Rameshwar Datt Singh* v. *Bharath Singh.*
(1932) 1932 All 127 (127): 33 Cri L Jour 200: 1932 Cri Cas 152, *Chiteshwar Dube* v. *Emperor.*
(1902) 1902 All W N 148 (148), *Emperor* v. *Lado.*

Note 4.

1. (1934) 1934 All 144 (147, 148): 1934 Cri Cas 210: 56 All 599: 36 Cri L Jour 38, *Dasrath Rai* v. *Emperor.*
(1924) 1924 All 674 (675), *Debi Prasad* v. *Emperor.* Only one Magistrate trying the case.
[But see (1902) 1902 All W N 148 (148), *Emperor* v. *Lado.* One member alone adjudicating upon case—Judgment is illegal.]
2. (1920) 1920 Bom 300 (301): 44 Bom 400: 21 Cri L Jour 369, *Mohidin Karim* v. *Emperor.*
(1934) 1934 Oudh 85 (86): 35 Cri L Jour 417: 1934 Cri Cas 255, *Rameshwar Datt Singh* v. *Bharath Singh.*
(1932) 1932 Nag 95 (96): 28 Nag L R 190: 33 Cri L Jour 559: 1932 Cri Cas 447, *Nago* v. *Shankar.*
[See also (1928) 1928 Oudh 212 (214): 29 Cri L Jour 310, *Suraj Bali* v. *Emperor.*]

Note 5.

1. (1918) 1918 Cal 304 (305): 19 Cri L Jour 312, *Chand Tarafdar* v. *Shamsher Fakir.*

powers, it was held by the High Court of Madras that Section 350 would not apply to the case.[2]

351.* (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

Detention of offenders attending Court.

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard.

Synopsis.

Scope of the Section. Note No. 1

Other Topics.

Section 190 and this Section. See Note 1.

1. Scope of the Section.

The following conditions are necessary for the application of the Section :—

(*a*) An offence must appear to have been committed on the evidence in the case before the Court;

(*b*) such offence must be one of which the Court can take cognizance; and

(*c*) the person who appears to have committed the offence must be *present* in Court.[1]

This Section does not by itself *confer* any power of taking cognizance of the offence disclosed in the evidence. It only prescribes the procedure to be followed when an offence of which the Court can take cognizance is disclosed on the evidence in the case.

The ordinary procedure where any person is to be proceeded against for any offence judicially is to issue a process against him. This Section is an exception to this general rule and enables the Court to at once *detain* the offender in custody without issuing any such process.

As to the principle on which cognizance is taken in such cases, *see* Notes 3, 5 and 10 to Section 190, *ante*.

As to the considerations to be borne in mind in exercising the discretion under this Section, *see* the undermentioned cases.[2]

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* (1882—S. 351; 1872—S. 104 and 1861—S. 206.)
Materially the same. Sub-section 2 was added in 1872 Code.

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2. (1932) 1932 Mad 505 (507) : 55 Mad 795 : 33 Cri L Jour 653 : 1932 Cri Cas 509, *Nannier* v. *Dasalier*.

Section 351—Note 1.

1. (1911) 12 Cri L Jour 92 (92) : 5 Sind L R 17 : *Ahmed Khan* v. *Emperor*. Where the accused is not in attendance, this Section does not apply.

2. (1925) 1925 Cal 104 (104) : 25 Cri L Jour 311, *Easatullamian* alias *Pramanick*, *In re*. To order a fresh enquiry against a discharged co-accused after examining and cross-examining him as a prosecution witness and thus gathering from his own mouth the evidence against him, is contrary

Sec. 352

352.* The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Courts to be open.

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

Synopsis.

	Note No.		Note No.
Evidence of pardanashin lady.	1	Exclusion of police officer.	3
Trial in Jail.	2	Holding Court in a private place.	4

Other Topics.

Grounds for exclusion. See Note 3 Pt. 1. Private place turned into Court-room—Sections 441 and 449, I. P. C., inapplicable. See Note 4, Pt. 3.

1. Evidence of pardanashin lady.

When the evidence of a *pardanashin* lady is to be taken, the Court must adjourn to some place where she can come. She should be examined behind a *pardah* but in the presence of the accused, the Judge taking such precaution as he

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* (Code of 1882—S. 352—Same.)

(Code of 1872—S. 187.)

187. The place in which the Court of a Magistrate is held for the trial of any offence, or for the purpose of conducting an inquiry into any case triable by a Court of Session or High Court, and also every Court of Session and every High Court, shall be deemed an open and public Court, to which the public generally may have access, so far as the same can conveniently contain them.

Criminal Courts to be open.

But the Magistrate or presiding Judge may, if he thinks fit, order that, during the inquiry into or trial of any particular case, no person shall have access to, or be, or remain in, the room or building used by the Court without the consent or permission of the Court.

(Code of 1861—S. 279.)

CHAPTER XVII.

Place where Preliminary Investigations and Trial held, an Open Court.

279. The place in which the Court of a Magistrate is held for the trial of any complaint or for the purpose of conducting any preliminary investigation into any case triable by a Court of Session or Supreme Court of Judicature, or any Superior Court, shall be deemed an open and public Court, to which the public generally may have access, so far as the same can conveniently contain them; but it shall be lawful for any such Court, if it shall think fit, to order that during the investigation into any particular case triable by a Court of Session or by a Supreme Court of Judicature, no person shall have access to or be or remain in such room or building without the consent or permission of the Court.

Place where investigation made, an open Court.

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to the traditions of justice in criminal Courts.

(1889) Ratanlal 477 (477, 478), *Queen Empress* v. *Bhogilal*. In absence of exceptional circumstances a Court ought not to suddenly transfer a witness from the witness box to the dock and proceed against him along with the other accused, as such a course is likely to discourage the witnesses, who follow, from telling the truth.

can to secure her identity.[1]

Sec. 352 Notes 1—4

2. Trial in Jail.

Trial in jail is not illegal when there is nothing to show that admittance was refused to anyone who desired it.[1]

3. Exclusion of police officer.

This Section empowers the Court to order that a particular person shall not remain in the room used by the Court. It makes no exception in the case of a police officer. When the accused person objects to the presence of a police officer or other person, the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable, considering the intelligence and susceptibilities of the class to which he belongs and not merely whether the presence is convenient or helpful to the Court or the prosecution.[1]

4. Holding Court in a private place.

To hold a Court in a private house, in spite of the protests from the accused and where he cannot get his pleader to attend or call his witnesses, is a material irregularity.[1] But where a case is tried in a Magistrate's private room instead of in the Court-room without any objection by the parties, the trial is not illegal.[2]

Where a private place belonging to the Judge is turned into a Court-room, such a place cannot be said to be "in the possession" of the Judge within the meaning of Section 441 of the Penal Code. Thus where an accused entered the private room of the Judge wherein a trial was proceeding, and even when asked to leave it disobeyed the order, it was held that the accused could not be convicted under Section 448 of the Penal Code.[3]

CHAPTER XXV.

Of the Mode of taking and recording Evidence in Inquiries and Trials.

Sec. 353

Evidence to be taken in presence of accused.

353.* Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

* (Code of 1882—S. 353—Same.)

(Code of 1872—S. 191, Para 1.)

Examination to be in presence of accused.

191. The complainant and the witnesses for the prosecution shall be examined in the presence of the accused person, or of his agent, when his personal attendance is dispensed with and he appears by agent.

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(Code of 1861—S. 194—Same as that of 1872 Code.)

Section 352—Note 1.

1. (1862) 2 Weir 432 (432).

Note 2.

1. (1917) 1917 Lah 311 (312): 18 Cri L Jour 852 (853), *Sahai Singh* v. *Emperor*.

Note 3.

1. (1925) 1925 Nag 296 (296): 26 Cri L Jour 1130, *Nathu Singh* v. *The Crown*.

Note 4.

1. (1918) 1918 Pat 197 (199): 3 Pat L Jour 147: 19 Cri L Jour 249, *Mewalal* v. *Emperor*.
2. (1906) 3 Cri L Jour 433 (435, 436) (Rang), *Narayanaswamy* v. *A. Blake*.
3. (1923) 1923 Rang 145 (145, 146): 25 Cri L Jour 653, *Nga Po Ya* v. *Emperor*.

Synopsis.

Other Topics.

Breach of the Section — Not curable. See Note 4, Pt. 4.
Cases—Cross-cases. See Note 4, Pt. 5; Note 4, F-N (4).
Consolidation with consent — Curable. See Note 4, Pt. 6.
Description in heading if part of deposition. See Note 3, Pt. 2.
Exceptions. See Note 2, Pts. 1 and 2.
Evidence in another case treated as evidence by consent. See Note 4, F-N (6).
Extradition Act, 1870. See Note 2, Pt. 2.
Reading out prior statements—Insufficient. See Note 4, Pts. 1 and 2 and F-N (4).
Same offence—Several trials—Section applies. See Note 4, Pt. 3.
Sections 32 and 33, Evidence Act. See Note 2, Pt. 1.
Section 428, sub-section (3), Sections 512, 509 and 510. See Note 2.

1. Legislative changes.

1. There is no difference between the corresponding Sections of the Codes of 1861 and 1872.
2. *Difference between the Codes of* 1872 *and* 1882 :—
   (*a*) The corresponding provision of the Code of 1872 applied to primarily *inquiries in cases triable by a Court of Session* (now Chapter XVIII) and was applied by another provision to warrant cases (now Chapter XXI). Section 353 of the Code of 1882 made the provision applicable also to trials and inquiries under Chapters XX, XXII and XXIII.
   (*b*) Under the Codes of 1861 and 1872 this provision applied only to the evidence of the *complainant* and the *prosecution witnesses*. Under the Code of 1882 this provision applied to *all* evidence.
   (*c*) There is no difference between the Codes of 1882 and 1898 in this respect.

2. Scope and applicability of the Section.

It is a general principle of law that all evidence in inquiries and trials should be taken in the *presence of the accused*. There are various provisions of the Code by which the presence of the accused may, under certain circumstances, be dispensed with. (*See* Sections 205 and 540-A.) This Section requires that in such cases the evidence shall be taken in the *presence of his pleader*.[1a]

The general rule stated in this Section is, however, not applicable where there is an *express provision to the contrary*.

Thus, an appellate Court may, under Section 428, sub-section 3, direct that the accused need not be present when additional evidence is taken. Similarly, where an accused person has absconded, the Court may, in his absence, take evidence under Section 512. Again when witnesses are examined on commission under the provisions in Chapter XL the accused need not be present.

Under Sections 32 and 33 of the Evidence Act, the statements of persons who cannot be called as witnesses are admissible in evidence.[1] Under Sections 509 and

Section 353—Note 2.

1a (1928) 1928 Pat 143 (143, 144) : 6 Pat 691 : 29 Cri L Jour 260, *Bijan* v. *Emperor*.
(1867) 8 Suth W R Cri 74 (78), *Queen* v. *Syed Hossein Ali*.

1. *See the following cases under Section* 32 *of the Evidence Act* :—
(1871) 3 N W P H C R 212 (213), *Queen* v. *Ujaril*.
(1901) 25 Bom 45 (48), *Imperatrix* v.

510 of this Code the deposition of a medical witness and his report are admissible in evidence without the medical officer being called. Similarly under the Extradition Act, 1870, the deposition or statements on oath taken in a Foreign State may, if duly authenticated, be received in evidence.[2] These provisions, however, are all exceptions to the general rule of evidence that all *evidence should be direct* (*See* Section 60 of the Evidence Act) and have no bearing on this Section.

3. "All evidence."

The words "all evidence" will include the evidence for the *defence* as well as evidence for the prosecution.[1]

See also Note 1.

As to whether the name, parentage, age, residence and profession given in the heading of the deposition form part of the deposition, *see* the undermentioned cases.[2]

4. "Shall be taken in the presence of the accused."

The Section is imperative that all evidence shall be taken in the presence of the accused, or in certain circumstances in the presence of his pleader. It is not sufficient under the Section to read out to a witness his previous deposition in a former case and asking him if the statements made therein are true;[1] nor is it suffi-

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Rudra.
(1902) 4 Bom L R 434 (435), *Emperor* v. *Rama.*
(1901) 6 Cal W N 72, *Emperor* v. *Mathura Thakur.*
(1882) 8 Cal 211 (213), *Empress* v. *Samiruddin.*
(1906) 5 Cri L Jour 427 (429) : 34 Cal 698, *Jatindra Nath Chatterjee* v. *Emperor.*
(1930) 1930 Cal 228 (229) : 31 Cri L Jour 916 : 1930 Cri Cas 196, *Tafiz Pramanik* v. *Emperor.*
(1870) 1870 Pun Re Cr No. 3, page 3 (8), *Crown* v. *Ghazee.*
(1886) 1886 Pun Re Cr No. 13, page 22 (22), *Abdul Jally* v. *Empress.*
(1887) 1887 Pun Re Cr No. 29, page 58 (58), *Zardal* v. *Empress.*
(1900) 1900 Pun Re Cr No. 9, page 21 (23), *Hashim* v. *Empress.*
(1886) 2 Weir 339 (339), *In re Singa.*
(1884) 2 Weir 750 (752), *In re Subba Revan.*
(1886) 2 Weir 753 (754), *In re Kusal Singh.*
(1914) 1914 Nag 70 (71) : 10 Nag L R 19 : 15 Cri L Jour 243, *Bhagwan* v. *Emperor.*
(1872-1892) 1872-1892 Low Bur Rul 157 (158), *Ram Loochun* v. *Empress.*

See also the following cases under S. 33 of the Evidence Act :—

(1919) 1919 All 351 (351) : 20 Cri L Jour 625, *Debi Singh* v. *Emperor.*
(1928) 1928 All 140 (141) : 50 All 113, *Narsingh Das* v. *Gokul Prasad.*
(1887) Ratanlal 347 (348, 349), *Empress* v. *Bhabhutgar.*
(1873) 20 Suth W R Cri 69 (69, 70), *Queen* v. *Mowjan.*
(1874) 21 Suth W R Cri 12 (12), *Queen* v. *Etwaree Dharee.*
(1913) 14 Cri L Jour 70 (71) : 18 Ind Cas 406 (Cal), *Ibrahim* v. *Emperor.*
(1929) 1929 Cal 822 (824) : 31 Cri L Jour 809 : 1929 Cri Cas 669, *Emperor* v. *C. A. Mathews.*
(1914) 1914 Lah 159 (161) : 15 Cri L Jour 62, *Daim* v. *Emperor.*
(1927) 1927 Lah 332 (333) : 8 Lah 570 : 28 Cri L Jour 451, *Lakat* v. *Emperor.*
(1933) 1933 Lah 561 (567) : 34 Cri L Jour 735 : 1933 Cri Cas 819, *Diwan Singh* v. *Emperor.*
(1868) 2 Weir 755 (755), *H. C. Proceedings, 19th August* 1868, *No.* 1,157.
(1916) 1916 Mad 851 (853) : 16 Cri L Jour 294 (296) : 39 Mad 449, *Annavi Muthirian* v. *Emperor.*
(1932) 1932 Mad 559 (560) : 33 Cri L Jour 738 : 1932 Cri Cas 589, *Muthiah Pillai* v. *Emperor.*
(1920) 1920 Nag 170 (171) : 16 Nag L R 30 : 21 Cri L Jour 486, *Mt. Ajodhi* v. *Emperor.*
(1922) 1922 Oudh 254 (255) : 25 Oudh Cas 142 : 24 Cri L Jour 828, *Dwarka Singh* v. *Emperor.*
(1924) 1924 Rang 209 (210) : 1 Rang 512 : 25 Cri L Jour 257, *Nga Nyo* v. *Emperor.*

2. (1911) 12 Cri L Jour 505 (507, 518) : 39 Cal 164, *In re Rudolph Stallmann.*

Note 3.

1. (1913) 14 Cri L Jour 287 (288) : 1912 Upp Bur Rul 152, *Nga Po Shein* v. *Emperor.*
2. (1904) 26 All 108 (118) : 31 I A 38 (P C), *Maqbulan* v. *Ahmad Husain.* (No.)
(1924) 1924 Cal 558 (560), *Lakshan Chandra Mandal* v. *Takim Dhali.* (No.)
(1928) 1928 Pat 420 (424) : 7 Pat 361 : 29 Cri L Jour 801, *Chotan Singh* v. *Emperor.* (Yes.)

Note 4.

1. (1870) 2 N W P H C R 100 (100), *Queen* v. *Halundar Doss.*
(1906) 4 Cri L Jour 89 (91) (Bom), *Emperor*

Sec. 353 Note 4

cient to read out to the accused the deposition of the complainant taken in the absence of the accused.[2] The examination of the witness must actually be made in the presence of the accused. It does not matter how often the same offence is the subject of a trial; every accused has a right to have the whole of the evidence given and recorded in his presence just as if the witness had never before given his testimony on the charge.[3] A contravention of the provisions of this Section is not a mere error, omission or irregularity and cannot be cured by Section 537.[4] In cross-

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v. *Ghanasham Ramchandra Mantri.*
(1895) Ratanlal 792 (792), *Empress* v. *Salu.*
(1868) 1 Beng L R 37 (38), *Queen* v. *Raj Krishna Mitter.*
(1864) Suth W R Gap Cri 1 (1), *Queen* v. *Sheik Kyamut.*
(1864) 1 Suth W R Cri 14 (14), *Queen* v. *Radhy.*
(1864) Suth W R Gap Cri 38 (38), *Queen* v. *Kanye Sheikh.*
(1868) 10 Suth W R Cri 56 (56), *In re Munger Bhooyan.*
(1869) 12 Suth W R Cri 3 (3, 5), *Queen* v. *Bishonath Pal.*
(1869) 12 Suth W R Cri 54 (55), *In re Kalikant Roy Chowdhry.*
(1870) 13 Suth W R Cri 21 (22), *Queen* v. *Hari Doss.*
(1871) 15 Suth W R Cri 6 (6), *In the matter of C. G. D. Betts.*
(1871) 16 Suth W R Cri 36 (37), *Queen* v. *Zoolfkar.*
(1874) 22 Suth W R Cri 33 (33), *Queen* v. *Bocha Chowkedar.*
(1876) 25 Suth W R Cri 14 (14), *Ali Meah* v. *The Magistrate of Chittagong.*
(1923) 1923 Cal 196 (197) : 50 Cal 223 : 24 Cri L Jour 198, *Mazahur Ali* v. *Emperor.*
(1925) 1925 Lah 19 (20) : 5 Lah 396 : 27 Cri L Jour 170, *Lal Singh* v. *Emperor.*
(1926) 1926 Lah 378 (379) : 27 Cri L Jour 555, *Ahman* v. *Emperor.*
(1933) 1933 Lah 231 (232) : 34 Cri L Jour 637 : 1933 Cri Cas 351, *Sukhdev Raj* v. *Emperor.*
(1899) 22 Mad 455 (456), *Queen* v. *Ayyakannu.*
(1899) 2 Weir 360 (360), *In re Duganna.*
(1868) 2 Weir 755 (755), *H. C. Proceedings, 19th August* 1868, *No.* 1157.
(1892) 5 C P L R 33 (34, 35), *Emperor* v. *Rampiare.*
(1872-1892) 1872-1892 Low Bur Rul 399 (399), *Nga Potum* v. *Empress.*
(1917) 1917 Low Bur 112 (113) : 17 Cri L Jour 512 (513), *Nga Thaku* v. *Emperor.*
(1928) 1928 Rang 284 (285) : 30 Cri L Jour 736, *Abdul Gaffor* v. *Govind Prasad.*
[See also (1866) 6 Suth W R Cri 7 (7), *Queen* v. *Kishen Dyal Aheer.*
(1872) 17 Suth W R Cri 5 (5), *Queen* v. *Wazira.*]

2. (1869) Ratanlal 24 (24), *Reg.* v. *Buldev Goomajee.*
(1911) 12 Cri L Jour 585 (587) : 36 Mad 457, *Jeremiah* v. *F. S. Vas.*

3. (1864) Suth W R Gap Cri 13 (13), *Queen* v. *Affazuddeen.*
(1874) 22 Suth W R Cri 38 (39), *Queen* v. *Mohun Banfer.*

4. (1928) 1928 Pat 143 (144, 145) : 6 Pat 691 : 29 Cri L Jour 260, *Bijan Singh* v. *Emperor.*
(1913) 14 Cri L Jour 287 (288) : 1912 Upp Bur Rul 152, *Nga Po Shein* v. *Emperor.*
(1906) 3 All L Jour 43*n* (43*n*), *Raja Ram* v. *Emperor.*
(1874) 21 Suth W R Cri 56 (56, 57), *Queen* v. *Lukhun Santhal.*
(1870) 2 N W P H C R 49 (50), *Queen* v. *Lalla Chowbey.*
(1882) 6 Bom 124 (125), *Empress* v. *Lakshman Bala.*
(1872) Ratanlal 66 (66), *Reg.* v. *Jetha Ganesh.*
(1906) 3 Cri L Jour 42 (43) (Bom), *Emperor* v. *Ningappa Sayadappa.*
(1867) 8 Suth W R Cri 17 (17), *Queen* v. *Rajcoomar Singh.*
(1868) 1 Beng L R Short Note 8 (8), *Bihooram* v. *Allaho Kolita.*
(1869) 11 Suth W R Cri 22 (22), *Queen* v. *Ramdhun Singh.* Committal quashed.
(1869) 11 Suth W R Cri 35 (35), *Queen* v. *Ram Das Boistab.*
(1876) 14 Suth W R Cri 25 (25), *Queen* v. *Chooramoni.*
(1871) 16 Suth W R Cri 40 (41), *Queen* v. *Grish Chuder.*
(1874) 21 Suth W R Cri 61 (63), *Queen* v. *Kassy Singh.*
(1875) 24 Suth W R Cri 76 (77), *Queen* v. *Russick Das.*
(1876) 25 Suth W R Cri 23 (24), *Queen* v. *Sanaoollah.*
(1901) 5 Cal W N 110 (113), *In re Surjya Narain Singh.*
(1893) 20 Cal 857 (866), *Girish Chunder* v. *Empress.*
(1867) 3 Mad H C R App 34*n* (34*n*).
(1925) 1925 Nag 457 (458) : 26 Cri L Jour 1289, *Narayan* v. *Chandrabhaga.*
(1927) 1927 Oudh 353 (353) : 1 Luck Cas 265 : 28 Cri L Jour 756, *Chhotelal* v. *Emperor.*
(1934) 1934 Mad 691 (692) : 1934 Cri Cas 1306 : 58 Mad 285, *K. Belligowder* v. *Emperor.* Commitment based on evidence recorded in absence of accused is illegal.

cases, and cases which are intimately connected with each other, a Court has no right to consider at all the evidence given in one case for the purpose of reaching his conclusions in the other. The two cases should be tried separately and determined on evidence recorded in each.[5] Where, however, more than one similar case is consolidated and evidence is recorded in one and used in the other with the consent of the accused, there is no contravention of this Section but only a contravention of the rule as to direct evidence which is curable under Section 537.[6] *See also* cases cited in Note 6, *infra*.

5. "When his personal appearance is dispensed with."

See Note 1, *ante*, and Notes to Section 540-A, *infra*.

6. Evidence in criminal cases—General.

See the undermentioned cases.[1]

(1890) 2 Weir 259 (260), *Re Chinnappan.* (Do.)

(1935) 1935 Oudh 488 (489) : 36 Cri L Jour 1198 : 1935 Cri Cas 1283, *Bishnath* v. *Emperor.* P. W.s examined-in-chief when accused was absent—Their cross-examination conducted in his presence—Case proved in cross-examination — Still trial is illegal. [See also (1876) 2 Cal 23 (30, 31), *Queen* v. *Bholanath Sen.*

(1881) 7 Cal 65 (69), *Empress* v. *Chandra Nath Sirkar.*

(1890) 17 Cal 642 (667), *Empress* v. *O'Hara.*

(1924) 1924 Lah 17 (18, 19) : 4 Lah 382: 25 Cri L Jour 377, *John Thomas Lyme* v. *Emperor.* Examination of witnesses— Procedure — Previous deposition read out—Illegality.

(1924) 1924 Lah 104 (105, 106): 4 Lah 376 : 25 Cri L Jour 68, *Allu* v. *Emperor.* When evidence in a case is treated as evidence in the counter-case, the procedure is illegal and not curable under S. 537.

(1927) 1927 Lah 781 (782) : 28 Cri L Jour 771, *Thakar Singh* v. *Emperor* (Do.)]

5. (1928) 1928 All 593 (593) : 50 All 457 : 30 Cri L Jour 337, *Sukhai Ahir* v. *Emperor.*

(1883) 13 Cal L R 275 (278, 280), *Chakowri* v. *Moti.*

(1924) 1924 Cal 813 (814) : 25 Cri L Jour 941, *Garibulla Akanda* v. *Sardar Akanda.*

(1900) 1900 Pun Re Cri No. 26, page 56 (56), *Rampat* v. *Empress.*

(1924) 1924 Lah 104 (105, 106) : 4 Lah 376 : 25 Cri L Jour 68, *Allu* v. *Emperor.*

(1925) 1925 Lah 149 (150) : 25 Cri L Jour 551, *Muhammad* v. *Emperor.*

(1928) 1928 Lah 380 (381) : 29 Cri L Jour 282, *Hayat* v. *Emperor.*

(1933) 1933 Mad W N 243 (244), *Krishna Pannadai* v. *Suryanarayana Asari.*

(1933) 1933 Mad 367 (369) : 56 Mad 159 : 1933 Cri Cas 550 : 34 Cri L Jour 175 (FB), *Mounagurusami Naicker, In re.*

6. (1926) 1926 Bom 231 (232) : 50 Bom 174 : 27 Cri L Jour 1335, *Emperor* v. *Harjivan Valji.*

(1930) 1930 Mad 505 (506) : 53 Mad 775 : 1930 Cri Cas 577: 31 Cri L Jour 1191, *Krishnayya Naidu* v. *Emperor.*

[See also (1928) 1928 All 593 (593, 595) : 50 All 457 : 30 Cri L Jour 337, *Sukhai Ahir* v. *Emperor.* Where parties consented to treat the evidence in one case as evidence in the other and no injustice followed from it, the trial is not bad.]

Note 6.

1. (1933) 1933 Pat 559 (560) : 1933 Cri Cas 1259, *Ramsewak Sahu* v. *Emperor.* Signature in language which expert cannot read or write—Opinion of expert is not of much value except by way of corroboration of other evidence.

(1916) 1916 Cal 912 (913) : 17 Cri L Jour 439, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Mon Mohan Roy.* Connected criminal appeals—It is irregular to make cross references in one case to evidence in other case.

(1928) 1928 Lah 34 (35) : 29 Cri L Jour 521, *Mahomed Khan* v. *Emperor.* Separate trials—Evidence must be separately recorded.

(1887) 14 Cal 358 (359, 360), *Bachu Mullah* v. *Sia Ram Singh.* Cross-cases arising out of same facts—Examining as witnesses in one case accused in other case—Course irregular but irregularity curable under S. 537.

(1915) 1915 Bom 14 (15) : 16 Cri L Jour 538, *Dosabhai J. Dhondi* v. *Emperor.* Trial of cross-complaints.

(1887) 9 All 609 (611), *Queen Empress* v. *Nandram.* Depositions in prior trial arising out of same facts read out with consent of accused and witnesses cross-examined—*Held*, that though course was irregular, irregularity was cured under S. 537.

(1916) 1916 Low Bur 20 (20) : 17 Cri L Jour 503, *Ram Sarup* v. *Emperor.* Two

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354.* In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

Manner of recording evidence outside presidency-towns.

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* (Code of 1882—S. 354—Same.)

(Code of 1872—S. 332.)

332. In inquiries and trials (other than summary trials) under this Act, the evidence of the witnesses shall be recorded by the Magistrate or Sessions Judge, as the case may be, in the following manner.

Manner of recording evidence.

(Code of 1861—Nil.)

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persons separately tried for same offence — Examination of one of them in the case against the other is irregular as it is likely to prejudice the Magistrate against him.

(1924) 1924 Lah 228 (229) : 24 Cri L Jour 415, *Narain Singh* v. *Emperor*. Several cases tried separately—Common witnesses not examined separately, but their evidence taken in one case read out to them in others with consent of accused's counsel and admitted as correct—*Held*, procedure though irregular did not prejudice accused and did not affect validity of trial.

(1928) 1928 Lah 69 (69) : 28 Cri L Jour 969, *Bhag Singh* v. *Emperor*. Merely recording statement that what the witness has to say is contained in a document which is filed as an exhibit is not enough.

(1925) 1925 Lah 19 (20): 5 Lah 396: 27 Cri L Jour 170, *Lal Singh* v. *Emperor*. (Do.)

(1928) 1928 Lah 152 (153): 29 Cri L Jour 200, *Sirajud-Din* v. *Emperor*. Recording of evidence piece-meal not proper.

(1917) 1917 Oudh 200 (200): 19 Oudh Cas 239 : 18 Cri L Jour 105, *Baldeo Prasada* v. *Emperor*. Medical witness, statement of—Recording of statement in commitment proceedings—Careless mode of recording condemned.

(1919) 1919 Cal 862 (871) : 19 Cri L Jour 753, *Grande Venkataratnam* v. *Corporation of Calcutta*. Expert witness — Evidence—Contradiction by reference to books cannot be allowed unless the relevant passages are put to the witness and he is given an opportunity to explain.

(1867) 1867 Pun Re Cri No 17, page 35 (36), *The Crown* v. *Sain Dass*. Conviction and sentence on evidence recorded by a Subordinate Magistrate is illegal.

(1866) 1866 Pun Re Cri No 65, page 70 (70), *The Crown* v. *Topun Mull*. Judge cannot take evidence by proxy.

(1921) 22 Cri L Jour 669 (670): 63 Ind Cas 461 (462) (Lah), *Wadhawa Singh* v. *Emperor*. Witnesses, whether they are Government officers or not, should give their evidence in the witness-box or other place in the Court room which is set apart for this purpose and it is not desirable that they should give their evidence on the dais by the side of the Magistrate.

(1883) 1883 All W N 145 (146), *Empress* v. *Gayadin*. Number of accused committed to Sessions—Magistrate must analyse evidence in respect of each accused.

(1918) 1918 Bom 212 (213, 214): 19 Cri L Jour 593, *Hari Ramji Pavar* v. *Emperor*. Evidence of child witnesses —Evidence of witnesses not competent to understand nature of oath or solemn affirmation — Necessity for administering oath—Oath when may be dispensed with — Precautions to be taken.

(1933) 1933 All 690 (692): 55 All 1040: 34 Cri L Jour 967 : 1933 Cri Cas 1202, *S. H. Jhabwala* v. *Emperor*. Conspiracy trials—Evidence in.

(1926) 1926 Bom 245 (245): 27 Cri L Jour 1289, *Mangru Feku, In re*. Local inquiry—Procedure at—Questioning persons without recording their evidence or allowing cross-examination is bad.

(1887) 1887 Pun Re Cri No 41, (p. 99), *Hassan Khan* v. *Empress*. Examination of pardanashin ladies as witnesses—Procedure.

Synopsis.

1. "Other than summary trials."

See Note 3 to Section 355.

2. "Other than a Presidency Magistrate."

As to the manner in which the evidence of the witnesses is to be recorded by or before a Presidency Magistrate, *see* Section 362, *infra*.

3. "In the following manner."

The words "*in the following manner*" refer to the manner as provided in Sections 355 to 361, *infra*.[1] If a person is before the Court as a *witness*, his evidence must be recorded only as the law directs, *viz*. under the provisions of this and the following Sections.[2]

355.* (1) In summons cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of Section 260, clauses (*b*) to (*m*), both inclusive, when tried by a Magistrate of the first or second class, and in all proceedings under Section 514 (if not in the course of a trial), the Magistrate

Record in summons cases and in trials of certain offences by first and second class Magistrates.

*** (Code of 1882—S. 355.)**

355. In summons-cases tried before a Magistrate, other than a Presidency Magistrate, and in cases of the offences mentioned in S. 260, Cls. (*b*) to (*k*), both inclusive, when tried by a Magistrate of the first or second class, the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

Record in summons-cases, and in trials of certain offences by first and second class Magistrates.

(Sub-sections 2 and 3 were the same as those of the 1898 Code.)

(Code of 1872—S. 333, Para. 1.)

333. In summons cases tried before Magistrates, and in cases of the kind referred to in section two hundred and twenty two, † when tried by a Magistrate of the first or second class, otherwise than at a summary trial, the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. * * * *

In summons-cases, and in trials by Magistrates of the first and second class of certain offences.

(Paras. 2 and 3 were the same as sub-sections 2 and 3 of 1898 Code.)

† [1872—S. 222; 1898—S. 260.]

(Code of 1861—S. 267.)

267. The Magistrate shall make a memorandum of the substance of the evidence of each witness, as the examination of the witness proceeds. The memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record. If the Magistrate shall be prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record. * * * * * * *

How the evidence is to be recorded.

Section 354—Note 3.

1. (1926) 1926 Pat 58 (59) : 26 Cri L Jour 1475, *Emperor* v. *Phagunia*. (*S.* 360).
2. (1867) 8 Suth W R Cri 11 (12), *Queen* v. *Phoolchand*.

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shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

Synopsis.

Other Topics.

Different modes of procedure in taking evidence under the Code. See Note 2.
Inapplicable to offences under Section 261, Clause (b). See Note 3, F-N (1).
Inapplicability to summary trials. See Note 3, Pt. 1.
Language of memo of evidence. See Note 4, Pt. 3.
Memo of evidence need not be read over. See Note 4, Pt. 4.
Memo of evidence—Not vague but full. See Note 4, Pts. 1 and 2.
Notes of evidence in summary trials—If part of record. See Note 3, Pts. 2 and 2a.
Omission to sign vitiates trial. See Note 6, Pt. 1.
Record "one witness deposed exactly as another" bad. See Note 5, Pt. 1.
Sections 263 and 264 not controlled by this Section. See Note 3, F-N (1).
Theft of value of less than Rs. 50. See Note 3, Pt. 3.
Theft with prior conviction. See Note 3, Pt. 4.

1. Legislative changes.

Difference between the Codes of 1861 *and* 1872:—

The provisions of the corresponding Section in the Code of 1861 applied only to summons cases. The Code of 1872 extended the provisions also to cases of the kind referred to in Section 222 of that Code (now Section 260).

Difference between the Codes of 1872 *and* 1882:—

The words "otherwise than at a summary trial" after the words "Magistrate of the First or Second Class," occurring in the Code of 1872, were omitted in Section 355 of the Code of 1882, as they were thought to be redundant, since those words already occurred in Section 354.

Difference between the Codes of 1882 *and* 1898:—

1. The words "Clauses (*b*) to (*m*)" were substituted for "Clauses (*b*) to (*k*)," in consequence of offences added in Section 260, *supra*.
2. The provisions of this Section have been extended also to proceedings under Section 514.

2. Scope of the Section.

There are three different kinds of procedure prescribed by the Code in the matter of evidence in the trial of cases:—

1. In summary trials (Sections 260 to 265) *no evidence* need be recorded by the Magistrate.[1]

Section 355—Note 2.

1. (1935) 1935 Rang 106 (107): 1935 Cri Cas 315: 13 Rang 225: 36 Cri L Jour 892, *Emperor* v. *Maung Po Shaw*. S. 355 has no application to summary trial of a case under Ch. XXII of the Code.

2. In *regular* trials of summons cases by a Magistrate other than a Presidency Magistrate and of cases of offences mentioned in Section 260, Clauses (*b*) to (*m*), and in proceedings under Section 514, the Magistrate shall make a *memorandum of the substance of the evidence of each witness* as his examination proceeds (Section 355).
3. In *regular trials* of cases not falling within this Section, the procedure prescribed by Sections 356 to 365 should be followed.

3. Sub-section 1 of Section 260, Clauses (b) to (m).

Section 354, *ante*, makes it clear that this and the following Sections do not apply to *summary* trials.[1] Thus, it does not apply to cases of the offences specified in sub-section 1 of Section 260, Clauses (*b*) to (*m*), if tried *summarily* and therefore in such cases the Magistrate is not bound to make any memorandum of the substance of the evidence of each witness. Even if he makes such a memorandum, the notes do not form part of the record.[2] The High Court of Calcutta has, however, held that such memorandum, if taken, would form part of the record and cannot be destroyed by the Magistrate.[2a] An offence of theft under Sections 379, 380 and 381, where the value of the property stolen does not exceed Rs. 50-0-0, is one falling under Section 260, Clause (d), and when tried regularly, is governed by this Section.[3] But a charge of theft under the said Sections, combined with a charge of previous conviction for a similar offence, has been held to be a *different offence* not falling within Clause (d).[4] Neither a summary procedure nor this Section will apply to such a case.

4. "Shall make a memorandum of the substance of the evidence."

This Section requires only a memorandum of the *substance* of the evidence given. Such a memorandum should not, however, be inadequate or vague,[1] but must be full and faithful.[2]

The Code is silent as to the *language* in which such a memorandum is to be recorded; consequently, if a Subordinate Magistrate, not authorised to take down evidence in English, records the memorandum of the substance of such evidence in English, there is nothing illegal in it.[3]

The memorandum under this Section need not be read over to the witnesses inasmuch as it is not *evidence proper*. Section 360 does not apply to such cases.[4]

5. "Each witness."

The direction of the Section, that the Magistrate must make "a memorandum

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(1934) 1934 Bom 157 (158): 58 Bom 298: 35 Cri L Jour 841 : 1934 Cri Cas 544, *Tippanna Koutya Mannavaddar, In re.* (Do.)

Note 3.

1. (1905) 2 Cri L Jour 375 (376): 3 Low Bur Rul 3, *Kuchi* v. *Emperor.*
   (1927) 1927 Bom 426 (427, 428): 28 Cri L Jour 537, *Chimanlal Manecklal* v. *Emperor.* S. 355 does not apply to offences coming under S. 261, Cl. (b).
   (1927) 1927 All 124 (124, 125): 49 All 261 : 28 Cri L Jour 97, *Mantoo Tewari* v. *Emperor.* The provisions of Ss. 263 and 264, in cases in which these Sections are applicable, are not controlled by S. 355.
2. (1927) 1927 All 124 (124, 125): 49 All 261 : 28 Cri L Jour 97, *Mantoo Tewari* v. *Emperor.*
2a (1921) 1921 Cal 165 (165): 48 Cal 280: 22 Cri L Jour 462, *Satish Chandra Mitra* v. *Manmath Nath Misra.*
3. (1923) 1923 All 432 (433), *Emperor* v. *Bulakhi.*
4. (1878) Weir 3rd Edition 921 (921). The same case is reported in (1878) 2 Weir 324 as High Court Proceedings 23rd Sept. 1878, No. 1537.
   (1880) 2 Weir 432 (433). *High Court Proceedings, 25th October* 1880, No. 2110.

Note 4.

1. (1883) 5 All 224 (226), *Laraiti* v. *Ram Dial*
2. (1924) 1924 Cal 541 (541): 24 Cri L Jour 688, *Ganoda Dassya* v. *Srimanta Ghosh.*
3. (1896) 19 Mad 269 (270), *Empress* v. *Gopal Goundan.*
4. (1894) 2 Weir 433 (433), *High Court Proceedings, 31st October* 1894, No 20.

Sec. 355 Notes 5—6

of the substance of the *evidence of each witness*," is not complied with by a mere statement that a witness deposed exactly as another.[1]

See also Section 356, *infra*.

6. "Shall sign the same."

Sub-section 2 requires that the Magistrate should sign the memorandum of the substance of evidence recorded by him. An omission to do so vitiates the trial.[1]

Sec. 356

356.* (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge.

Record in other cases outside presidency-towns.

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* **(Code of 1882—S. 356**—Same as that of 1898 Code.)

(Code of 1872—S. 334, Paras. 1, 2 and 3.)

334. In all other cases before Magistrates, and in all proceedings before Courts of Session, the evidence of each witness shall be taken down in writing in the language in ordinary use in the district in which the Court is held, by or in the presence and hearing, and under the personal direction and superintendence of the Magistrate or Sessions Judge, and shall be signed by the Magistrate or Sessions Judge.

In all other cases before Magistrates, and in all proceedings before Courts of Session.

When the evidence of a witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand: and an authenticated translation of the same, in the language in ordinary use in the district in which the Court is held, shall form part of the record.

Evidence in English.

If the accused person be an European British subject, or be familiar with the English language, no translation shall be necessary.

(Paras. 4 and 5 were the same as sub-sections 3 and 4 of 1898 Code.)

(Code of 1861—S. 195.)

195. The evidence of such witness shall be taken down in writing in the language in ordinary use in the district in which the Court is held, by or in the presence and hearing and under the personal direction and superintendence of the Magistrate, and shall be signed by the Magistrate. When the evidence of a witness is given in English, the Magistrate may take it down in that language in his own hand, and an authenticated translation of the same in the language in ordinary use in the District in which the Court is held shall form part of the record. In cases in which the evidence is not taken down in writing by the Magistrate, he shall be bound as the examination of each witness proceeds, to make a memorandum of the substance of what such witness deposes, and such memorandum shall be written and signed by the Magistrate with his own hand, and shall be annexed to the record. If the Magistrate shall be prevented from making a memorandum as above required, he shall record the reason of his inability to do so.

Mode and language in which the evidence is to be recorded.

(1923) 1923 Pat 157 (157): 23 Cri L Jour 120, *Mohammad Ishaq* v. *Emperor*.

Note 5.

1. (1875) 24 Suth W R Cri 76 (77), *Queen* v. *Russick*.

Note 6.

1. (1922) 1922 Pat 5 (7): 23 Cri L Jour 114, *Balkesar Singh* v. *Emperor*.

Sec. 356

(2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

Evidence given in English.

(2-A). *When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.*

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

Memorandum when evidence not taken down by Magistrate or Judge himself.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

Synopsis.

Other Topics.

Attestation in presence of the accused. See Note 8, Pt. 3.
Curable defect under S. 537. See Note 5, Pt. 3.
Deposition destroyed—Value of memo. See Note 5, Pt. 5.
Desirability of shorthand notes in Sessions. Note 11, Pt. 5.
Evidence taken after discharge of assessors. See Note 3, F-N (1).
Failure to decide claim as European British subject. See Note 3, F-N (1).
Irregularity in memo of evidence. See Note 11, Pts. 3 and 4.
Prior depositions exhibited in *de novo* trials—Incurable even by consent. See Note 3, Pt. 2.
Proceedings under S. 145. See Note 2, F-N (1).
Provision mandatory. See Note 5, Pt. 1.
Record "as last witness deposed." See Note 6, Pt. 2.
Record "corroborates" prior witness. See Note 6, Pt. 3.
Record in different language — Effect. See Note 5, Pt. 2.
Record of medical witness as detailed in certificate—Improper. See Note 6, Pt. 1.
Record piece-meal—Irregular. See Note 6, Pt. 4.
Refusal to sign—No offence. See Note 8, Pt. 4.
Retrials and *de novo* trials. See Note 3, Pt. 1.
Signature by presiding Judge and not all Judges. See Note 8, Pt. 2.
Signature of deponent. See Note 8, Pt. 4.
Sub-section 3 is supplementary to Sub-section 1 and not to override it. See Note 11, Pt. 2.
Vernacular record more reliable than notes. See Note 5, Pt. 4.
Want of sanction or complaint under S. 195. See Note 3, F-N (1).

Sec. 356 Notes 1—5

1. Legislative changes.

1. There was practically no difference between the corresponding Sections of the Codes of 1861 and 1872.
2. *Difference between the Codes of* 1872 *and* 1882 :—
   The provisions of this Section were made applicable to "all inquiries under Chapters XII and XVIII."
3. The Section remained the same in the Code of 1898.
4. *Change made in* 1923 :—
   Sub-section 2-A was newly added.

2. Scope of the Section.

Section 355, *ante*, provides for the manner in which evidence is to be recorded in certain specified cases. This Section provides for the manner of recording of evidence in all *other trials* before Magistrates and Courts of Session and in all inquiries under Chapters XII[1] and XVIII.

3. "In all other trials."

The procedure enacted in this Section is applicable also to re-trials and *de novo* trials.[1] When, in a trial *de novo*, the depositions of witnesses examined at the previous trial were exhibited without the witnesses being examined *de novo*, it was held that the procedure vitiated the proceedings and that even the consent of the accused person would not cure the irregularity.[2]

4. Proceedings for security for good behaviour.

An inquiry in a proceeding for demanding security for good behaviour should, under the provisions of Section 117, be conducted and evidence recorded as in warrant cases. The manner in which evidence is to be recorded in warrant cases is that prescribed by this Section and, consequently, evidence in inquiries under Section 117, on an order for security for good behaviour, should be taken in the manner prescribed by this Section.[1]

5. Record of evidence—Sub-section 1.

Under this Section the entire evidence must be recorded fully,[1a] either by the Magistrate himself or by somebody else under his direction and in his presence,

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Section 356—Note 2.

1. (1932) 1932 Sind 145 (146) : 1932 Cri Cas 681 : 26 Sind L R 353 : 34 Cri L Jour 216, *Natho Khan* v. *Emperor.*
   (1894) 21 Cal 727 (730), *Bathoo Lal* v. *Domi Lall.*
   (1903) 30 Cal 508 (514), *Surjya Kanta Acharjee* v. *Hem Chander Choudhry.*
   (1925) 1925 Cal 822 (826) : 52 Cal 721 : 26 Cri L Jour 1194, *Narendra Chandra Rudra Pal* v. *Sabarali Bhuiya.* Inquiry under S. 145.
   (1925) 1925 Oudh 286 (286) : 26 Cri L Jour 70, *Chowdhuri Mohammad Ayub* v. *Chowdhuri Sarfaraz.*
   (1873) 20 Suth W R Cri 14 (14), *Khettomony Dasi* v. *Sreenath Sirkar.*
   (1873) 11 Ben L R App 5 (6), *Khettur Moonee Dassee* v. *Sreenath Sirkar.*
   (1915) 1915 Cal 664 (665): 16 Cri L Jour 192 (192) : 42 Cal 381, *Sadananda Mandal* v. *Krista Mandal.*

Note 3.

1. (1882) 4 All 141 (145), *Empress* v. *Berril.* Accused claiming to be tried as European British subject — Trial without determining the point—No jurisdiction.
   (1883) 15 All 136 (137), *Empress* v. *Ramlal.* Recording of evidence by Sessions Court after discharge of the assessors.
   (1875) 24 Suth W R Cri 64 (64), *In re Edoo Khansamah.* Want of sanction under S. 195 (now written complaint).
   (1880) 5 Cal 121 (123, 124), *Empress* v. *Chunder Nath Dutt.*
2. (1923) 1923 Mad 32 (33) : 46 Mad 17 : 23 Cri L Jour 748, *K. K. Ummar Maji, In re.*

Note 4.

1. (1925) 1925 Cal 720 (721) : 52 Cal 632 : 26 Cri L Jour 1240, *Sanatan Bhattacharya* v. *Emperor.*

Note 5.

1a (1922) 1922 Pat 40 (41) : 23 Cri L Jour 218, *Lachmi Lal* v. *Emperor.*

in the language of the Court. This provision is mandatory and an omission to record the evidence in the manner provided is a material irregularity sufficient to set aside the proceedings.[1] But where evidence is recorded but not in the language of the Court, the defect "is merely an irregularity and not an illegallity which would vitiate the trial. The essence of the rule contained in sub-section 1 is the taking down in writing of the evidence of each witness and not the taking down in writing of the same in the *language* of the Court as is shown by the provisions of Section 357, *infra* under which, if the Local Government so directs, the evidence may be taken down in the mother tongue of the Judge or in English."[2] So, where the error is only one of procedure and does not go to the root of the trial or prejudice the accused or occasion a failure of justice, it is cured by Section 537.[3]

Generally speaking where evidence is given by a witness, in his own language, the vernacular record is always more reliable and entitled to greater weight than the memorandum which the Judge makes in English.[4]

Where, however, the deposition taken down in the language of the Court is destroyed and the memorandum in English made by the Magistrate under sub-section 3, is very full and careful, a conviction based on such a memorandum is not invalid.[5]

6. Evidence of each witness shall be taken.

Taking down evidence means, taking the statement of a witness *in full as he deposes.* Therefore, where a Magistrate in recording the evidence of a medical witness, instead of taking down his statements, simply recorded that the injuries on the accused were fully detailed in the medical certificate the procedure is improper.[1] The evidence of each witness must be taken as the examination proceeds; and this requirement is not complied with by a mere record that a witness "deposes as the last witness did"[2] or "corroborates" another witness.[3]

The practice of recording evidence piece-meal and not at a stretch is highly irregular.[4]

7. Language of the Court.

The language of the Court is that determined by the Local Government under Section 558, *infra.*

1. (1915) 1915 Cal 664 (665) : 16 Cri L Jour 192 (192) : 42 Cal 381, *Sadananda Mandal* v. *Krista Mandal.*
   (1890) 1890 All W N 164 (165), *Natai Lal* v. *Anant Ram.*
   (1891) 1891 All W N 145 (145), *Empress* v. *Barmajit.*
   (1919) 1919 All 64 (64) : 21 Cri L Jour 28 : *Udit Narain* v. *Emperor.*
   (1917) 1917 Pat 41 (41) : 19 Cri L Jour 235, *Janki Prasad* v. *Emperor.*
   [See (1866) 1866 Pun Re Cri No. 65, (p. 70), *The Crown* v. *Topun Mull.* Conviction and sentence by District Magistrate on investigation by a Subordinate Magistrate is illegal.]
2. (1903) 6 Oudh Cas 73 (74), *Harbakhsh Singh* v. *Emperor.*
3. (1931) 1931 All 2 (2) : 1931 Cri Cas 2 : 32 Cri L Jour 368, *Sankatha Misir* v. *Bishwanath.*
   (1931) 1931 All 3 (6) : 1931 Cri Cas 3 : 53 All 172 : 32 Cri L Jour 372, *Kallu* v. *Bashiruddin.*
   (1932) 1932 Sind 145 (146) : 1932 Cri Cas 681 : 26 Sind L R 353 : 34 Cri L Jour 216, *Nathokhan* v. *Emperor.*
4. (1923) 1923 Lah 167 (168) : 24 Cri L Jour 625, *Sadhu Singh* v. *Emperor.*
5. (1883) 1883 All W N 226 (226), *Empress* v. *Ashiq Husain.*

Note 6.

1. (1928) 1928 Lah 69 (69) : 28 Cri L Jour 969, *Bhag Singh* v. *Emperor.*
2. (1863) 1 Bom H C R Crown Cas 91 (92), *Reg.* v. *Byha valad Surjim.*
   (1864) 1864 Suth W R Gap Cri 18 (18), *Queen* v. *Muttee Nushyo.*
3. (1900-02) 1900-02 Low Bur Rul 238 (241), *Chit Tun* v. *The Crown.*
   (1899-1900) 1899-1900 Low Bur Rul 626 (627), *Nga Ngyin Byu* v. *Empress.*
   (1915) 1915 Cal 558 (562) : 16 Cri L Jour 424 (429) : 42 Cal 313, *H. Meredith* v. *Sanjibani Dassi.*
4. (1918) 1918 Cal 588 (590) : 18 Cri L Jour 609 (611), *Mahomed Ibrahim* v. *Emperor.*
   (1928) 1928 Lah 152 (153) : 29 Cri L Jour 200, *Sirajuddin* v. *Emperor.*

Sec. 356 Notes 8—11

8. Shall be signed.

The presiding officer of the Court must sign the deposition of the witness examined by him. The object is to ensure the accuracy of the record.[1]

Where the Court is composed of more than one Judge, it is not necessary that all the Judges should sign. It is enough if the presiding Judge signs it.[2]

There is no provision of law which makes it obligatory on the Court to attest the deposition in the *presence of the accused*, though it is desirable that the depositions should be taken and attested in the presence of the accused and a few apt words written on the face of the deposition to make it apparent that this has been done.[3] *See* Section 509, *infra*, which makes such a thing obligatory for the purpose of that Section.

The signature of the *deponent* is not made compulsory though it is desirable that such signatures also should be obtained. However, a refusal to sign a deposition is not an offence under Section 180 of the Penal Code.[4]

9. Record of oath.

There is nothing in the Code or elsewhere which requires a Court examining a witness to record the fact that the oath was administered to him. Where the record does not show that the oath was administered to a witness, the reasonable presumption in the absence of any suggestion to the contrary, would be that proper procedure was followed and the oath duly administered.[1]

10. Sub-section 2-A.

This sub-section was newly added in 1923. The reason is thus stated in the statement of objects and reasons :

"Section 356 does not provide for evidence being taken down in any other language than that of the Court, or, if the language of the Court is not English, in English. The result is a certain loss of accuracy, whenever evidence is given in a third language, as it has to be translated into and taken down in the language of the Court or in English. The object of the amendment is to secure greater accuracy and to avoid waste of time in translation."[1]

11. Sub-section 3.

The provisions of this sub-section apply only to cases in which the evidence recorded under sub-section 1 is not recorded in the Magistrate's own hand.[1] It is supplementary to the provisions in sub-section 1 and cannot override the provisions therein.[2] Where, therefore, there is only a memorandum in English, and such a memorandum is not made as the examination of each witness is proceeding and it is not signed by the Judge, the irregularity is so serious that the conviction will be quashed.[3] But where the evidence is recorded in the language of the Court and the Magistrate does not make a memorandum in English, the failure is only an irregularity which is curable by Section 537.[4]

Note 8.

1. (1928) 1928 Lah 125 (127) : 29 Cri L Jour 212, *Taj Mohammad* v. *Emperor.*
   Sel Cas 192 (Oudh), *Queen-Empress* v. *Nanhu.* Mere initialling is not signing.
2. (1928) 1928 Lah 125 (127) : 29 Cri L Jour 212, *Taj Mohammad* v. *Emperor.*
3. (1888) 10 All 174 (178), *Empress* v. *Pohp Singh.*
4. (1871) 1 Weir 112 (113), *High Court Proceedings 9th January* 1871, *No.* 40.

Note 9.

1. (1914) 15 Cri L Jour 19 (20) : 35 All 575, *Syed Ahmed* v. *Emperor.*

Note 10.

1. Statement of Objects and Reasons, 1921.

Note 11.

1. (1915) 1915 Cal 664 (665) : 16 Cri L Jour 192 (192) : 42 Cal 381, *Sadananda Mandal* v. *Krista Mandal.*
2. (1915) 1915 Cal 664 (665) : 16 Cri L Jour 192 (192) : 42 Cal 381, *Sadananda Mandal* v. *Krista Mandal.*
3. (1891) 1891 All W N 145 (145), *Empress* v. *Barmajit.*
4. (1928) 1928 Oudh 112 (112) : 29 Cri L Jour 70, *Surman Singh* v. *Emperor.*
   [See also (1934) 1934 Cal 636 (637,

The Calcutta High Court has suggested in the following case[5] that provisions should be made for recording full and accurate shorthand notes of proceedings at Sessions trials. **Sec. 356 Note 11**

357.* (1) The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates, the evidence of each witness shall, in the cases referred to in Section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court. **Sec. 357**

Language of record of evidence.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record:

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother-tongue.

Synopsis.

Scope of the Section. Note No. 1

Other Topics.

Authority, personal and local. See Note 1, Pt. 2.

Transfer to another district without authority—Effect. See Note 1, Pt. 3.

1. Scope of the Section.

This Section applies only to evidence taken under Section 356, *ante*.[1] The authority conferred under this Section is personal to the particular officer on whom it is conferred and is in force only while he is in the district or part of the district in which it is conferred.[2] But where such an officer is transferred to another district and he takes down depositions in his own handwriting without

* **(Code of 1882—S. 357**—Same.)

(Code of 1872—S. 335.)

Materially the same as that of 1898 Code, except the proviso which ran :—

Provided that, if the vernacular language of the Sessions Judge or Magistrate be not English or the language in ordinary use in the district in which the Court is held, the Local Government may direct him to take down the evidence in the English language, or in the language in ordinary use in the district in which the Court is held, instead of his own vernacular.

(Code of 1861—S. 196—Materially same as that of 1872 Code.)

638) : 1934 Cri Cas 929 : 61 Cal 399 : 35 Cri L Jour 1479, *Nayeb Shana* v. *Emperor*. Failure to make a memorandum under this sub-section was held only an irregularity.]

5. (1924) 1924 Cal 257 (288) : 25 Cri L Jour 817 (F B), *Emperor* v. *Barendra Kumar Ghose*.

Section 357—Note 1.

1. (1896) 19 Mad 269 (270), *Queen* v. *Gopal Goundan*.

2. (1869) 2 Weir 434 (434), *H. C. Proceedings, 25th Nov.* 1869, No 2330.

Sec. 357 Note 1

authority for that district, and commits the accused, the commitment, although irregular, is not invalid unless the accused is prejudiced thereby.[3]

Sec. 358

Option to Magistrate in cases under Section 355.

358.* In cases of the kind mentioned in Section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in Section 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to in Section 357, in the manner provided in the same Section.

Synopsis.

"If he thinks fit." Note No. 1

1. "If he thinks fit."

Even in cases of the kind specified in Section 355, *ante*, the Magistrate may take down the evidence in the manner mentioned in Section 356 *if he thinks fit* to do so, as for example, where it appears that a witness is giving false evidence and that it is likely to be necessary to start criminal proceedings against him.

Sec. 359

Mode of recording evidence under Section 356 or Section 357.

359.† (1) Evidence taken under Section 356 or Section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

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* (Code of 1882—S. 358 and Code of 1872—S. 336—Same.)

(Code of 1861—S. 268.)

Manner of recording evidence in certain cases.

268. In any case in which the Magistrate shall consider it necessary it shall be competent to him, instead of taking down merely the substance of the evidence of any witness, to take down the evidence of any witness in the manner provided in Section 195 or in the manner provided by Section 196 of this Act if within the jurisdiction of such Magistrate the local Government shall have made an order as provided in that Section. In any such case the provisions of Sections 199 and 200 shall be applicable to the evidence so taken.

† (Code of 1882—S. 359—Same.)

(Code of 1872—S. 338.)

Form of record of evidence.

338. The evidence taken under Section 334 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

It shall be in the discretion of the Magistrate or Sessions Judge to take down, or cause to be taken down, any particular, question and answer, if there appears any special reason for so doing, or if any person who is a prosecutor or a person accused, or his counsel or agent, requires it.

(Code of 1861—S. 198—Same as in 1872 Code.)

(1883) 2 Weir 434 (435), *In re Chathanadiyil Kelu Nayar.*

3. (1883) 2 Weir 434 (435), *In re Chathanadiyil Kelu Nayar.*

Synopsis.

Scope of the Section. Note No. 1

Other Topics.

Evidence in first person. See Note 1, Pt. 2.
Paraphrase of evidence. See Note 1, Pt. 1.
Record of questions and answers by Judge. See Note 1, Pt. 3.
Verbatim record of question and answer. See Note 1, Pt. 2.

1. Scope of the Section.

This Section prescribes the mode of recording evidence under Sections 356 and 357. It directs that the evidence shall ordinarily be taken down in the form of a *narrative*. In doing so, the Judge thould adhere as far as possible to the words actually used either in the question or in the answer given by the witness. The provisions of law cannot be said to be complied with by recording a *paraphrase* of the evidence given by the witness.[1] The ordinary and proper and convenient way of recording the evidence is to take it down in the first person exactly as spoken to by the witness.[2]

The Judge is not bound to make *verbatim* record of any particular questions and answers. It is left to the discretion of the Judge, if either side specially requests him to do so.

A Judge may also himself question the witness and record his question and answer under Section 165 of the Evidence Act, but it should be exercised with discretion and within limits as it is unfair to the accused to anticipate or break the thread of his cross-examination.[3]

360.* (1) **Procedure in regard to such evidence when completed.** As the evidence of each witness taken under Section 356 or Section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

* **(Code of 1882—S. 360—Same.)**

(Code of 1872—S. 339.)

339. As the evidence of each witness, taken under Section three hundred and thirty-four, is completed it shall be read over to the witness in the presence of the accused person, if in attendance, or of his agent, when his personal attendance is dispensed with and he appears by agent, and shall, if necessary, be corrected.

Procedure in regard to evidence when completed.

If the witness deny the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

If the evidence be taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the witness may require his evidence as taken down to be interpreted to him in the language in which it was given, or in a language which he understands.

(Code of 1861—S. 198—Same as that of 1872 Code.)

Section 359—Note 1.

1. (1905) 2 Cri L Jour 133 (142) (Rang), *Nga Saw* v. *Emperor*.
(1899-1900) 1899-1900 Low Bur Rul 626 (627), *Nga Ngyin Byu* v. *Empress*.
[See also (1900) 3 Oudh Cas 72 (77, 78), *Shankar* v. *Empress*.]

2. (1871) 16 Suth W R Cr 36 (37), *Queen* v. *Zoolfakar Khan*.
(1883) 1883 All W N 12 (12), *Empress* v. *Balwant Singh*.

3. (1905) 2 Cri L Jour 133 (143, 144) (Rang), *Nga Saw* v. *Emperor*.

Sec. 360 Note 1

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

Synopsis.

Other Topics.

Accused not entitled to suggest corrections. See Note 2, Pt. 4 ; Note 4, Pt. 4.
Applicability to Defence of India Act, 1915. See Note 2, Pt. 5.
Applicability to Chapters 8 & 12. See Note 4, Pts. 5 and 6.
Consent of accused immaterial. See Note 2, Pt. 2.
Deposition not read over—Prosecution. See Note 8, Pts. 3 to 6.
Failure to read over. See Note 8, Pt. 2 and F-N (2).
Handing over deposition — Insufficient. See Note 3, Pt. 4.
Interpretation to accused. See Note 7, Pt. 3.
Interpretation without reading over. See Note 7, Pt. 2.
Not to be read over as each sentence is recorded. See Note 5, Pt. 3.
Object. See Note 2, Pts. 3 and 4.
Presence and not hearing. See Note 4, Pt. 4.
Prosecution of witness for perjury. See Note 8, Pt. 8.
Reading over after all witnesses are examined. See Note 5, Pts. 1 and 2.
Reading over—Before vakil of one of several accused. See Note 4, Pt. 1.
Reading over during examination of another witness. See Note 3, Pt. 5 ; Note 8, F-N (4).
Reading over during midday interval. See Note 5, F-N (1).
Read over after cross-examination on another day. See Note 5, Pt. 4.
Read over in absence of accused. See Note 8, F-N (4).
Record of 'read over.' See Note 3, Pts. 1 and 2 ; Note 8, Pt. 7.
Remand for not reading over. See Note 8, F-N (1).
Section if mandatory. See Note 7, Pt. 1; Note 2, Pt. 1 ; Note 3, Pt. 3 and Note 8.
Swearing interpreters. See Note 7 and S. 543.
Trial under Section 211, I. P. C. See Note 8. F-N (3).

1. **Legislative changes.**

1. There was no difference between the corresponding Sections of the Codes of 1861 and 1872.
2. *Difference between the Codes of* 1872 *and* 1882:—
   (*a*) The words "or of his agent, when his personal attendance is dispensed with and he appears by agent" were substituted in the 1882 Code by the words "or of his pleader."
   (*b*) Under Section 339 of the Code of 1872, the witness "may require his evidence to be interpreted to him." In the Code of 1882 and in the present Code the evidence "*shall* be interpreted to him."
3. There is no difference between the corresponding Sections of the Code of 1882 and this Code.

2. Scope and applicability of the Section.

Sections 356 and 357, *ante*, prescribe the manner of taking evidence in the cases mentioned therein. This Section enacts the procedure to be followed after the evidence is *completed*. The evidence should be *read over* to the witness or *interpreted* to him if it has been taken down in a language which the witness does not understand. Such reading over or interpretation should be done in the *presence of the accused or of his pleader* if he appears by pleader. The Section is *mandatory* in these two respects[1] and no departure therefrom can be justified on the ground that time would be saved thereby or that the accused is a consenting party thereto.[2]

The object of the provision is to obtain an accurate record from the witness of what he really means to say and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down.[3] It is not to enable the *accused* or his advocate to suggest corrections.[4]

The Section applies also to proceedings before commissioners under the Defence of India Act, 1915.[5]

3. "Shall be read over to the witness"—Sub-section 1.

Under Section 199 of the Code of 1861 it was necessary that a *memorandum should be signed* and attached to the deposition of each witness to the effect that the evidence was read over to him and that he acknowledged the same to be correct.[1] This provision has not been enacted in the present Code. It is, therefore, not imperative though desirable under the present Code that a record is made by the Magistrate that the deposition was read over to the witness in the presence of the accused.[2]

The Section is *mandatory* and not merely directory and the evidence of a witness must be *read over to him* in the presence of the accused or of his pleader,[3] though it may take a considerable time to do so. It is not a sufficient compliance with the Section, to merely hand over to the witness his deposition so that he may

Section 360—Note 2.

1. [See cases in footnote (3) to Note 3, *infra*.]
2. (1927) 1927 P C 44 (46, 47) : 5 Rang 53 : 28 Cri L Jour 259 : 54 Ind App 96 (P C), *V. M. Abdul Rahman* v. *Emperor*.
3. (1927) 1927 P C 44 (47) : 5 Rang 53 : 54 Ind App 96 : 28 Cri L Jour 259 (P C), *V. M. Abdul Rahman* v. *Emperor*.
   [See also (1926) 1926 Rang 53 (61) : 27 Cri L Jour 669, *V. M. Abdul Rahman* v. *Emperor*.
   (1925) 1925 Pat 378 (379) : 4 Pat 231 : 26 Cri L Jour 932, *Bhagwat Singh* v. *Emperor*.
   (1871) Ratanlal 54 (54), *Reg.* v. *Bal Krishna*.]
4. (1927) 1927 P C 44 (47) : 54 Ind App 96 : 5 Rang 53 : 28 Cri L Jour 259 (P C), *V. M. Abdul Rahman* v. *Emperor*.
   The following cases holding that the object is to give the accused an opportunity of checking the correctness of the dsposition must be taken to be no longer law :—
   (1912) 13 Cri L Jour 569 (570) : 1 Upp Bur Rul 123, *Nga San Myin* v. *Emperor*.
   (1924) 1924 Cal 889 (891) : 52 Cal 159 : 26 Cri L Jour 201, *Hiralal Ghose* v. *Emperor*.
5. (1928) 1928 Lah 125 (128) : 29 Cri L Jour 212, *Taj Mohammad* v. *Emperor*.

Note 3.

1. (1870) 13 Suth W R Cr 1 (7), *In the matter of Mohesh Chander Banerjee*.
   (1867) 8 Suth W R Cr 63 (64), *Queen* v. *Issur Raut*.
   (1870) 2 N W P H C R 132 (137), *Queen* v. *Lekhraj*.
   (1871) 16 Suth W R Cr 61 (61), *Queen* v. *Mudun Mundle*.
   (1870) 13 Suth W R Cr 17 (18), *Queen* v. *Hossein Sirdar*.
   [See also (1869) 12 Suth W R Cr 44 (45), *Queen* v. *Radhoo Jana*.
   (1911) 12 Cri L Jour 44 (45) : 9 Ind Cas 262 (Mad), *In re Muthukumara Reddy*.]
2. (1925) 1925 Pat 723 (725) : 26 Cri L Jour 927, *Rameshar Singh* v. *Emperor*.
   (1927) 1927 Pat 100 (102) : 28 Cri L Jour 77, *Arjun Kurmi* v. *Emperor*.
3. (1926) 1926 Cal 157 (158) : 27 Cri L Jour 375, *Abdul Mallick* v. *Emperor*.
   (1924) 1924 Cal 889 (889, 891) : 52 Cal 159 : 26 Cri L Jour 201, *Hiralal Ghose* v. *Emperor*.
   (1921) 1921 Pat 149 (150) : 22 Cri L Jour 568, *Barkmdeo Singh* v. *King Emperor*.
   (1909) 10 Cri L Jour 581 (583) : 36 Cal 955,

Sec. 360 Notes 3—4

read it over himself.[4] Nor is it a compliance with the Section if the evidence is read over to the witness while another witness is being examined. The reason is that the accused cannot at one and the same time listen to the evidence that is being read over and to the evidence of a fresh witness that is being recorded.[5]

4. "In the presence of the accused or of his pleader."

The evidence must be read over in the *presence of the accused* if he is in attendance, or of his pleader. Where, however, there are *several accused* in the case, the evidence of a witness read over in the presence of the pleader of *one* only of such accused is not inadmissible in a case of perjury against such witness, merely because it was not read over in the presence of all the *other* accused or their pleaders.[1]

It is only where the accused "appears by a pleader" that a reading over of the evidence in the presence of such pleader is sufficient.[2] The words "if he appears by a pleader" cannot be restricted to cases in which a pleader is allowed to represent one accused whose personal *attendance has been dispensed with.* The natural meaning of the words is that if an accused person has engaged a pleader who is in attendance the reading over of the deposition in his presence will be a full compliance with the provisions of this Section.[3]

The evidence must be read over only in the *presence* of the accused or of his pleader. It is not necessary that it should be within their *hearing*. The reason is that the accused is only entitled to be sure that the evidence has been read over and that the witness has had an opportunity of correcting the written words. But he is not necessarily entitled to the opportunity of *suggesting corrections.*[4]

Does this Section apply to proceedings under Chapters 8 and 12 of the Code ? It has been held by a Full Bench of the High Court of Calcutta that the persons proceeded against under those chapters are not "accused" persons, but that the first Clause of this Section should be read as meaning that the evidence is to be

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Jyotish Chandra Mukerjee v. *Emperor.*
(1870) 14 Suth W R Cr 13 (14), *Queen* v. *Parbutty Churn Chukerbutty.*
(1925) 1925 Mad 1206 (1206) : 49 Mad 71 : 26 Cri L Jour 1587, *Kuppa Mudaliar, In re.*
(1925) 1925 Pat 378 (380) : 4 Pat 231 : 26 Cri L Jour 932, *Bhagwat Singh* v. *Emperor.*
[But see (1929) 1929 Mad 862 (863) : 1929 Cri Cas 602 : 52 Mad 995 : 31 Cri L Jour 273, *Damodaran* v. *Emperor.*]

4. (1927) 1927 P C 44 (48) : 54 Ind App 96 : 5 Rang 53 : 28 Cri L Jour 259 (P C), *V. M. Abdul Rahman* v. *Emperor.*
(1925) 1925 Cal 1120 (1120) : 26 Cri L Jour 951, *Sahorali Molla* v. *Emperor.*
(1925) 1925 Cal 782 (783): 52 Cal 431 : 26 Cri L Jour 1178, *Mahammed Yasin* v. *Emperor.*
(1914) 1914 Cal 789 (790): 42 Cal 240 : 15 Cri L Jour 483, *Emperor* v. *Jogendra Nath Ghose.*
(1925) 1925 Pat 723 (725): 26 Cri L Jour 927, *Rameshar Singh* v. *Emperor.*
[See also (1927) 28 Cri L Jour 651 (651) : 103 Ind Cas 107 (Lah), *Kesar Singh* v. *Sultan-ul-Mulk.*
(1925) 1925 Cal 729 (732): 26 Cri L Jour 1009, *Jessarat* v. *Emperor.*]
[But see (1926) 1926 Pat 232 (233): 5 Pat 63 : 27 Cri L Jour 484, *Jagwa Dhanuk* v. *Emperor.*]

5. (1927) 1927 P C 44 (46, 48): 5 Rang 53: 28 Cri L Jour 259 : 54 Ind App 96 (P C), *V. M. Abdul Rahman* v. *Emperor.*
(1925) 1925 Cal 831 (832) : 52 Cal 499 : 26 Cri L Jour 213, *Dargahi* v. *Emperor.*
(1925) 1925 Cal 933 (933): 26 Cri L Jour 1267, *Manik* v. *Emperor.*
(1926) 1926 Cal 423 (423): 26 Cri L Jour 1016, *Adiladdi* v. *Emperor.*
(1894) 2 Weir 435 (435), *In re Singiri Eradu.*
(1905) 2 Cri L Jour 133 (143) (L B), *Nga Saw* v *Emperor.*

Note 4.

1. (1909) 10 Cri L Jour 150 (155): 36 Cal 808, *Rakhal Chandra Laha* v. *Emperor.*
2. (1926) 1926 Cal 528 (528): 27 Cri L Jour 509, *Kasim Ali* v. *Sarada Kripa Laha.*
3. (1928) 1928 Cal 27 (32) : 29 Cri L Jour 49, *Hari Narayan Chandra* v. *Emperor.*
4. (1927) 1927 P C 44 (48): 54 Ind App 96: 5

read over in the presence of the accused if *there is one* and that, therefore, the evidence should be read over to the witness in such proceeding though not in the presence of the persons proceeded against.[5] The High Court of Patna has come to the same conclusion.[6]

5. "As the evidence of each witness is...completed."

The evidence of each witness must be read over to him *immediately* after it is completed. The Section is not complied with if the deposition is read over at the end of the day after all the witnesses are examined.[1] Where a Magistrate examined a number of witnesses and asked them to be in a room and then had the depositions read over to them, it was held that the procedure was illegal and not merely irregular.[2] Again, the Section is no tcomplied with if the evidence is read out as each *sentence* of it is being recorded. It must be read out only after it is *completed*.[3] But where the evidence is read over to a witness some days after his examination-in-chief but immediately after his *cross-examination*, it was held that .this Section was sufficiently complied with.[4]

6. "And shall, if necessary, be corrected."

Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain.[1]

7. "Shall be interpreted to the witness."

Under the Codes of 1861 and 1872, when the evidence was taken down in a language different from that in which it was given, the witness "*may require*" that his evidence should be interpreted to him. Under this Code it is *obligatory* on the Court in all such cases, whether the witness requires it or not, to interpret his evidence to him.[1] It is, however, not necessary to first read out the deposition to the witness in the language in which it is taken and then to interpret it to him. It is sufficient if it is merely interpreted to him.[2]

Should the evidence in such cases be interpreted to the accused? In *Abdul Rahman* v. *King-Emperor*,[3] their Lordships of the Privy Council observed as follows:—

Rang 53: 28 Cri L Jour 259 (P C), *Abdul Rahman* v. *Emperor*.
(1927) 1927 Pat 100 (102): 28 Cri L Jour 77, *Arjun Kurmi* v. *Emperor*.

5. (1925) 1925 Cal 822 (831): 52 Cal 721: 26 Cri L Jour 1194 (F B), *Narendra Chandra Rudra Pal* v. *Sabarali Bhuiya*. In view of this F. B., 1925 Cal 678, 1925 Cal 720 and 1925 Cal 1040, holding contra are no longer law.
6. (1922) 1922 Pat 371 (371): 23 Cri L Jour 125, *Ram Narain Singh* v. *Dhonrai Gopi*.

Note 5.

1. (1926) 1926 Cal 157 (158): 27 Cri L Jour 375, *Abdul (Bari) Mullick* v. *Emperor*.
[See also (1926) 1926 Cal 563 (564): 53 Cal 129: 27 Cri L Jour 688, *Samserali Hazi* v. *Emperor*. Read over during mid-day interval.]
2. (1925) 1925 Mad 1206 (1206): 49 Mad 71: 26 Cri L Jour 1587, *Kuppa Mudaliar, In re*.
3. (1921) 22 Cri L Jour 669 (671): 63 Ind Cas 461 (463) (Lah), *Wadhawa Singh* v. *Emperor*.
4. (1929) 1929 Cal 390 (391): 1929 Cri Cas 26: 31 Cri L Jour 373, *Kamini Kumar* v. *Emperor*.
(1918) 1918 Pat 448 (450): 19 Cri L Jour 169, *Ramdhari Singh* v. *Emperor*.
[But see (1926) 1926 Pat 58 (60): 26 Cri L Jour 1475, *Emperor* v. *Bhagunia Bhuian*. Which seems to suggest that it should be read over at the end of the examination-in-chief.]

Note 6.

1. [See also (1916) 1916 Bom 49 (51): 18 Cri L Jour 480, *Pandu Namaji Gavande, In re*.
(1872) 18 Suth W R Cr 57 (57), *Queen* v. *Tulsi Dosadh*.]

Note 7.

1. (1881) 7 Cal L R 393 (394), *In the matter of Okhoy Kumar*.
2. (1928) 1928 Cal 27 (31): 29 Cri L Jour 49, *Hari Narayan Chandra* v. *Emperor*.
3. (1927) 1927 P C 44 (47, 48): 54 Ind App 96: 5 Rang 53: 28 Cri L Jour 259 (P C), *Abdul Rahman* v. *Emperor*.

Sec. 360 Notes 7—8

"The distinction between S. 360 and S. 361 is very marked. Under the latter Section, if the evidence is given in a language not understood by the accused or his pleader, it is to be interpreted into their language, while under the former Section, when it is read over, it is to be interpreted to the *witness* in his own language; but there is no provision for its being interpreted to the *accused*. Thus, if the depositions are taken down in English, and the language of the accused is Hindi and the language of a witness is Burmese, . . . the depositions will have to be *taken* by getting the witness's answers in Burmese, having them interpreted to the Court so that they be taken down in English and further interpreted to the accused, so that he may understand them, in Hindi. When, however, the deposition comes to be read over, as it will be, in English, it will be interpreted to the *witness* in Burmese, but not to the accused in Hindi; and if the accused knew neither English nor Burmese, he will be none the wiser."

As to whether a sworn interpreter is necessary for interpreting the evidence to the witness, *see* Section 543, *infra*.

8. Non-compliance with the Section—Effect of.

It has now been settled by the Privy Council that non-compliance with the strict provisions of this Section is only an irregularity which is cured by Section 537 of the Code in the absence of prejudice.[1] Thus, a failure to read over the evidence to the witness would not necessarily vitiate the trial of the *accused*.[2] There is a conflict of opinion as to whether the *witness* can be prosecuted on the basis of such evidence. On the one hand, it has been held that non-compliance with the Section renders the evidence *inadmissible* under the Evidence Act, that no *other* evidence could be admitted by virtue of the provisions of Section 91 thereof and that, therefore, a conviction on such evidence cannot be sustained.[3]

Note 8.

1. (1927) 1927 P C 44 (49) : 54 Ind App 96 : 5 Rang 53 : 28 Cri L Jour 259 (P C), *Abdul Rahman* v. *Emperor*.
[See also (1927) 1927 All 755 (755) : 28 Cri L Jour 606, *Sher Mohammad Khan* v *Emperor*.
(1926) 1926 Rang 53 (61, 63) : 27 Cri L Jour 669, *Abdul Rahman* v. *Emperor*.
(1924) 1924 Pat 786 (787) : 25 Cri L Jour 89, *Sondi Singh* v. *Govind Singh*.
(1927) 1927 Cal 575 (575) : 28 Cri L Jour 751, *Fatiar Bap* v. *Emperor*.
(1925) 1925 Cal 928 (929) : 26 Cri L Jour 1276, *Abdur Rahim* v. *Emperor*. Case remanded for reading over the depositions.]

The following cases cannot be considered to be good law after the Privy Council case (1927 *P C* 44).—
(1927) 1927 Pat 315 (315) : 6 Pat 478 : 28 Cri L Jour 772, *Fazlur Rahman* v. *Emperor*. Assumption that evidence not read over cannot be used in the case *in which it was given* is not correct.
(1925) 1925 Cal 933 (933) : 26 Cri L Jour 1267, *Manick* v. *Emperor*.
(1926) 1926 Cal 423 (423) : 26 Cri L Jour 1016, *Adiladdi* v. *Emperor*.
(1926) 1926 Cal 563 (563) : 53 Cal 129 : 27 Cri L Jour 688, *Samserali* v. *Emperor*.
(1925) 1925 Cal 816 (816) : 52 Cal 470 : 26 Cri L Jour 1233, *Nawal Ali* v. *Emperor*.
(1924) 1924 Cal 889 (889, 893) : 52 Cal 159 : 26 Cri L Jour 201, *Hira Lal Ghosh* v. *Emperor*.
(1924) 1924 Cal 182 (183) : 25 Cri L Jour 289, *Haro Nath Malo* v. *Ala Bux*.

2. (1925) 1925 Pat 414 (419) : 4 Pat 488 : 26 Cri L Jour 811, *Saiyid Mohiuddin* v. *Emperor*.
(1927) 1927 All 757 (758) : 28 Cri L Jour 596, *Bajai* v. *Ram Sarup*
(1927) 1927 All 764 (765) : 28 Cri L Jour 514, *Jiwan Singh* v. *Sheonandan Singh*.
(1924) 1924 Pat 786 (787) : 25 Cri L Jour 89. *Sondi Singh* v. *Govind Singh*. Failure to read over deposition—Decision cannot be said to be on no evidence.

3. (1919) 1919 Mad 45 (47) : 42 Mad 561 : 20 Cri L Jour 379, *Nalluri Chenchiah, In re*.
(1928) 1928 Lah 125 (129) : 29 Cri L Jour 212, *Taj Mohammad* v. *Emperor*.
(1914) 1914 Cal 789 (790) : 42 Cal 240 : 15 Cri L Jour 483, *Emperor* v. *Joyendra Nath Ghose*.
(1909) 10 Cri L Jour 581 (583) : 36 Cal 955, *Jyotish Chandra Mukerjee* v. *Emperor*.
(1912) 13 Cri L Jour 569 (571) : 1 Upp Bur Rul 123, *Nga San Myin* v. *Emperor*.
(1921) 1921 Pat 149 (150) 22 Cri L Jour 568, *Barhmdeo Singh* v. *Emperor*.
(1918) 1918 Low Bur 129 (130) : 18 Cri L Jour 966 (967), *Kadir Pakiri* v. *Emperor*.
(1908) 8 Cri L Jour 116 (118) (Cal), *Mohendra Nath Misser* v. *Emperor*.

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A contrary view has, on the other hand, been taken in the undermentioned cases[4] to the effect that non-compliance with the Section does not render the evidence inadmissible but only prevents a presumption being raised as to its correctness under Section 80 of the Evidence Act. In view of the decision of the Privy Council in *Abdul Rahman* v. *King Emperor*,[5] that non-compliance with the Section is not fatal to the conviction, it is submitted that the latter view is correct.

Where the accuracy of the deposition is challenged and it is clear that a relevant statement of a witness was omitted from the record which was not read over to the witness, it was held that the conviction should be quashed.[6]

The absence of a memorandum subjoined to a deposition, and stating the fact of compliance with the Section, does not, of itself, prove that the provisions of this Section have not been complied with.[7]

As to the witness's liability to be produced for perjury, *see* Section 193 of the Penal Code and the undermentioned cases.[8]

9. Revision.

The question whether a deposition was read over to the witness in accordance with this Section is one of fact and cannot be raised for the first time in revision before the High Court.[1]

361.* (1) Whenever any evidence is given in a language Sec. 361

* **(Code of 1882—S. 361—Same.)**

(Code of 1872—S. 340.)

Interpretation of evidence to accused or his agent.

340. In all cases whatever, when the evidence is given in a language not understood by the accused person, it shall be interpreted to him in open Court in a language understood by him, where he is present in person.

(1875) 23 Suth W R Cr 28 (29), *Queen* v. *Mungul Dass.*

(1928) 1928 Cal 271 (271), *Choyenuddin Paramanik* v. *Emperor.* Trial under S. 211, I. P. C.

(1870) 14 Suth W R Cri 13 (14), *Queen* v. *Parbutty Churn.*

4. (1921) 1921 Sind 151 (154) : 16 Sind L R 255 : 26 Cri L Jour 657, *Pitoo Mal* v. *Emperor.*

(1921) 1921 Sind 16 (18) : 18 Sind L R 342 : 26 Cri L Jour 1137, *Pittumal* v. *Emperor.*

[See also (1919) 1919 Low Bur 129 (130) : 10 Low Bur Rul 16 : 20 Cri L Jour 506, *Tun Ya* v. *Emperor.*

(1910) 11 Cri L Jour 482 (482). 34 Mad 141, *In re Bogra.* Read over but not in the presence of the accused.

(1911) 12 Cri L Jour 44 (45): 9 Ind Cas 262 (Mad), *In re Muthukumara Reddy.* Read over while another witness was being examined.]

5. (1927) 1927 P C 44 (48) : 54 Ind App 96 : 5 Rang 53 : 28 Cri L Jour 259 (P C), *Abdul Rahman* v. *Emperor.*

6. (1926) 1926 Rang 78 (79) : 3 Rang 612 : 27 Cri L Jour 857, *Mayeth* v. *Emperor.*

7. (1925) 1925 Pat 378 (380) : 4 Pat 231 : 26 Cri L Jour 932, *Bhagwat Singh* v. *Emperor.*

8. (1903) 26 Mad 55 (58), *In re Palani Palayan.*

(1884) 10 Cal 937 (945), *Habibullah* v. *Queen.*

(1911) 12 Cri L Jour 405 (408): 11 Ind Cas 589 (Lah), *Dasoudha Singh* v. *Emperor.*

(1887) 1887 Pun Re Cr No. 54, (page 143), *Empress* v. *Fatta*

(1924) 1924 Oudh 373 (373) : 26 Cri L Jour 10, *Chedi Lal* v *Emperor.*

(1874) 22 Suth W R Cr 2 (3), *Queen* v. *Gonouri.*

(1922) 1922 Oudh 198 (199) : 25 Oudh Cas 139 : 23 Cri L Jour 652, *William* v. *Emperor.*

(1913) 14 Cri L Jour 280 (281) : 16 Oudh Cas 81, *Lachmi Narain* v *Emperor.*

(1864) 1864 Suth W R Gap Cri 10 (10), *Queen* v. *Gullie Mullick.*

(1893-1900) 1893-1900 Low Bur Rul 21 (22), *Queen* v. *Nga Tha Dwe.*

Note 9.

1. (1925) 1925 Pat 414 (419): 4 Pat 488 : 26 Cri L Jour 811, *Saiyid Mohiuddin* v. *Emperor.*

Sec. 361 Notes 1—4

Interpretation of evidence to accused or his pleader.

not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

Synopsis.

Other Topics.

Interpretation to both accused and his pleader essential but omission is curable. See Note 4, Pts. 1 and 2.
Sub-sections 1 and 2 apply to oral evidence. See Note 3, Pt. 1.
Sub-Sections 1 and 2 not mutually exclusive. See Note 4, Pt. 1.

1. Legislative changes.

Changes introduced in 1882 :—

1. The word "pleader" was substituted for the word "agent" which occurred in Section 340 of the Code of 1872.
2. The words "the language of the Court" were substituted for the words "the language in ordinary use in the district in which the Court is held."

There are no material changes between Section 361 of the Code of 1882 and this Section.

2. Distinction between this Section and Section 360.

See Note 7 to Section 360.

3. "Evidence"—Meaning of.

The word "evidence" in this Section means *oral* evidence.[1] Documents are separately mentioned in sub-section 3.

4. Interpretation to accused and his pleader.

It has been held in the undermentioned case[1] that sub-sections 1 and 2 are not mutually exclusive and that even where the accused appears by a pleader, it is

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If he appears by agent, and the evidence is given in a language other than the language in ordinary use in the district in which the Court is held, it shall be interpreted to such agent in that language.

In cases in which documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

(Code of 1861—S. 200—Same as the first two paragraphs of 1872 Code.)

Section 361—Note 3.

1. (1870) 13 Suth W R Cri 25 (27), *Queen* v. *Ooma Moye Debea.*

Note 4.

1. (1930) 1930 Mad 186 (186) : 1930 Cri Cas 186 : 31 Cri L Jour 827, *Erappa* v.

necessary to interpret the evidence to the accused. The non-compliance with this requirement is, however, only an irregularity which can be cured under Section 537.[2]

5. Interpreters.—*See* Section 543.

6. Interpretation of documents.

Sub-clause 3 gives effect to the undermentioned case[1] decided under Section 200 of the Code of 1861 which did not contain a provision similar to sub-clause 3.

Record of evidence in Presidency Magistrates' Courts.

362. (1) In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees, or imprisonment for a term exceeding six months, he shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

(2-A) In every case referred to in sub-section (1) the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.

(3) Sentences passed under Section 35 on the same occasion shall, for the purposes of this Section, be considered as one sentence *unless they are sentences of imprisonment ordered to run concurrently.*

(4) In cases other than those specified in sub-section (1), it

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* **(Code of 1882—S. 362**—Same as that of 1898 Code.)

(Code of 1872—Ss. 335 and 338; Code of 1861—Ss. 196 and 198.)
See under Ss. 357 and 359 of 1898 Code.

Emperor.

2. (1930) 1930 Mad 186 (186) : 1930 Cri Cas 186 : 31 Cri L Jour 827, *Erappa* v. *Emperor.*
(1875) 24 Suth W R Cri 50 (51), *Queen* v. *Bhoobun Mohun Dey.*

Note 6.

1. (1871) 15 Suth W R Cri 25 (27), *Queen* v. *Ameeroddeen.*

Sec. 362 Notes 1—2

shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.

Synopsis.

Other Topics.

Compared with Sections 263 and 264. See Note 2, Pt. 3.
Duty to record all material facts. See Note 2, Pt. 1.
Inapplicability to references of cases under Section 110. See Note 1, Pt. 1.
Legislative changes. See Notes 2, 3, 5, and 6.
Narrative in indirect form. See Note 4, Pt. 1.
Petty cases or "morning cases." See Note 3, Pts. 5 and 7.
Refusal of copies and Section 45, Spcific Relief Act. See Note 9, Pt. 1.
Section 364 and sub-section 2-A of this Section. See Note 5.
Section 370—Effect. See Note 5.
Section 411. See Note 2.
Section 254. See Note 6, Pt. 1.
Select Committees of 1916 and 1922. See Note 2.
Sending boy to juvenile jail is imprisonment. See Note 7, Pt. 4.

1. Scope of the Section.

This Section enacts that in appealable cases Presidency Magistrates should take down the evidence of witnesses in their own hand, or cause it to be taken down in open Court, to their dictation. They are also required to make a memorandum of the substance of the examination of the accused in such cases. In other cases, *i. e.* non-appealable cases, they need not record any evidence, or even frame a charge.

This Section does not apply to cases under Section 110, where it becomes necessary to make a reference to the High Court, in regard to the sentence of imprisonment.[1]

2. Record of evidence in appealable cases.

In cases coming under Section 362, sub-section 1, *i. e.*, in appealable cases, the Magistrate is bound to record the evidence with his own hand or cause it to be taken down in writing from his dictation in open Court. In doing so, it is the duty of the Magistrate to take note of all the material facts, whether they appear in the examination-in-chief or in the course of cross-examination.[1]

Before the amendment of 1923, sub-section 1 applied to *cases in which the Magistrate imposed a fine of Rs.* 200, *or imprisonment for a period exceeding six months.* The taking of evidence precedes the sentence, and it is on the evidence given that the sentence is based. Therefore, the language was clearly faulty as it is unreasonable to suppose that the Magistrate should make up his mind as to the sentence he would pass, before the evidence was recorded.[2] This defect of language was noticed, and in regard to it, the Select Committee of 1916 observed:

Section 362—Note 1.

1. (1909) 10 Cri L Jour 122 (123) : 2 Ind Cas 651 (Cal), *Emperor* v. *Nepal Sikary.*

Note 2.

1. (1919) 1919 Cal 696 (700, 701) : 46 Cal 411 : 20 Cri L Jour 24, *Ah Foong Chinaman* v. *Emperor.*

2. (1906) 33 Cal 1036 (1038), *Shaik Babu* v. *Emperor.*

"We think that the opening words of sub-section 1 of Section 362 require amendment. As the Section stands, it seems to imply that a Presidency Magistrate before he commences his enquiry must make up his mind as to the maximum limit of the sentence he will impose. We think that the sub-section would read better as amended by us; compare the wording of Section 264."

The amendment made is that in cases *in which an appeal lies*, the Presidency Magistrate shall either record the evidence himself, or have it recorded. It is not clear how the defect of language noticed above has been remedied by the amendment. If the Section as it stood before the amendment implied that the Magistrate should make up his mind as to the maximum limit of sentence he would pass, the same implication still continues, for, under Section 411, only a sentence of imprisonment for more than six months and a fine exceeding Rs. 200 are appealable. In short, to make up his mind to award an appealable sentence is to make up his mind as to the maximum limit of the sentence he would pass. In regard to this criticism, the Select Committee in 1922, observed:

"We are inclined to agree with those critics who point out that the re-draft proposed in sub-section 1 of Section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We cannot see how this difficulty can be got rid of; but we think that the amendment proposed has the advantage of bringing the language of this Section into conformity with the language of Sections 263 and 264 and we would, therefore, retain this sub-clause."

Apart from the uniformity of the language, it is not clear what "advantage" is gained by using language similar to that in Sections 263 and 264. It must in this connection be noted, that the language in Section 264 is appropriate and presents no difficulties similar to those in Section 362 (1), for a judgment does usually precede the sentence. It is the language in Section 263 that presents difficulties similar to those in Section 362 (1), and in regard to it, it was observed:

"It may be difficult for a Magistrate to determine at the initial stage whether he will or will not pass an appealable sentence. In such a case the course he has to adopt is to make a memorandum of the evidence of each witness as the examination of the witness proceeds. If, on the other hand, even at the initial stage he can make up his mind that in any event the sentence to be passed by him will not be appealable, he need not record the evidence."[3]

3. Record of evidence in non-appealable cases.

Sub-section 4 was newly introduced in 1923. The Section as it stood before 1923 having provided the procedure to be adopted in *appealable cases* only, there was uncertainty as to the procedure to be followed in *non-appealable cases.*[1] It was held by the High Court of Calcutta in the undermentioned case[2] that it was left to the *discretion* of the Magistrate to record or not, evidence in such cases and that the High Court felt unable to prescribe a procedure which the law did not render obligatory. In another case[3] the same High Court remarked that though the Magistrate was not *bound* to record evidence in such cases, it was *desirable* that he should keep some record of the statements made by witnesses or that their judgments should indicate what the statements were, so that the High Court may judge as a Court of revision of the propriety or legality of the orders passed by them. A similar view was expressed in the following cases also.[4]

In *Emperor* v. *Harischandra*,[5] the High Court of Bombay held that the Magistrate had a *discretion* to take evidence or not in such cases, but that such

3. (1921) 1921 Cal 165 (165) : 48 Cal 280 : 22 Cri L Jour 462, *Satish Chandra* v. *Manmatha.*

Note 3.

1. Statement of objects and reasons (1914).
2. (1904) 31 Cal 983 (988), *Emaman* v. *Emperor.*
3. (1906) 33 Cal 1036 (1038, 1039) : 4 Cri L Jour 368, *Shaik Babu* v. *Emperor.*
4. (1886) 13 Cal 272 (274), *In re Yacoob.* (1875) 15 Beng L R App 14 (15), *Re Louis.*
5. (1908) 7 Cri L Jour 194 (195) (Bom), *Emperor.*

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discretion had to be exercised *reasonably and not arbitrarily*; it was observed :

" But the discretion like all discretionary powers, should be exercised judicially, in a reasonable spirit and not arbitrarily. For instance in cases of petty offences, such as 'nuisances' or what are called in police parlance 'morning cases,' there may be no necessity to record any evidence. But in a case of this kind where an educated man holding a respectable status in life is charged with an offence reflecting on his character and serious allegations are levelled against him, there ought to have been some record of evidence to enable him in a case of conviction to come up to this Court in revision and satisfy it that the conviction is wrong."

This view was adopted by the same High Court in the undermentioned cases[6] which arose after the introduction of sub-section 4 of this Section.

In *D'Souza* v. *Emperor*,[7] however, the said view was dissented from. Beaumont, C. J., observed as follows :

" Section 362 is perfectly plain ; it says that in cases which are not appealable, it shall not be necessary for a Presidency Magistrate to record the evidence. There is no distinction drawn between what the learned Judges refer to as 'morning cases' and any other cases. Nor is any distinction drawn between charges against people occupying a respectable status in life and people who occupy some other status. Nor in terms has any discretion been conferred upon the Magistrate. It is no doubt true that in one sense he has a discretion, because it is not illegal for him to record evidence if he likes to do so. But his right to refuse to record evidence is, in my opinion, absolute, and as long as the case falls within the cases excepted under Section 362, sub-section 4, the Magistrate is not bound to record the evidence, and this Court has no jurisdiction to require him to do what the Statute says it is not necessary for him to do. If he likes to record the evidence, that is another matter : and probably if he was hearing a case which involved a question of serious consequence to the accused, and the accused asked him to make a record of those portions of the evidence on which he wished to rely on an application in revision, the Magistrate would, in a proper case, comply with that request. But in my opinion, the exercise of any such discretion would be *ex gratia*, and not subject to review in this Court."

4. Mode of recording evidence.

Under sub-section 2 it is required that the evidence shall ordinarily be recorded in the form of a narrative, but that the Magistrate may in his discretion, take down any particular question or answer. But mere irregularities in the mode of recording evidence will not, unless failure of justice has been occasioned thereby, vitiate the trial. Thus where a Presidency Magistrate recorded certain portions of the depositions of some of the witnesses which were of a more or less formal nature in the form of indirect narration as "P. W. 4 speaks to the identification by P. W. 1 of some of the jewels," and "P. W. 3 proves his signature to the search lists," it was held that the trial was not vitiated, as this mode of recording evidence occasioned no failure of justice.[1]

5. Memorandum of the substance of the examination of the accused.

Sub-section 2-A which has been newly added requires the Presidency Magistrates to record the substance of the examination of the accused *in appealable cases*. Simultaneous with the introduction of this Section, sub-section 4 of Section 364 has been amended so as to make the provisions of Section 364 as to the recording of the examination of the accused inapplicable to Presidency Magistrates in appealable cases. Thus in appealable cases Presidency Magistrates need only make a memorandum of the examination of the accused and are not required to take down the examination of the accused in the manner provided in Section 364.

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peror v. *Harischandra Talcherkar*.

6. (1925) 1925 Bom 147 (147) : 26 Cri L Jour 454, *Mahomed Roshan* v. *Emperor*.
(1931) 1931 Bom 142 (143) : 1931 Cri Cas 190 : 32 Cri L Jour 276, *Hanifabai* v. *Mahomed Yakub*.

7. (1932) 1932 Bom 180 (181) : 1932 Cri Cas 209 : 56 Bom 200 : 33 Cri L Jour 404, *P. X. D'Souza* v. *Emperor*.

Note 4.

1. (1918) 1918 Mad 1197 (1198) : 18 Cri L Jour 336, *Gulab Chand, In re*.

As to why this new sub-section was introduced, the Select Committee say :

"In order to meet difficulties that have arisen, we have introduced a sub-section 2-A laying down that Presidency Magistrates, in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused, and we have introduced a new clause making a consequential amendment in sub-section 4 of Section 364."

There is no provision as to the mode of recording the examination of the accused in *non-appealable cases*, which are now severely left alone confined to the protection that Section 370, by its own terms, would afford. Thus in non-appealable cases the only record of the examination of the accused is what is filled up under column (f) of Section 370. As to the filling up of this column, however, Section 370 is silent and it has been held that in a case where the accused, both at the time he took the plea and when he was examined, denied that he committed the offence, the entry "denied" in column (f) of Section 370 was sufficient.[1]

6. Framing of charges by Presidency Magistrates.

Sub-clause 4 which has been newly added relieves Presidency Magistrates from the duty of framing charges in non-appealable cases. But in appealable cases where charges have to be framed under Section 254, the Presidency Magistrates are bound to frame charges.[1] Thus to try an accused for an offence punishable under Section 420/75, of the Indian Penal Code, without framing a charge, is a defect of procedure, for Section 254 applies to Presidency Magistrates and it is mandatory.

7. Sentence of imprisonment—Meaning of.

The words "sentence of imprisonment" under this Section mean *substantive* sentence and not imprisonment on the failure of the accused to carry out an order as to fine or security.[1] Thus a sentence of imprisonment for six months coupled with a fine of Rs. 200 and in default of payment of fine, three months' simple imprisonment, is not appealable.[2] Similarly a sentence of imprisonment for eight months in case of default to execute a bond or procure a surety is not appealable and hence the Presidency Magistrate need not record evidence in that case.[3] But sentencing a boy for a year's imprisonment and sending him to a juvenile jail, is a sentence of imprisonment and not mere detention in a reformatory, and hence the Presidency Magistrate should record evidence in such a case.[4]

8. Sentences on conviction for several offences at the same trial.

Sub-section 3 provides for cases where at the same trial sentences for conviction for several offences are passed. The Select Committee observed : "It is provided that when sentences in excess of one are passed which are ordered to run concurrently, it is the heaviest sentence that determines the applicability of Section 362."[1] The one exception to the rule that sentences passed under Section 35 are to be considered as one is the case when the sentences passed to run concurrently are sentences of imprisonment.

9. Right of parties to get copies of depositions.

Parties to criminal proceedings are entitled to get copies of depositions taken by Presidency Magistrates. Where on the dismissal of a complaint the complainant

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Note 5.

1. (1929) 1929 Cal 406 (406) : 1929 Cri Cas 30 : 56 Cal 1067 : 30 Cri L Jour 526, *Sadagar Chaudhuri* v. *Emperor.*

Note 6.

1. (1932) 1932 Cal 865 (865) : 1932 Cri Cas 889 : 33 Cri L Jour 828, *Raghubir Khahar* v. *Emperor.*

Note 7.

1. (1906) 33 Cal 1036 (1038, 1039) : 4 Cri L Jour 368, *Shaik Babu* v. *Emperor.*
2. (1889) 16 Cal 799 (801), *Schein* v. *Queen.*
3. (1906) 33 Cal 1036 (1038, 1039) : 4 Cri L Jour 368, *Shaik Babu* v. *Emperor.*
4. (1925) 1925 Bom 147 (147) : 26 Cri L Jour 454, *Mahomed Roshan* v. *Emperor.*

Note 8.

1. Statements of objects and reasons (1914).

Sec. 362 Note 9

asked for copies of depositions, and they were refused, the High Court under Section 45, Specific Relief Act, had those records sent for and kept with the Registrar so that the party might take copies of them.[1]

Sec. 363

Remarks respecting demeanour of witness.

363.* When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Synopsis.

	Note No.		Note No.
Remarks on demeanour of witness.	**1**	**Remarks on substance of deposition of witness.**	**2**

Other Topics.

Appellate Court's duty to consider facts independently. See Note 1, Pt. 10.

Attestation of Magistrate as to physical capacity of witness to answer. See Note 1, Pt. 15.

Demeanour not sure test. See Note 1, Pts. 13 and 14.

Demeanour of accomplice. See Note 1, Pt. 14.

Demeanour when material. See Note 1, Pts. 5 to 9.

Improbabilities and discrepancies. See Note 1, Pts. 11 and 12.

Note as to credibility after whole evidence taken. See Note 2, Pts. 1 and 2.

Note as to falsity of witness during examination—Ground for transfer. See Note 2, Pt. 3.

1. Remarks on demeanour of witness.

A mere record of the deposition of a witness in a language different from that in which it was deposed and in a narrative form is but a very imperfect representation of what passes between a witness and a counsel, more especially in cross-examination.[1] It cannot give the look or the manner of the witness, his hesitation, his doubts, his variation of language, his confidence, or precipitancy, his calmness or consideration. It has, therefore, been said that "it is, in short, or it may be the dead body of the evidence without its spirit which is supplied when given openly or orally to the ear and the eye of those who receive it."[2] This "spirit" which is "supplied. . . to the ear and to the eye" consists in the manner in which the evidence is given or in the language of this Section "demeanour. . . whilst under examination". This demeanour may be such as is not calculated to inspire confidence,[3] or it may be such as to lead to the inevitable conclusion that the witness is perjuring himself.[4] It is for this reason that when the credibility of a witness turns upon his manner and demeanour[5] or where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses[6] or where the evidence is all oral and its credibility is a matter of opinion,[7] the

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* (1882—S. 363; 1872—S. 341; 1861—S. 267, Last sentence.)

Note 9.

1. (1911) 11 Ind Cas 499 (499) (Cal), *Emperor* v. *Sailendra Nath Mukerjee.*

Section 363—Note 1.

1. (1874) 21 Suth W R Cri 13 (14), *Queen* v. *Madhub Chander Giri Mohunt.*
2. (1869) 12 Suth W R Cri 3 (3, 4), *Queen* v. *Bishonath Pal.*
3. (1928) 1928 Cal 769 (770) : 30 Cri L Jour 825, *Ambar Ali* v *Emperor.*
4. (1930) 1930 Pat 58 (59), *Beas Singh* v. *Khedu Mian.*
5. (1926) 1926 P C 29 (30) : 4 Rang 513 (PC), *Kyi Oh* v. *Ma Thet Pon.*
   (1927) 1927 Rang 200 (200), *Ma Lon Ma* v. *S. R. M. M. R. M. Firm.*
   (1917) 1917 All 35 (39) : 39 Ind Cas 666 (671) : 39 All 426, *Mauladad Khan* v. *Abdul Sattar.*
6. (1915) 1915 P C 1 (2) : 39 Bom 386 : 42 Ind App 110 (PC), *Bombay Cotton Manufacturing Co.* v. *Motilal Shivlal.*
7. (1914) 1914 Lah 427 (431) : 15 Cri L Jour 203, *Emperor* v. *Bishen Singh.*

opinion of the Magistrate who heard and saw the witnesses is not lightly set aside and it may even be said that it is generally taken as conclusive. Thus where a Sessions Judge of experience stated that the demeanour of the eye-witnesses was evasive, that they inspired him with no confidence and no man could be convicted on their testimony, the appellate Court could not and would not accept the evidence of those eye-witnesses as true, unless the appellate Court is assured in the most positive and convincing manner that the criticism of the Sessions Judge was not justified.[8] The High Court was prepared to accept the evidence of a girl of six years who was the only eye-witness to the murder as the Sessions Judge stated that "her evidence was given without hesitation and without the slightest suggestion of tutoring or anything of that sort."[9] The demeanour of witnesses whilst under examination is thus very important on the question of credibility of oral evidence and hence the Magistrate or the Sessions Judge as the case may be, is required by this Section to record such remarks as he thinks material regarding the demeanour of the witnesses, so that the appellate Court might take these remarks into consideration in assessing the value to be attached to the oral evidence adduced in the case.

While the appellate Court should be guided by the remarks made by Magistrates about the demeanour of the witnesses, yet it is bound to independently consider the facts of the case.[10] As a matter of fact where the opinion of the Lower Court is based not so much on the demeanour of the witness as on the inherent improbabilities of the story deposed to,[11] or the supposed discrepancies in the case as put forward by a party,[12] the appellate Court is in as good a position as the Magistrate, Sessions Judge or the trial Court to note the improbabilities or the discrepancies, and hence is not very much bound by the opinion of the trial Court.

Unsatisfactory demeanour, however, is not always a sure indication of falsehood. It has been said that it is dangerous to reject on the ground of unsatisfactory demeanour *statements in themselves probable* made under the sanction of an oath by witnesses of good reputation.[13]

Nor is good or satisfactory demeanour always a real test of truth. A good demeanour on the part of an accomplice cannot be sufficient corroboration of his evidence. Impressions as to demeanour of an accomplice "are too ephemeral in their character to take the place of corroboration in material particulars to make the testimony of an accomplice worthy of credit."[14]

The attestation of a Magistrate that at the time the deposition of a certain witness was taken, he was in such a weak state of mind that the Magistrate was unable to proceed with his examination and that the witness could not answer more than two questions is *prima facie* proof of those facts and can be put before the jury.[15]

2. Remarks on substance of deposition of witness.

A Magistrate is not authorised under this Section to record any remarks

8. (1914) 1914 Lah 427 (431) : 15 Cri L Jour 203, *Emperor* v. *Bishen Singh.*
(1904) 1 Cri L Jour 781 (787) : 1904 Pun Re Cri No. 7, *Emperor* v. *Chattar Singh.*
9. (1921) 1921 Pat 109 (110, 111) : 22 Cri L Jour 417, *Fatu Santal* v. *Emperor.*
10. (1898) 1898 Pun Re Cri No. 6, page 15 (18), *Moula Baksh* v. *Emperor.*
11. (1926) 1926 P C 29 (30) : 4 Rang 513 (PC), *Kyi Oh* v. *Ma Thet Pon.*
12. (1927) 1927 Rang 200 (200), *Ma Lon Ma* v. *S. R. M. M. R. M. Firm.*
13. (1909) 9 Cri L Jour 261 (264) : 1 Sind L R 20, *Crown* v. *Fazul Muhammad.*
14. (1925) 1925 Oudh 1 (4) : 27 Oudh Cas 40 : 25 Cri L Jour 49, *Manna Lal* v. *Emperor.*
15. (1869) 12 Suth W R Cri 51 (51), *Queen* v. *Rasookoollah.*

Sec. 363 Note 2

about the credibility or the *substance of the deposition* of the witness until the whole evidence has been taken.[1] The reason is that this will amount to *prejudging* the case and the parties are entitled to claim that he shall not do so until the case has been fully and finally presented to the Magistrate by the parties or their counsel after the entire evidence has been recorded.[2] Where a Magistrate, while recording the evidence of a witness, made a note not only as to his demeanour, but also that he had not spoken the truth, it was held that there was sufficient ground for transfer of the case to some other Magistrate.[3]

Sec. 364

364.* (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by a Royal Charter or the Chief Court of Oudh, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he

Examination of accused how recorded.

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* **(Code of 1882—S. 364**—Same as that of 1898 Code.)

(Code of 1872—S. 346)

346. Whenever an accused person is examined, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, and shall be shown or read to him, and he shall be at liberty to exlpain or add to his answers.

Examination of accused how recorded.

When the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the district, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall be annexed to the record. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record his inability to do so.

The accused person shall sign or attest by his mark, such record.

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(Code of 1861—S. 205.)

205. The examination of the accused person, including every question put to him and every answer given by him, shall be recorded in full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answers; and when the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

Examination of the accused how to be recorded.

Note 2.

1. (1928) 1928 Lah 975 (978) : 10 Lah 778 : 30 Cri L Jour 129, *Sikandar Lal Puri* v. *Emperor.*
   (1883) 2 Weir 435 (436), *In re Palani Nadan.*
2. (1928) 1928 Lah 975 (978) : 10 Lah 778 : 30 Cri L Jour 129, *Sikandar Lal Puri* v. *Emperor.*
3. (1925) 1925 Cal 480 (480) : 26 Cri L Jour 852, *Golam Bari Gazi* v. *Yar Ali Khan.*

understands and he shall be at liberty to explain or add to his answers. Sec. 364 Note 1

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, * * * as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this Section shall be deemed to apply to the examination of an accused person under Section 263, *or in the course of a trial held by a Presidency Magistrate.*

(In sub-section 3, the words "unless he is a Presidency Magistrate," were omitted by the Amending Act of 1923.)

Synopsis.

Other Topics.

Certificate—Effect. See Note 7, Pt. 2.
Examination in handwriting of Magistrate not needed. See Note 8.
Examination of Magistrate to cure defect in certificate. See Note 10, Pts. 10 to 12.
Irrelevant questions and answers thereto. See Note 2, Pt. 3.
Legislative changes. See Note 9.
Object. See Note 3, Pt. 1; Note 4, Pt. 1; Note 5, Pt. 2.
Questions and answers to be recorded in full See Note 2, Pts. 1 and 2; Note 10, Pts. 1 and 2.
Record of confessions in different language. See Note 3, Pt. 2.
Record of exact words. See Note 2, Pt. 2; Note 3, Pt. 1.
Refusal to sign by accused. See Note 6; Note 10, Pts. 6 to 9.
Request of accused contra. See Note 2, Pt. 4.
Section obligatory. See Note 4, Pt. 1.
Section 164. See Note 1, Pt 4.
Section 202, enquiry. See Note 1, Pt. 2.
Signature and not handwriting of certificate. See Note 7, Pt. 1
Signature not in immediate presence. See Note 6, Pt. 1.
Whole examination to be conformable to truth according to accused. See Note 5, Pt. 2.

1. Scope and applicability of the Section.

This Section prescribes the manner in which the examination of an accused person (under Section 342) is to be recorded,[1] but is not applicable to the following cases :—

Section 364—Note 1.

1. (1902) 4 Bom L R 461 (462), *Emperor* v. *Nagar Purshotam.* [See also (1875) 23 Suth W R Cr 16.

Sec. 364 Notes 1—3

1. Where the person examined is not an *accused* person, *e. g.* a person examined under Section 202 of the Code.[2]
2. Where the accused is not examined at all and a note is made by the Magistrate that the accused is unwilling to be examined and on that ground is not examined.[3]
3. Where the accused is examined under Section 263 (summary trials),[3a] or in the course of a trial held by a Presidency Magistrate: *see* sub-section 4.

By virtue of sub-section 2 of Section 164, a confession recorded under that Section is to be recorded in the manner prescribed by this Section.[4] *See also* the following case.[5]

2. Record of examination should be full.

The whole examination of an accused person including every question put to him and every answer given by him must be recorded in full.[1] As far as possible the record should be made in the exact words used by him.[2] The Section does not except even irrelevant questions from being taken down. The Magistrate or Court is responsible for putting such questions, but if they *are* put, they must be recorded as also the answers given.[3] Even where the accused gives an answer, but says that it should not be taken down in his statement, the Magistrate should record it under this Section.[4]

3. Language of the Record.

The examination of an accused person should be taken down in the language in which the person is examined, the object being to represent the very words and expressions used so as to ensure accuracy and prevent misrepresentation or misconstruction of what was said.[1] If, however, such a record is *not practicable*, the law directs that the statement or confession shall be recorded in the language of

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(16[illegible], *Queen* v. *Jetoo.*
(1900) 1900 All W N 183 (183), *Empress* v. *Jagannath.* Case under the Prisons Act.]

2. (1906) 3 Cri L Jour 138 (140) : 32 Cal 1085, *Sat Narain Tewari* v *Emperor.*
3. (1917) 1917 Sind 24 (24) : 11 Sind L R 52 : 18 Cri L Jour 913, *Emperor* v. *Dosu.*
3a (1935) 1935 Sind 193 (193) : 1935 Cri Cas 1047, *Deviimal* v. *Emperor.*
4. (1883) 1883 All W N 243 (243), *Empress* v. *Gajadhar.*
(1887) 1887 Pun Re Cri No 52, page 139 (141), *Buta* v. *Empress.*
5. (1935) 1935 Oudh 416 (420) : 36 Cri L Jour 927 : 1935 Cri Cas 956, *Sheo Prasad* v. *Emperor.* Section does not apply where no evidence has as yet been produced against the accused.

Note 2

1. (1931) 1931 Oudh 166 (170) : 32 Cri L Jour 854 : 1931 Cri Cas 438, *Mata Din* v. *Emperor.*
(1921) 1921 Pat 109 (113, 114) : 22 Cri L Jour 417, *Fatu Santal* v. *Emperor.*
(1915) 1915 Lah 16 (45) : 1915 Pun Re Cri No. 17 : 16 Cri L Jour 354, *Balmookand* v. *Emperor.*
(1902) 4 Bom L R 461 (462), *Emperor* v. *Nagar Purshotam.*
(1869-70) 5 Mad H C R App 4 (4), *High Court proceedings, 11th November* 1869.
(1922) 1922 Mad 40 (41) : 45 Mad 230 : 23 Cri L Jour 680, *Tangedupalle Pedda Obigadu* v. *Pullasi Pedda.*
(1934) 1934 Pat 651 (652) : 36 Cri L Jour 447 : 1934 Cri Cas 1322, *Ramsakhia* v. *Emperor.* Incompleteness of record—Effect.
2. (1925) 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761, *Emperor* v. *Nani Mandal.*
(1875) 24 Suth W R Cr 54 (55), *Queen* v. *Moonsai Bibee.*
(1903) 5 Bom L R 999 (1000), *Emperor* v. *Abdul Hossain Shamsuddin.*
(1935) 1935 Cal 489 (490) : 1935 Cri Cas 881, *Sailabala Dasi* v. *Emperor.* Especially when a statement is made in answer to questions put by the Court under S. 342.
3. (1871) 15 Suth W R Cri Letters 3 (3).
4. (1932) 1932 Bom 279 (282) : 56 Bom 434 : 33 Cri L Jour 613, *Vasudeo Balwant Gogte* v. *Emperor.*

Note 3.

1. (1925) 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761, *Emperor* v. *Nani Mandal.* Examination under S. 342.
(1894) 21 Cal 642 (660), *Queen* v. *Sagal Samba Sajao.* (Do.)
(1875) 24 Suth W R Cr 54 (55), *Queen* v. *Moonsei Bibee.* (Do.)
(1893) Ratanlal 633 (633), *Empress* v. *Sur-*

the Court or in English.[2]

As to the effect of non-compliance with this rule with regard to the record of *confessions*, *see* Note 11 to Section 164, *supra*.

4. "Shall be shown or read or interpreted to him."

It is obligatory on the Court to show or read the record of the statements of an accused person to him or to have it interpreted to him if it is in a language not understood by him, so that he might be assured that his words have been correctly taken down and so that, if necessary, he may have it corrected.[1]

5. "To explain or add to his answers."

When the record of an examination of an accused person is shown or read over to him, he is entitled to explain or add to his answers,[1] so that the whole shall be made conformable to what the accused declares to be the truth.[2] It is the statement as *finally declared* by him to be true that is to be accepted as representing his statement.[3]

6. The record shall be signed.

The record of the examination of an accused must be signed both by the accused and by the Magistrate or Judge making the record.

The signature of the accused person to a statement should be made in the *immediate presence* of the Magistrate himself. To take a signature in an adjoining room before a clerk, and not in the Magistrate's immediate presence, is not a proper compliance with the provisions of the Section.[1]

As to the effect of refusal by the accused to sign, *see* Note 10, *infra*.

7. "Shall certify under his own hand."

The certificate need not be in the *handwriting* of the Magistrate or Judge. It is sufficient if it is under his hand only, *i. e.* signed by him.[1] When duly recorded, the certificate is sufficient *prima facie* proof of such examination and it is to be presumed that the proceedings were regular.[2]

8. Sub-section 3.

The examination need not be taken down in the Magistrate's *own hand-*

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mal. (Do.)

(1872) 4 N W P H C R 16 (22), *Queen* v. *Bheebee Koo.* Confession.

2. (1894) 21 Cal 642 (659, 660), *Empress* v. *Sagal Samba Sajao.* Examination under S. 342.

(1888) 15 Cal 595 (607, 608), *Empress* v. *Nilmadhub Mitter.* (Do.)

(1890) 17 Cal 852 (870), *Jai Narayan Rai* v. *Empress.* (Do.)

(1891) 1891 All W N 55 (56), *Empress* v. *Bachanna.* Confessions.

(1880) 5 Cal 826 (829), *Empress* v. *Vaimbilee.*

Note 4.

1. (1925) 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761, *Emperor* v. *Nani Mandal.*

(1921) 1921 Pat 109 (113, 114) : 22 Cri L Jour 417, *Fatu Santal* v. *Emperor.*

(1923) 1923 Pat 13 (15, 16) : 24 Cri L Jour 497, *Emperor* v. *Dewan Kahar.*

(1867) 7 Suth W R Cr 49 (50), *Queen* v. *Mt. Niruni.*

(1875) 24 Suth W R Cr 29 (30), *Queen* v. *Kala Chand Pal.*

Note 5.

1. (1929) 1929 Lah 382 (384) : 10 Lah 223 : 29 Cri L Jour 769, *Fakir Singh* v. *Emperor.*

(1921) 1921 Pat 109 (113, 114) : 22 Cri L Jour 417, *Fatu Santal* v. *Emperor.*

(1925) 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761, *Emperor* v. *Nani Mandal.*

2. (1902) 4 Bom L R 461 (462), *Emperor* v. *Nagar Purushotam.*

3. (1929) 1929 Lah 382 (384) : 10 Lah 223 : 29 Cri L Jour 769, *Faqir Singh* v. *Emperor.*

Note 6.

1. (1894) Ratanlal 687 (687, 688), *Empress* v. *Bhika.*

Note 7.

1. (1900) 1900 All W N 203 (204), *Empress* v. *Riaz Ali.*

(1867) 8 Suth W R Cr 55 (56), *Queen* v. *Rezza Hossein.*

2. (1871) 15 Suth W R Cr 68 (68, 69), *Queen* v. *Goshto Lall Dutt.*

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writing. It is enough if it is taken down in his presence and hearing.[1] In such cases, however, the Magistrate is bound to make a *memorandum* of the examination in his own hand and annex it to the record.

9. Sub-section 4.

Sub-section 4 provides that this Section shall not apply to two classes of cases:—

1. Cases coming under Section 263, *supra*, *i. e.* cases tried *summarily*.[1]
2. Cases tried by a Presidency Magistrate.

Before the amendment of the Code in 1923, the procedure as to the recording of an examination of the accused applied to all Magistrates including Presidency Magistrates and it was held that it was obligatory upon the Presidency Magistrates to record the examination of the accused in the manner provided by the Section, but that it was desirable that the Legislature should relieve the Presidency Magistrates altogether from this obligation.[2] The Amending Act of 1923 gave effect to this view and omitted the words "unless he is a Presidency Magistrate" in sub-section 3 and added the words "or in the course of a trial held by a Presidency Magistrate" in sub-section 4 and sub-section 2-A to Section 362, *supra*, in order "to make it clear that in cases where an appeal lies, the Presidency Magistrate shall take down a memorandum of the examination of the accused person as provided by the new sub-section 2-A of Section 362 and that in non-appealable cases no record of the examination of the accused need be made."

Thus the effect of sub-section 4 as amended is that:

1. In the case of Presidency Magistrates, no record of the examination of the accused need be made in non-appealable cases and only a memorandum of the examination need be made in appealable cases.
2. In the case of Magistrates other than Presidency Magistrates, the examination must be recorded in full as provided by the Section in all cases except those that come under Section 263 and in cases under Section 263, the examination must be recorded but need not be in *full* as provided in this Section.

10. Non-compliance with the Section—Effect of.

1. *Not recording questions and answers*:—

The record of the examination under this Section is not inadmissible in evidence merely because it is recorded in a *narrative* form and not in the form of questions and answers,[1] or because it is not recorded in full so as to include the questions.[2] But where there is no *record* made at all, of the *questions and answers* or even an attempt at doing it, it is a clear and deliberate non-compliance with the provisions of this Section and no question of prejudice arises and therefore the

(1864-66) 2 Bom H C R Crown Cas 125 (125), *Reg.* v. *Timmi*.
(1869) 11 Suth W R Cr 39 (39), *Queen* v. *Jaga Poly*.

Note 8.

1. (1897) 21 Bom 495 (500), *Empress* v. *Visram Babaji*.
(1873) 20 Suth W R Cr 50 (50), *Queen* v. *Lucky Narain Dutt*.
[See (1926) 1926 Cal 691 (692): 27 Cri L Jour 751, *Ismail Sha* v. *Emperor*.]

Note 9.

1. (1927) 1927 Oudh 42 (43): 28 Cri L Jour 76, *Bhawani Bhik* v. *Emperor*.
(1927) 1927 Pat 369 (370): 6 Pat 504: 28 Cri L Jour 1037, *Parsotim Das* v. *Emperor*.
2. (1922) 1922 Bom 290 (291, 292): 46 Bom 441: 23 Cri L Jour 45, *Emperor* v. *Gulab Jan*.
(1921) 1921 Bom 374 (376): 45 Bom 672: 22 Cri L Jour 17, *Fernandez* v. *Emperor*.

Note 10.

1. (1864-66) 2 Bom H C R Crown Cas 398 (398), *Reg* v. *Vithoji valad Appa*.
2. (1864-66) 2 Bom H C R Crown Cas 395 (396), *Reg* v. *Kalla Lakhmaji*.
(1883) 12 Cal L R 120 (121), *Empress* v.

defect is not one that can be cured either by Section 533 or by Section 537.[3] **Sec. 364 Note 10**

2. *Not signing the statement*:—

A statement recorded under this Section is not inadmissible merely because it is not signed by the accused,[4] or by the Magistrate.[5] The defect is one curable by Section 533. It was held by the High Court of Bombay,[6] and Madras,[7] under the old Code of 1872, and by the Chief Court of Lower Burma in a case arising under the Code of 1882,[8] following the Bombay view, that a refusal by the accused to sign the record of his examination under this Section could not be punished under Section 180 of the Penal Code.

The High Court of Allahabad has, however, in a case coming under the present Code, not followed the Bombay view and has held that a refusal to sign will be an offence under Section 180 of the Penal Code.[9]

3. *Defects in certificates*:—

Any defect in the certificate may be cured by proving it by the examination of the Magistrate who recorded it.[10] Thus, where the certificate appears in the first page of the record and not in the last,[11] or there is no certificate at all appended to the record,[12] the defect can be cured by calling the Magistrate to prove the statement.

365. Every High Court established by Royal Charter and the Chief Court of Lower Burma may, from time to time, time to time, by general rule,

Record of Evidence in High Court.

365.* Every High Court established by Royal Charter and the *Chief Court of Oudh shall* from

Record of Evidence in High Court.

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* **(Code of 1882—S. 365**—Materially the same.)

(Codes of 1872 and 1861—Nil.)

Sagambur.
(1882) 8 Cal 618 (620), *Titu Maya* v. *Queen.*

3. (1934) 1934 Nag 213 (215) : 31 Nag L R 49 : 1934 Cri Cas 984: 35 Cri L Jour 1457, *Hari Krishnaji Ghate* v. *Emperor.*
(1925) 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761, *Emperor* v. *Nani Mandal.*
(1926) 1926 Cal 430 (431) : 26 Cri L Jour 1032, *Messer Bepari* v. *Emperor.*
(1925) 1925 Cal 821 (822) : 52 Cal 446 : 26 Cri L Jour 1244, *Sarat Chandra Kar* v. *Emperor.*

4. (1883) 1883 All W N 213 (243), *Empress* v. *Gajadhar.*
(1874) 11 Bom H C R Crown Cas 237 (238, 239), *Reg.* v. *Deva Dayal.*

5. (1899) 3 Cal W N 387 (389), *Empress* v. *Lal Sheikh.*
(1899) 3 Cal W N 103*n* (103*n*), *Empress* v. *Bepin Manjhi.*

6. (1879) 4 Bom 15 (18, 19) *Imperatrix* v. *Sirsapa.*

7. (1881) 1 Weir 113 (113), *High Court Procoedings, 3rd September* 1881, *No.* 1810.

8. (1906) 4 Cri L Jour 205 (206) : 3 Low Bur Rul 199, *Emperor* v *Ba Tin.*

9. (1917) 1917 All 48 (49) : 39 All 399 : 18 Cri L Jour 559, *Umar Khan* v. *Emperor.* Distinguishing 4 Bom 15 as under the old Code.
[See also (1935) 1935 All 652 (653) : 1935 Cri Cas 652 : 36 Cri L Jour 1098, *Motilal* v. *Emperor.* No exemption on the ground that the accused has refused to answer questions or that he has refused to make a further statement.]

10. (1915) 1915 Lah 487 (494) : 16 Cri L Jour 257 (F B), *Emperor* v. *Shuldham.*

11. (1904) 1 Cri L Jour 10 (12) (Cal), *Emperor* v. *Rajani Kanto Koer.*

12. (1870) 14 Suth W R Cr 10 (11), *Queen* v. *Petambur Dhoobee.*
[See also (1867) 8 Suth W R Cri Letters 22 (22). Where the Magistrate was not examined.
(1869) 12 Suth W R Cr 44 (45), *Queen* v. *Radhoo Jana.* (Do.)]

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by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed.

prescribe the manner in which evidence shall be taken down in cases coming before the Court, *and the evidence shall be taken down in accordance with such rule.*

CHAPTER XXVI.

OF THE JUDGMENT.

Sec. 366

Mode of delivering judgment.

366.* (1) The judgment in every trial in any criminal Court of original jurisdiction shall be pronounced, or the substance of such judgment shall be explained,—

(a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and

(b) in the language of the Court, or in some other language which the accused or his pleader understands:

Provided that the whole judgment shall be read out by the presiding Judge, if he is requested so to do either by the prosecution or the defence.

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* **(Code of 1882—S. 366.)**

366. The judgment in every trial in any criminal Court of original jurisdiction shall be pronounced in open Court either immediately or at some subsequent time of which due notice shall be given to the parties or their pleaders; and the accused shall, if in custody, be brought up, or if not in custody shall be required to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only, in which case it may be pronounced in the presence of his pleader.

Mode of delivering judgment.

(Code of 1872—S. 211, Para. 3 and S. 462.)

211. * * * * * * *

When the personal attendance of the accused person during the trial has been dispensed with, the sentence of the Magistrate, if the sentence be for fine only, may be pronounced in the presence of such accused person's agent, if he has been permitted to appear by agent; or the accused person may be required to attend to hear such sentence.

462. In trials with assessors, when the exhibits have been perused, the witnesses examined, and the parties heard in person or by their respective pleaders, the Court shall pronounce its judgment. The judgment shall be pronounced in open Court, either immediately, or on some future day, of which due notice shall be given to the parties or their pleaders.

When judgment is to be pronounced.

(Code of 1861—Nil.)

(2) The accused shall, if in custody, be brought up, or, if not in custody, be required by the Court to attend to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted, in either of which cases it may be delivered in the presence of his pleader. Sec. 366 Note 1

(3) No judgment delivered by any criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders or any of them, the notice of such day and place.

(4) Nothing in this Section shall be construed to limit in any way the extent of the provisions of Section 537.

Synopsis.

Other Topics.

Absence of accused—Judgment—Whether illegal. See Note 10, Pts. 1 to 3, F-N (2).
Bench of Magistrates—Presiding officer's judgment in absence of other members—Not proper judgment. See Note 3, Pt. 3.
Death of Magistrate—After passing sentence but before writing judgment—Irregularity. See Note 11, F-N (1).
Judgment — Not in Court hall—Not necessarily illegal. See Note 7, Pt. 1.
Judgment—To be pronounced only after termination of trial without delay. See Note 8, Pts. 1, 2.
Judgment—Before pronouncement is inoperative and can be altered. See Note 4, Pt. 2.
Loss of records—Judge can write judgment from memory. See Note 6.
Magistrate—On leave or transferred cannot pronounce judgment. See Note 3, Pt. 2.
Section 366—Not applicable to orders in trials. See Note 1, Pts. 2, 3.
Section 366 and S. 367—Provisions must be obeyed. See Note 1, Pt. 1 and S. 367, Pt. 1, F-N (1).
Sentence—To follow judgment—Breach of rule. See Note 11, Pts. 1, 2.

1. Scope and applicability of the Section.

This and the following Sections deal with judgments in *trials*. This Section deals with the mode of delivering a judgment and the next Section with the language and contents of such judgments.

The requirements of this Section and the next are no mere matters of form ; the provisions are based upon good and substantial grounds of public policy and must be obeyed.[1]

Section 366—Note 1.

1. (1892) 14 All 242 (272), *Queen-Empress* v. *Har Gobind Singh*.

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The Section does not apply to orders which are not judgments in *trials*. Thus the Section is not applicable to an order under Section 195 of the Code[2] or to an order dismissing a complaint under Section 203.[3]

2. 'Judgment'—Meaning of.

See Notes to Sections 367 and 369, *infra*.

3. Delivery of judgment cannot be delegated.

The judgment must be pronounced by the Judge or Magistrate who held the trial. The latter cannot delegate this function to others.[1] A Magistrate who has gone on leave, or who has been transferred to another district and has handed over charge, has no jurisdiction to pronounce judgment in a trial held by him.[2] Where the Court consists of a Bench of Magistrates, a judgment prepared by the presiding officer in the absence of the other members of the bench is not a proper judgment.[3]

4. Judgment must be pronounced.

The Section specifically requires that every judgment ought to be *pronounced* by Court in accordance with the Section.[1] Till then it is inoperative as a judgment and is nothing more than the private expression of an opinion by the Judge which can be changed and altered.[2]

5. Substance of judgment to be explained.

It is not obligatory on the Court to pronounce the *whole* of the judgment. It is enough if the substance of such judgment is explained. Where, however, the prosecution or the defence requests the Court to read the whole of the judgment the presiding officer should comply with the request.

6. Effect of loss of records.

This Section does not require that the records of a case should not have been lost at the time of pronouncing judgment.[1] In such cases it is open to the Judge to re-write the judgment from memory and from the materials before him and place it on the record.

7. "In open Court."

The judgment should be ordinarily pronounced in *open Court*. Where, however, a judgment is pronounced by a Magistrate in his private house instead of in the usual Court hall by reason of his illness, the judgment is not necessarily illegal and will not be set aside in the absence of proof of prejudice.[1]

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2. (1904) 1 Cri L Jour 969 (970) : 6 Bom L R 897 (899), *In re Nagappa Satyappa*.

3. (1906) 4 Cri L Jour 284 (284, 285) : 1906 Upp Bur Rul, Cr P C 49, *Emperor* v. *Nga Sein Gyi*.

Note 3.

1. (1889) 1889 All W N 181 (184), *Queen-Empress* v. *Jia Lal*.

2. (1881) 3 All 563 (565) (F B), *Empress* v. *Anand Sarup*.
(1932) 1932 All 582 (582) : 1932 Cri Cas 700 : 34 Cri L Jour 112, *Ram Ratan* v. *Emperor*.
(1924) 1924 Cal 192 (193) : 25 Cri L Jour 192, *Jagat Bandhu* v. *Jagabandhu*. Order under S. 145.
(1879) 1879 Pun Re Cri No 20, page 59 (60), *Sharif* v. *Empress*.
(1917) 1917 Cal 310 (310) : 36 Ind Cas 842 (843) : 18 Cri L Jour 10, *Chandra Kishore* v. *Emperor*.

3. (1928) 1928 Mad 1172 (1173) : 52 Mad 237 : 29 Cri L Jour 973, *Ramakotiah* v. *Subba Rao*.

Note 4.

1. (1892) 14 All 242 (272), *Queen-Empress* v. *Hargobind*,

2. (1929) 1929 Lah 692 (694): 1929 Cri Cas 219: 31 Cri L Jour 975, *Sikandar Lal Puri* v. *Emperor*.
(1892) 1892 All W N 157 (157), *Empress* v. *Abdul Majid*.
(1913) 14 Cri L Jour 562 (563) : 21 Ind Cas 162 (All). *Ramdhir Rai* v. *Emperor*.

Note 6.

1. (1915) 1915 Mad 1038 (1039) : 14 Cri L Jour 595 (596) : 38 Mad 498, *Kamakshamma* v. *Emperor*.

Note 7.

1. (1866) 1 Agra H C R Cri 17 (18), *Government* v. *Holasee Singh*.

8. Time of pronouncing judgment.

The judgment should be pronounced only after the *termination* of the trial; if pronounced before such a termination, it is a nullity.[1] But there should be no unreasonable delay in pronouncing the judgment after the termination of the trial. Such delay is not only unjust to the accused as it prevents them from appealing against the sentence, but is also opposed to the general principles of law.[2]

9. Pronouncing predecessor's judgment.

See Note 6 to Section 350 and also the undermentioned case.[1]

10. Presence of accused when pronouncing judgment—Sub-section 2.

Where the accused, was not required to attend to hear the judgment delivered and could not be so required as he had absconded before judgment, it was held by the High Court of Lahore that the judgment pronounced in his absence was wholly illegal and should be set aside.[1] *See also* the undermentioned case.[2] Where an accused person absconded before judgment and on his re-arrest, the Magistrate re-pronounced the judgment which he had pronounced in his absence, it was held that the defect was one which was cured under Section 537.[3] It has been seen in Note 10 to Section 205, *ante* that where the accused is convicted and the sentence is not one of fine only, the Court must, under sub-section 2 of this Section direct the personal attendance of the accused for hearing the judgment.

11. Sentence or release to be after judgment.

A sentence in the case of a conviction, or a direction to set the accused at liberty in the case of an acquittal can only *follow* the judgment and not *precede* it. A breach of this rule is, however, only an irregularity which can be cured under the provisions of Section 537, *infra*.[1] The High Court of Patna has, however, in

Note 8.

1. (1932) 1932 Mad W N 648 (649), *Srinivasachariar* v. *Emperor*.
2. (1892) 5 C P L R Cri 24 (24), *Empress* v. *Baldeo*.

Note 9.

1. (1931) 1931 Cal 637 (638): 1931 Cri Cas 837: 33 Cri L Jour 60, *Jogesh Chandra Roy* v. *Surendra Mohan Roy*. Succeeding Judge cannot deliver predecessor's judgment.

Note 10.

1. (1927) 1927 Lah 870 (870): 28 Cri L Jour 971, *Abdullah* v. *Emperor*.
2. (1870) 7 Bom H C R Crown Cas 31 (34), *Reg.* v. *Ragha Naranji*. When the proceedings in a case tried by a Subordinate Magistrate are submitted under S. 277 of the Cr. P. C. to a District Magistrate to pass sentence upon the accused, the accused is entitled to be present at the passing of such sentence before the District Magistrate. The order so passed in his absence is illegal.
3. (1887) Ratanlal 325 (325), *Queen-Empress* v. *Ghotiram*.

Note 11.

1. (1933) 1933 All 660 (662): 1933 Cri Cas 1143: 55 All 886: 34 Cri L Jour 1036, *Dhonda Kandoo* v. *Sitaram*. Distinguishing 14 All 242.
   (1896) 23 Cal 502 (505), *Tilak Chandra Sarkar* v. *Baisagomoff*.
   (1894) 21 Cal 121 (125), *Damu Senapati* v. *Sridhar Rajwar*.
   (1911) 12 Cri L Jour 457 (458): 11 Ind Cas 993 (Bom), *Emperor* v. *Thaver Issaji Boree*. Distinguishing 1 Bom L R 160.
   (1925) 1925 Lah 137 (137): 25 Cri L Jour 705, *Ata Muhamad* v. *Emporor*. Dissenting from 14 All 242.
   (1922) 1922 Mad 502 (503): 45 Mad 913: 23 Cri L Jour 583 (FB), *Sankaralinga Mudaliar* v. *Narayana Mudaliar*.
   (1915) 1915 Mad 1038 (1039): 14 Cri L Jour 595 (596): 38 Mad 498, *Kamakshamma* v. *Emperor*.
   (1879) 2 Weir 438 (439) *High Court Proceedings, 28th August* 1879. A Magistrate passed sentence and then died before writing judgment—*Held* it was only an irregularity.
   (1930) 1930 Rang 77 (78): 7 Rang 370: 1930 Cri Cas 203: 30 Cri L Jour 1166, *Md. Hayat Mulla* v. *Emperor*.
   (1911) 12 Cri L Jour 610 (610): 5 Sind L R 131, *Emperor* v. *Morio Khan*.
   [But see (1892) 1892 All W N 157 (157, 158), *Queen-Empress* v. *Abdul Majid Khan*.
   (1903) 27 Mad 237 (238), *Bandanu Atchayya* v. *Emperor*.
   (1909) 19 Mad L Jour 9 (Sh. Notes), *Referred Trial* 1 *of* 1909.]

Sec. 366 Note 11

the undermentioned case[2] held that pronouncing judgment before completing the judgment makes the sentence illegal. The decision follows the view expressed in *Queen-Empress* v. *Har Gobind*, I. L. R. 14 All 242, which has been explained in later decisions of the Allahabad High Court.

Sec. 367

Language of judgment. Contents of judgment.

367. (1) Every such judgment shall, except as otherwise expressly provided by the Code, be written by the presiding officer of the Court in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it.

Language of judgment. Contents of judgment.

367.* (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court *or from the dictation of such presiding officer* in the language of the Court, or in English; and shall contain, the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it, *and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.*

(2) It shall specify the offence (if any) of which, and the Section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

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* **(Code of 1882—S. 367—Same** as that of 1898 Code.)

(Code of 1872—Ss. 255, last Para; 287, Para. 2; 461; 463 and 464, Paras. 1 and 4.)

255. * * * * * *

A statement of the Judge's direction to the jury shall form part of the record.

287. * * * * * *

If the accused person is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.

CHAPTER XXXIV

Of the judgment, order and sentence.

Judgment to specify offence.

461. When the trial in any criminal Court is concluded, the Court, in passing judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the Section of the Indian Penal Code or other law under which, he is convicted:

Judgment in the alternative.

or if it be doubtful under which of two Sections, or under which of two parts of the same Section, such offence falls, the Court shall, distinctly express the same and pass judgment in the alternative according to Section 72 of the said Code.

Judgment to be written in English, or language of district.

463. The judgment or final order shall be written by the presiding officer of the Court in English, or the language of the district.

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2. (1930) 1930 Pat 148 (149): 8 Pat 904: 31 Cri L Jour 416: 1930 Cri Cas 90, *Jhari Lal* v. *Emperor*.

(3) When the conviction is under the Indian Penal Code, and it is doubtful under which of two Sections or under which of two parts of the same Section, of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative. Sec. 367

Judgment in alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed:

Proviso. If the language of the Judge be not English, the judgment shall not be written in English, unless the Judge be sufficiently conversant with the English language to be able to write a clear and intelligible decision in that language.

464. The judgment or final order shall contain the point or points for determination, the finding thereupon and the reasons for the finding and shall be dated and signed by the Judge in open Court at the time of pronouncing it. It shall specify the offence of which the accused person is convicted and the punishment to which he is sentenced: or if it be a finding of acquittal, it shall direct that he be set at liberty.

Judgment what to contain.

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In trials by jury, the Court need not state its reasons for its judgment, but shall record the heads of the charge to the jury.

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(Code of 1861—Ss. 379, 380, 381, 429 and 430.)

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379. * * * * *

A statement of the Judge's direction to the jury shall form part of the record.

Of verdict of Jury.

* * * *

380. * * * * *

If the accused person shall be convicted of an offence which by the Indian Penal Code is punishable with death and the Court shall sentence such person to any punishment other than death, the Court shall state the grounds upon which it remitted the punishment of death in the statement of trials periodically submitted to the Sudder Court, as hereinafter required, under the head of "Sentences passed upon the accused persons."

Acquittal or conviction.

CHAPTER XXVI.

Finding, judgment and sentence.

381. When the trial in any criminal Court is concluded, the Court, in passing judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the Section of the Indian Penal Code under which he is convicted, or if it be doubtful under which of two Sections the offence falls, shall distinctly express the same, and pass judgment in the alternative, according to S. 72 of the said Code.

What the judgment is to specify.

CHAPTER XXXI.

General Rules.

429. Every sentence or final order of a criminal Court, together with the reason for making or passing the same, shall be written in the vernacular language of the presiding Officer, and shall be dated and signed by such Officer at the time of his making or passing the same. * * * *

In what language sentence to be written.

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Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

(6) *For the purposes of this Section, an order under Section 118 or Section 123, sub-section (3), shall be deemed to be a judgment.*

Synopsis.

Other Topics.

Accused's action—Open to two constructions—Presumption of innocence to prevail. See Note 6, Pt. 29.

Alibi evidence. See Note 6, Pt. 24.

Alibi—Plea of—No Bar to other pleas. See Note 6, F-N (9).

Alibi—Effort by accused to concoct false evidence—Not proof of commission of crime. See Note 6, F-N (4).

Bench of Magistrates—President of Bench in minority—Member of majority to write judgment. See Note 3, Pt. 2.

Civil Court's decision—Not binding on criminal Court. See Note 6, F-N (1).

Circumstantial evidence—When sufficient. See Note 6, Pts. 27 and 28.

Discharge order—Not judgment. See Note 1a, Pt. 2.

Evidence—Only quality and weight material—And not number of witnesses. See Note 6, Pt. 11.

Evidence—Appreciation and effect—Difference in civil and criminal proceedings. See Note 6, Pt. 1a.

Finding of guilty—Some sentence necessary. See Note 10, Pt. 1.

Gravest suspicion—Not sufficient. See Note 6, F-N (1).

Guilt of accused—Onus on prosecution—To be proved in accordance with law. See Note 6, Pts. 1 to 5.

Heads of charge—To be written soon after delivery of charge to jury. See Note 15, Pt. 3.

Judge—Not to act on matters not made evidence on record. See Note 6, Pts. 6 to 8.

Judgment—Not in English or Court language—Only irregularity. See Note 2, Pt, 2.

Judgment—Contents. See Note 6, Pts. 38, 39 ; Note 9, Pts. 1, 2.

Judgment of acquittal—Detention of accused after pronouncement — Illegal—Formal warrant of release not necessary. See Note 13, Pt. 3.

Judgment not according to law—*De novo* trial to be ordered. See Note 16, Pt. 1.

Legislative changes. See Note 3; Note 17.

Medical witness, experts, etc.—Evidence not to be blindly accepted. See Note 6, Pts. 18 to 20.

Motive—Mere motive—Not sufficient. See Note 7, F-N (3).

Prosecution evidence trustworthy—Failure to prove motive immaterial. See Note 6, Pt. 31a.

Section—Not applicable to orders on petitions. See Note 1, Pt. 3.

Sentence—Cannot be postponed after judgment. See Note 10 Pts. 2, 3.

Short-hand notes only in murder cases—Practice deprecated. See Note 15, F-N (5).

"Sign"—Meaning. See Note 11, Pts. 3, 4.

Signature—Not to be with stamp—But if with stamp, only irregularity. See Note 11, Pts. 5, 7.

Unnatural offence—Conviction can be on uncorroborated testimony of boy. See Note 6, F-N (11).

Witness—Mistake in identification—No reason for discrediting his other evidence. See Note 6, F-N (16).

When it may be written in English,

430. If the vernacular language of the presiding Officer be not English, and the Officer be sufficiently conversant with the English language to be able to write the sentence or final order in a clear and intelligible manner, in that language, and prefer to write the same in that language, the sentence or final order may be written in English.

1. Object and applicability of the Section.

As has been already mentioned in the Notes to Section 366, *ante*, the provisions of this Section also are based upon good and substantial grounds of public policy.[1]

This Section applies to such judgments as are referred to in Section 366, *ante*, that is to say, to judgments in *trials*.[2] It does not apply to orders on petitions.[3]

As to whether the Section applies to orders under Sections 118 and 123, *see* *Note* 17, *infra*.

1a. Judgment—Meaning of.

The word "judgment" has not been defined in this Code. The wording of Section 366, *ante*, as well as this Section shows that the word "judgment" means a decision in a *trial* which decides a case finally so far as the Court trying the case is concerned, and terminating in either a conviction or acquittal of the accused.[1] Thus, an order of discharge is not a final order and is not, therefore, a judgment within the meaning of the Section.[2] For further notes, *see* Notes to Section 369.

2. Language of judgment.

The judgment should be written in the language of the Court or in English.[1] An omission to do so is, however, only an irregularity which can be cured by the provisions of Section 537, *infra*.[2]

3. "Written by the presiding officer."

Prior to the amendment in 1923 this Section provided that the judgment must be written by the presiding officer. It was, therefore, held that the judgment should be written by the Court itself and not by somebody else to the dictation of the officer.[1] The amendment of 1923 now allows such a procedure.

Where in the case of a trial by a Bench of Magistrates, the President of the Bench is in a minority as to conviction or acquittal, the judgment should be written by some member of the majority.[2]

Section 367—Note 1.

1. (1892) 14 All 242 (272), *Queen-Empress* v. *Hargobind Singh*.
2. (1904) 1 Cri L Jour 969 (970) (Bom), *In re Nayappa*. Order under Section 195—Record of reasons not necessary.
3. (1872) Ratanlal 61 (61), *Reg* v. *Pandurang*. [See also (1929) 1929 Nag 133 (134, 135) : 25 Nag L R 6 : 30 Cri L Jour 872, *Rajulu* v. *Emperor*. Order under Section 494— Judgment not necessary—But there must be something to show why Magistrate orders withdrawal.
(1918) 1918 Cal 485 (485) : 18 Cri L Jour 886, *Umesh Chandra Roy* v. *Satish Chandra Roy*.
(1923) 1923 Lah 163 (165) : 24 Cri L Jour 433, *Mul Singh* v. *Emperor*,
(1924) 1924 Cal 382 (382) : 24 Cri L Jour 229, *Jagat Chandra Roy* v. *Kalimuddi Sardar*.]

Note 1a.

1. (1910) 11 Cri L Jour 190 (190) : 31 Mad 543, *In re Abdul Kadir*.
(1909) 9 Cri L Jour 80 (82) : 31 Mad 543, *Emperor* v. *Maheswara Kondaya*.
2. (1907) 5 Cri L Jour 255 (256) (Bom), *Emperor* v. *Nabi Fakira*. Though record of reasons is not compulsory, it is desirable to record reasons.
(1909) 9 Cri L Jour 80 (82) : 31 Mad 543, *Emperor* v. *Maheswara Kondaya*.

Note 2.

1. (1906) 4 Cri L Jour 162 (163) (Cal), *Dhanukdhari Singh* v. *Harihar Singh*. [See also (1865) 4 Suth W R Cri 19 (19), *Queen* v. *Bholunneshur Gossamy*.]
2. (1906) 4 Cri L Jour 162 (163) (Cal), *Dhanukdhari* v. *Harihar*.

Note 3.

1. (1906) 4 Cri L Jour 394 (395) (Cal), *Manik Lal* v. *Corporation of Calcutta*.
(1891) Ratanlal 545 (546), *Queen-Empress* v. *Lakshmi Bai*.
Sel Cases 192 (Oudh), *Queen-Empress Nanhu*.
2. (1928) 1928 Mad 197 (197) : 51 Mad 338 : 29 Cri L Jour 207, *Boddipatti Lalamma* v. *Emperor*.
(1926) 1926 Mad 354 (354, 355) : 27 Cri L Jour 90, *Dyta Seetharamayya, In re*.

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4. Contents of judgment :—*See* Section 424.

5. Points for determination :—*See* Notes to Section 424.

6. "Decision thereon"—Appreciation of evidence.

Though the rules of evidence are the same in civil and criminal proceedings, there is always a marked difference between the effect and appreciation of evidence in the two cases. In civil cases a mere *preponderance* of probability or greater probative value is sufficient to warrant a conclusion ; while in criminal cases, there should be such a *moral certainty* as convinces the mind of the tribunal as reasonable men, beyond the possibility of doubt or suspicion.[1a] Thus it is primarily the duty of the prosecution to establish the guilt of the accused to the satisfaction of the Judge and the jury,[1] and it is certainly not the province or the duty of the accused to establish his own innocence.[2] The prosecution should establish the case against the accused by *positive affirmative* evidence of his guilt and suspicion, however grave, does not take the place of proof.[3] The onus cast on the prosecution is not discharged by any absence of explanation or weakness on the part of the

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Note 6.

1a (1917) 1917 Pat 111 (113): 19 Cri L Jour 344 (347), *Luchmi Singh* v. *Emperor.*
(1929) 1929 Nag 113 (114) : 30 Cri L Jour 789, *Ramdayal* v. *Emperor.*
(1895) Ratanlal 772 (773), *Queen-Empress* v. *Ganesh.*

1. (1932) 1932 Cal 293 (294) : 1932 Cri Cas 262: 59 Cal 136 : 33 Cri L Jour 441, *Trailokya Nath Das* v. *Emperor.* A civil Court's decision is not binding on a criminal Court.
(1928) 1928 Oudh 373 (373): 29 Cri L Jour 763, *Rameshwar* v. *Emperor.*
(1933) 1933 Oudh 372 (373): 35 Cri L Jour 66 : 1933 Cri Cas 1049, *Emperor* v. *Parameshwar Din.* The gravest suspicion is insufficient.
[See (1932) 1932 Cal 833 (833) : 1932 Cri Cas 860, *Khurshed Chik* v. *Raniganj Municipality.* Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that the liability has been incurred to prove that the things prescribed in the Act have been actually done.
(1926) 1926 Lah 375 (376): 27 Cri L Jour 593, *Emperor* v. *Sain Das.*]
[See also (1933) 1933 Oudh 299 (301): 1933 Cri Cas 669 : 34 Cri L Jour 838, *Nibar* v. *Emperor.*]

2. (1920) 1920 Pat 553 (555) : 20 Cri L Jour 253, *Ram Sarat Sahay* v. *Emperor.*
(1866) Ratanlal 5 (5), *Reg.* v. *Jenkoo.*
(1918) 1918 Nag 123 (124) : 20 Cri L Jour 747, *Gulzarsha Fakir* v. *Emperor.* A moral conviction of guilt is no sufficient foundation for a verdict of guilty, unless it is based on substantial facts which lead to no other reasonable conclusion than that the person charged is guilty.
(1933) 1933 Cal 532 (534) : 1933 Cri Cas 891 : 60 Cal 656 : 34 Cri L Jour 1059, *Nishi Kanta Chatterji* v. *Emperor.*

3. (1931) 1931 Lah 406 (408) : 1931 Cri Cas 646 : 32 Cri L Jour 1049, *Amarnath* v. *Emperor.*
(1923) 1923 Lah 42 (43) : 26 Cri L Jour 28, *Surat Singh* v. *The Crown.*
(1914) 1914 Oudh 275 (278) : 15 Cri L Jour 643 : 17 Oudh Cas 276, *Abbas Guli Khan* v. *Emperor.*
(1933) 1933 Oudh 148 (151) : 1933 Cri Cas 279 : 34 Cri L Jour 498 : 8 Luck 301, *Ratan* v. *Emperor.*
(1927) 1927 Lah 862 (864) : 29 Cri L Jour 532, *Lila Ram* v. *Emperor.*
(1929) 1929 Pat 112 (113) : 30 Cri L Jour 835, *Basudeb Mandar* v. *Emperor.*
(1930) 1930 Lah 84 (86) : 1930 Cri Cas 100 : 31 Cri L Jour 141, *Emperor* v. *Soopi.*
(1928) 1928 Lah 272 (273) : 9 Lah 531 : 29 Cri L Jour 481, *Dula Singh* v. *Emperor.*
(1930) 1930 Oudh 321 (323) : 1930 Cri Cas 725 : 31 Cri L Jour 1078 : 6 Luck 68, *Rangi Lall* v. *Emperor.*
(1915) 1915 Low Bur 115 (118) : 16 Cri L Jour 25 (28), *Nga Po Thein* v. *Emperor.*
(1933) 1933 Pesh 28 (30) : 1933 Cri Cas 329 : 34 Cri L Jour 386, *Rahmat Shah* v. *Emperor.*
(1934) 1934 Lah 693 (694) : 36 Cri L Jour 778 : 1934 Cri Cas 1008, *Sardhar Ahmad* v. *Emperor.*
(1918) 1918 Pat 146 (151) : 19 Cri L Jour 789, *Ritbaran Singh* v. *Emperor.*
(1927) 1927 Lah 581 (590) : 28 Cri L Jour 625, *Farkati* v. *Emperor.*
(1932) 1932 Lah 195 (195) : 33 Cri L Jour 501 : 1932 Cri Cas 216, *Dila Ram* v. *Emperor.* Mere motive cannot be

accused,[3a] or even by the fact that the defence put forward by the accused was found to be false.[4]

It is not only necessary that the guilt of the accused should be proved beyond a possibility of doubt but also that it should be proved strictly in accordance with law.[5] Thus it is improper for a Judge to make inquiries after a

considered as sufficient evidence of the commission of a crime by the particular person.

(1927) 1927 Lah 74 (75): 28 Cri L Jour 118, *Arjan* v. *Emperor*. (Do.)

(1926) 1926 Lah 88 (90): 7 Lah 84: 27 Cri L Jour 709, *Rannun* v. *King Emperor*. (Do.)

(1933) 1933 All 394 (395): 1933 Cri Cas 664: 34 Cri L Jour 754, *Mt. Gajram* v. *Emperor*. (Do.)

3a (1924) 1924 All 299 (300): 25 Cri L Jour 327: 46 All 64, *Umed Singh* v. *Emperor*.

(1931) 1931 Lah 361 (361): 1931 Cri Cas 466: 32 Cri L Jour 1233, *Mela Ram* v. *Emperor*.

(1922) 1922 All 24 (25): 23 Cri L Jour 193, *Ramhit* v. *Emperor*.

(1932) 1932 Lah 243 (244): 1932 Cri Cas 255: 33 Cri L Jour 411, *Hayat* v. *Emperor*. Murder—Two persons seen together and shortly afterwards one of them found to have been murdered—No onus rests on survivor to explain how deceased met with his death.

(1933) 1933 Oudh 226 (228): 8 Luck 397: 1933 Cri Cas 432: 34 Cri L Jour 935, *Har Dayal* v. *Emperor*.

(1933) 1933 Oudh 257 (258): 1933 Cri Cas 562: 34 Cri L Jour 661, *Ramamurthi* v. *Jai Indra Bahadur Singh*.

(1925) 1925 Oudh 78 (88): 26 Cri L Jour 225, *Hira Lal* v *Emperor*.

(1905) 2 Cri L Jour 352 (353) (All), *Abdul Ganni* v. *King-Emperor*.

(1933) 1933 Oudh 333 (338): 8 Luck 570: 35 Cri L Jour 45: 1933 Cri Cas 780, *Ratan Lal* v. *Emperor*.

(1904) 1 Cri L Jour 390 (395): 28 Bom 533, *Emperor* v. *Bankatram*.

(1919) 1919 Oudh 160 (174): 20 Cri L Jour 465, *Sushil Chandra Lahiri* v. *Emperor*.

(1928) 1928 Nag 257 (260): 29 Cri L Jour 561, *Mt. Shevanthi* v. *Emperor*.

(1923) 1923 Mad 365 (367): 24 Cri L Jour 426, *In re, Ramudu Ayyar*.

(1922) 1922 Nag 87 (88): 23 Cri L Jour 345, *Domar Singh* v. *Emperor*.

(1920) 1920 Pat 553 (555): 20 Cri L Jour 253, *Ram Sardhar Sahay* v. *Emperor*.

(1894) Ratanlal 686 (686), *Queen-Empress* v. *Jethmal Narayan*.

(1933) 1933 Lah 871 (875): 35 Cri L Jour 137: 1933 Cri Cas 1116, *Emperor* v. *Rai Singh Narain Singh*.

(1933) 1933 Lah 808 (808): 35 Cri L Jour 69: 1933 Cri Cas 1101, *Piran Ditta* v. *Emperor*.

(1914) 1914 Sind 111 (112): 7 Sind L R 109: 15 Cri L Jour 497, *Isarsing Sawansing* v. *The Crown*. But where onus is discharged, the duty is cast upon the accused to explain himself.

(1925) 1925 Sind 289 (292): 19 Sind L R 71: 26 Cri L Jour 1063, *Bahadur valad Rano Khaskhelli* v. *Emperor*. (Do.)

(1910) 11 Cri L Jour 222 (234): 6 Ind Cas 51 (Mad), *In re Chukkapalli Ramayya*.

(1924) 1924 Cal 323 (325): 51 Cal 418: 25 Cri L Jour 776, *Mamfru Chowdhury* v. *King-Emperor*.

(1927) 1927 Pat 257 (260): 28 Cri L Jour 497, *Devendra Bhatta Chandrya* v. *Emperor*.

[See (1927) 1927 Sind 85 (87): 27 Cri L Jour 1265, *Bukshan* v. *Emperor*. But when a *prima facie* case is made out, the presumption of innocence is displaced and the force of suspicious circumstances is augmented, when accused offers no explanation.

(1930) 1930 Sind 211 (215): 1930 Cri Cas 851: 24 Sind L R 252: 31 Cri L Jour 1046, *Baksho* v. *Emperor*.

(1919) 1919 Pat 534 (536): 4 Pat L Jour 289: 20 Cri L Jour 375, *Ram Prasad Mahton* v. *Emperor*.]

4. (1916) 1916 All 63 (64): 17 Cri L Jour 23 (24), *Abdul Aziz* v. *Emperor*.

(1921) 1921 Lah 89 (90): 22 Cri L Jour 595, *Hari Ram* v. *Emperor*.

(1915) 1915 Lah 95 (97): 16 Cri L Jour 152 (154), *Lachhman Das* v. *Emperor*.

(1925) 1925 Lah 282 (283): 26 Cri L Jour 949, *Natha Singh* v. *King-Emperor*.

(1925) 1925 Lah 42 (43): 26 Cri L Jour 393, *Tabri* v. *Crown*. The fact that the accused made an effort to concoct false evidence of an *alibi* does not go to prove that he committed the offence charged.

(1933) 1933 Lah 946 (947): 35 Cri L Jour 79: 1933 Cri Cas 1409, *Prabhu* v. *Emperor*.

(1911) 12 Cri L Jour 584 (584): 12 Ind Cas 848 (Rang), *Kyaw Hla* v. *Emperor*.

(1921) 1921 Cal 531 (532): 23 Cri L Jour 220, *Gouri Narain* v. *Tilbakaran Chetri*.

(1933) 1933 Cal 603 (605): 1933 Cri Cas 967: 34 Cri L Jour 1073, *Tarapada Mitra* v *Emperor*.

5. (1932) 33 Cri L Jour 514 (516): 137 Ind Cas 290 (Oudh), *Puttu* v. *Emperor*.

(1921) 1921 Pat 406 (408), *Dhannu Belder* v. *King-Emperor*.

Sec. 367 Note 6

case is closed and to act upon statements and matters not made evidence on record.[6] Similarly he ought not to allow himself to be influenced by proceedings which have taken place before him in another trial,[7] or by evidence taken in any connected case or proceeding before him.[8] Before recording a conviction the Court has not only to satisfy itself that the facts constituting the offence have been established, but also to see whether the proved or admitted facts bring the case within any of the exceptions which take the case out of the purview of the offence.[9] Especially in cases where the accused specifically raises such a plea, such as the right of private defence, the exact circumstances justifying the act should be established.[10]

In considering the effect of the evidence adduced, regard should be had only to the quality and weight of the evidence adduced and not to the number of witnesses examined.[11] Thus it is open to the Court in its judgment to rely on the

(1932) 33 Cri L Jour 677 (677) 138 Ind Cas 704 (Lah), *Sher Md.* v. *Emperor.*
(1925) 1925 Oudh 676 (676): 26 Cri L Jour 1042, *Bishambhar Nath* v. *Emperor.*

6. (1928) 1928 Lah 1 (3): 9 Lah 537: 29 Cri L Jour 815, *Charanji Lal* v. *Emperor.*
(1928) 1928 Lah 125 (131): 29 Cri L Jour 212, *Miantaj Muhammad* v. *Crown.*
[See (1927) 1927 Pat 37 (38): 27 Cri L Jour 1112, *Jai Singh* v. *Emperor.*
(1887) 1887 All W N 54 (54), *Emperor* v. *Hardewa.*
(1889) 1889 All W N 181 (184), *Empress* v. *Jia Lal.*
(1885) 1885 All W N 264 (265), *Empress* v. *Sarfaraz Ali.*
(1885) 1885 All W N 31 (31), *Empress* v. *Indar Singh.*
(1933) 1933 Cal 36 (39): 1933 Cri Cas 71: 34 Cri L Jour 36, *Jagadesh Narain Tewari* v. *Emperor.*
(1875) 24 Suth W R Cri 28 (28), *Queen* v. *Ram Charan Kurmokar.*
(1870) 7 Bom H C R Crown Cas 50 (54), *Reg* v. *Vyankatrav Srinivas.*
(1870) 1870 Pun Re Cr No. 10, p. 16 (17), *The Crown* v. *Ghusseetan.*
(1909) 10 Cri L Jour 321 (325): 3 Ind Cas 622 (Lah), *Muzammal* v. *Emperor.*]

7. (1926) 1926 Cal 945 (946): 53 Cal 471: 27 Cri L Jour 975, *Surendra Nath Singha* v. *Janki Nath Ghose.*
(1930) 1930 All 481 (482): 31 Cri L Jour 716: 1930 Cri Cas 701, *Emperor* v. *Kanhaiya.*
(1925) 1925 All 443 (444): 26 Cri L Jour 981, *Din Dayal* v. *Emperor.*
(1928) 1928 Lah 923 (924): 29 Cri L Jour 734, *Sheo Karan* v. *Emperor.*

8. (1885) 1885 All W N 28 (29): *Empress* v. *Zauwar Hussain.*
(1928) 1928 Lah 923 (924): 29 Cri L Jour 734, *Sheo Karan* v. *Emperor.*

9. (1922) 1922 Lah 314 (315): 22 Cri L Jour 507, *Gulam Rasul* v. *Emperor.* Right of private defence established on evidence, though accused pleads *alibi.*
(1929) 1929 Cal 346 (348): 56 Cal 1013: 31 Cri L Jour 369, *Muhammad Ghul* v. *Fazley Karim.*
[See (1904) 1 Cri L Jour 300 (302) (Cal), *Holland Bombay Trading Company* v. *Buktear Mull.*]

10. (1925) 1925 Rang 133 (134): 26 Cri L Jour 409: 2 Rang 558, *Nga Po E* v. *King-Emperor.*
(1927) 1927 Lah 786 (788): 28 Cri L Jour 838, *Hazura Singh* v. *Emperor.*
(1912) 13 Cri L Jour 470 (471): 15 Ind Cas 310 (Mad), *Veeranna* v. *Emperor.*
(1927) 1927 Cal 324 (326): 28 Cri L Jour 334, *Adam Ali Talukdar* v. *Emperor.*
(1926) 1926 Pat 433 (434): 27 Cri L J 1322: 5 Pat 520, *Farman* v. *Emperor.*

11. (1928) 1928 Mad 1135 (1136): 29 Cri L Jour 1041, *Muhammad Salia Rowther* v. *Emperor.* No criminal Court is justified in brushing aside the documents, to which the accused are parties when the accused themselves file those documents in Court along with their statements.
(1914) 1914 Lah 565 (566): 16 Cri L Jour 266 (267), *Sardar Ahmad* v. *Emperor.* *Held* that in the case of unnatural offence under S. 377, Penal Code, conviction can safely be based on uncorroborated testimony of the boy if it is not otherwise doubtful.
(1920) 1920 Pat 366 (367): 21 Cri L Jour 33, *Brahmdeo Singh* v. *Emperor.*
(1921) 1921 Oudh 115 (115): 22 Cri L Jour 647: 24 Oudh Cas 225, *Gur Din* v. *Emperor.*
(1925) 1925 Oudh 501 (501): 27 Oudh Cas 327: 26 Cri L J Jour 530, *Bahadur* v. *Emperor.*
(1931) 1931 All 362 (363): 53 All 598: 1931 Cri Cas 618: 32 Cri L Jour 780, *Arjun Singh* v. *Emperor.*
(1925) 1925 Lah 295 (296): 26 Cri L Jour 292, *Aziz* v. *Emperor.*
(1922) 1922 Pat 88 (91): *Thakur Ajodya Prasad* v. *Emperor.*
(1918) 1918 Lah 322 (322): 19 Cri L Jour 946, *Ganpat* v. *Emperor.*
(1930) 1930 Lah 892 (893): 32 Cri L Jour 444: 1930 Cri Cas 988, *Ram Saran Das* v. *Emperor.*
(1934) 1934 Lah 158 (160): 36 Cri L Jour 108: 1934 Cri Cas 343, *Hayat*

evidence of a particular person even though such person may be interested,[12] or to discard the evidence of a number of witnesses on the ground of their unreliability.[13] The Court should exercise great care in considering and giving weight to the evidence of accomplices,[14] (*see* Section 337, *ante*) or to retracted confessions of accused persons.[15] (*See* Notes 18 and 19 to Section 164, *ante*.) Where a part of the evidence of a witness is found to be false, the Court should not accept the other parts of his evidence to base a conviction thereon unless such evidence is corroborated by other independent evidence.[16] Especially in capital cases the evidence of persons who have resiled from their former statements should be scrutinized with

Mohammad v. *Emperor*.
(1926) 27 Cri L Jour 223 (224) : 92 Ind Cas 975 (Lah), *Pali* v. *Emperor*.
[See (1921) 3 Lah L Jour 482 (483), *Nura* v. *Crown*.
(1923) 1923 Pat 519 (519): 24 Cri L Jour 360, *Bhangi Duffy* v. *Emperor*.
(1928) 1928 Pat 98 (100): 28 Cri L Jour 906, *Jagi Raut* v. *Emperor*.
(1925) 1925 Lah 42 (42): 26 Cri L Jour 393, *Tabri* v. *Crown*.]

12. (1928) 1928 Mad 1186 (1190): 51 Mad 956: 30 Cri L Jour 317, *Veerappa Goundan* v. *Emperor*.
(1930) 1930 Cal 645 (646): 1930 Cri Cas 1206 : 31 Cri L Jour 1225, *Haripado Baidya* v. *Emperor*.
(1929) 1929 Mad W N 587 (590), *Kumaraswami Asari* v. *Emperor*.
(1875) 24 Suth W R Cr 18 (18), *Gobinda Suain* v. *Narain*.
(1931) 1931 Lah 529 (530): 1931 Cri Cas 769 : 32 Cri L Jour 1032, *Miran Baksh* v. *Emperor*.
[See (1926) 8 Lah L Jour 144 (145), *Gandasingh* v. *Crown*.]

13. (1925) 1925 Lah 397 (398): 26 Cri L Jour 1335, *Nawab* v. *The Crown*.
(1929) 1929 Lah 436 (436): 30 Cri L Jour 941 : 1929 Cri Cas 3, *Hazur Singh* v. *Crown*.
(1929) 1929 Pat 705 (709) : 31 Cri L Jour 468 : 1929 Cri Cas 577, *Rampal Das* v. *Emperor*.
(1927) 1927 Lah 874 (874) : 28 Cri L Jour 43, *Dalip Singh* v. *Emperor*

14. (1932) 1932 Cal 295 (296) : 1932 Cri Cas 264 : 33 Cri L Jour 477, *Golam Asphia* v. *Emperor*.
(1930) 1930 Oudh 353 (356) : 31 Cri L Jour 1210 : 1930 Cri Cas 841, *Hazari* v. *Emperor*.
(1932) 1932 Cal 377 (380) : 33 Cri L Jour 357 : 1932 Cri Cas 320, *Surendra Nath Goswamy* v. *Emperor*.
(1932) 1932 Oudh 317 (319) : 1932 Cri Cas 872 : 33 Cri L Jour 920 : 7 Luck 511, *Emperor* v. *Maqbool Ahmad Khan*.
[See (1921) 1921 Nag 39 (41, 42) : 23 Cri L Jour 673 : 17 Nag L R 113, *Govinda* v. *Emperor*.]
[See S. 337, Note 15, *ante*.]

15. See S. 164, Notes 18 and 19, *ante*.
(1932) 1932 Oudh 317 (319) : 1932 Cri Cas 872: 33 Cri L Jour 920: 7 Luck 511, *Emperor* v. *Maqbool Ahmad Khan*.
(1930) 1930 Mad W N 785 (786), *Lahshmayya* v. *Emperor*.
(1914) 1914 Lah 321 (323): 1914 Pun Re Cri No. 30 : 15 Cri L Jour 626. *Jawan* v. *Emperer*.
(1930) 1930 Cal 633 (635) : 57 Cal 488 : 1930 Cri Cas 969, *Emperor* v. *Khutub Bux*.
(1930) 1930 Cal 141 (142) : 31 Cri L Jour 667 : 1930 Cri Cas 141, *Emperor* v. *Balai Ghosh*.
(1932) 1932 Oudh 321 (323) : 33 Cri L Jour 502 : 1932 Cri Cas 876, *Musaheb Ali* v. *Emperor*.

16. (1933) 1933 All 314 (318) : 55 All 379 : 34 Cri L Jour 689 : 1933 Cri Cas 480, *Shunkul* v *Emperor*.
(1931) 1931 Lah 38 (47) : 32 Cri L Jour 522: 1931 Cri Cas 102, *Mahta Singh* v. *Crown*.
(1921) 28 Cri L Jour 185 (186): 99 Ind Cas 857 (Lah), *Kesri* v. *Crown*.
(1930) 1930 Mad W N 723 (726), *Viswanatha Ayyar* v. *Emperor*.
(1927) 1927 Nag 43 (44) : 28 Cri L Jour 186, *Mt. Yashodi* v. *King-Emperor*.
(1932) 1932 Lah 424 (425) : 1932 Cri Cas 576, 33 Cri L Jour 744, *Sanwal* v. *Emperor*.
(1933) 1933 Oudh 59 (61): 1933 Cri Cas 99: 34 Cri L Jour 243, *Ram Adhin* v. *Emperor*.
(1933) 1933 All 401 (402): 1933 Cri Cas 384: 34 Cri L Jour 765. *Man Singh* v. *Emperor*.
(1916) 1916 Cal 98 (99): 16 Cri L Jour 411 (412): 42 Cal 784, *Hari Krishna* v. *King-Emperor*.
(1918) 1918 Pat 536 (537): 19 Cri L Jour 877 (878), *Phatali Singh* v. *Emperor*.
(1929) 1929 Oudh 248 (250): 4 Luck 705: 31 Cri L Jour 181, *Dwarka* v. *Emperor*.
(1924) 1924 Nag 33 (35): 25 Cri L Jour 141, *Laxman* v. *Emperor*.
(1917) 1917 Pat 331 (332): 18 Cri L Jour 639 (639), *Jagdeo Rai* v. *Kali Rai*.
(1930) 1930 Oudh 460 (463) : 1930 Cri Cas 1084: 32 Cri L Jour 94, *Gendan Lal* v. *Emperor*.
(1914) 1914 Lah 93 (94) : 15 Cri L Jour 148, *Lakka Singh* v. *Emperor*.
(1927) 1927 Lah 797 (798), *Sardul Singh* v. *King-Emperor*.
(1921) 1921 Pat 406 (408), *Dhannu Beldar* v. *King-Emperor*.
(1923) 1923 All 352 (354) : 45 All 300 : 24 Cri L Jour 526, *Khetal* v. *Emperor*.

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great care.[17] The Court should not accept blindly the evidence of medical men,[18] or experts,[19] or identification evidence,[20] to outweigh the testimony of respectable eye-witnesses: nor should the Court base its judgment on its own theories unsupported by evidence,[21] or on personal knowledge,[22] or on a hypothetical state

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The fact that a witness makes mistakes in identification, is no reason for discrediting his evidence in other matters.
[See also (1915) 1915 Cal 558 (562): 16 Cri L Jour 424 (428): 42 Cal 313, *H. Meredth* v. *Sanji Bani Dasi.*
(1918) 1918 Pat 536 (537): 19 Cri L Jour 877, *Phatali* v. *Emperor.*]
[See however (1931) 1931 Pat 384 (385): 1931 Cri Cas 912: 10 Pat 590: 33 Cri L Jour 111, *Leda Bhagat* v. *Emperor.*]

17. (1925) 1925 Mad 879 (880): 27 Cri L Jour 18, *Ayyamperumal Pillai* v. *Emperor.*

18. (1924) 1924 Bom 457 (459), *Siddubai* v. *Nilappagand*
(1923) 1923 Cal 116 (120): 50 Cal 100, *Saradindu Nath* v. *Sudhir Chandra Das.*

19. (1925) 1925 Oudh 413 (415): 26 Cri L Jour 929: 29 Oudh Cas 1, *Girdhari Lal* v. *King-Emperor.*
(1933) 1933 Lah 561 (566): 1933 Cri Cas 819: 34 Cri L Jour 735, *Diwan Singh* v. *Emperor.*
(1932) 1932 Lah 490 (1) (490): 1932 Cri Cas 628: 33 Cri L Jour 593, *Prabh Dial* v. *Emperor.*
(1912) 13 Cri L Jour 563 (564): 15 Ind Cas 979 (Lah), *Jalal-ud-din* v. *Crown.*
(1905) 2 Cri L Jour 353 (355) (All), *Srikant* v. *King-Emperor.*
(1922) 1922 Pat 73 (75): 1 Pat 242: 23 Cri L Jour 638, *Bazari Hajam* v. *Emperor.*
[Ses also (1929) 1929 Lah 210 (211): 30 Cri L Jour 52, *Diledad* v. *Emperor.*]
[But see (1930) 1930 Lah 667 (668): 1930 Cri Cas 811: 31 Cri L Jour 877, *Sarada* v. *Emperor.* Finger print Expert.]

20. (1927) 1927 Cal 820 (821): 28 Cri L Jour 874, *Emperor* v. *Irjan.*
(1932) 1932 Oudh 287 (287): 1932 Cri Cas 791: 34 Cri L Jour 197, *Sheo Sahai* v. *Emperor.*
(1932) 1932 Oudh 99 (102): 1932 Cri Cas 162: 7 Luck 552: 33 Cri L Jour 381, *Gajadhar* v *Emperor.*
(1933) 1933 Oudh 49 (49, 50): 1933 Cri Cas 89: 34 Cri L Jour 382, *Tula* v. *Emperor.*
(1924) 1924 Oudh 295 (296): 25 Cri L Jour 1125 *Din Dayal* v. *Emperor.*
(1928) 1928 Lah 724 (725): 29 Cri L Jour 697, *Sullah* v. *Emperor*
(1933) 1933 Lah 299 (301): 1933 Cri Cas 399: 35 Cri L Jour 610, *Chan Singh* v *Emperer*
(1927) 1927 Oudh 196 (197): 2 Luck 444: 28 Cri L Jour 460, *Mathna* v. *Emperor.*
(1923) 1923 Lah 662 (662): 26 Cri L Jour 19, *Rehman* v. *Emperor.*
(1916) 1916 Lah 297 (297): 17 Cri L Jour 156 (157), *Nikka* v. *Emperor.*
(1917) 1917 Oudh 118 (120): 18 Cri L Jour 456 (458), *Kallu* v. *Emperor.*
(1932) 1932 Sind 55 (58): 33 Cri L Jour 641: 1932 Cri Cas 196, *Nawat Kamal* v. *Emperor.*
(1929) 1929 Sind 149 (149, 150): 1929 Cri Cas 317: 30 Cri L Jour 456, *Ramzan* v. *Emperor.*
(1904) 1 Cri L Jour 475 (476): 2 Low Bur Rul 206, *Tha Hmu* v. *King-Emperor.*
(1934) 1934 Lah 641 (647): 1934 Cri Cas 973: 36 Cri L Jour 121, *Bhagat Ram* v. *Emperor.*
(1925) 1925 Lah 137 (138): 25 Cri L Jour 1272, *Manni* v. *Emperor.*
(1929) 1929 All 928 (929): 1929 Cri Cas 656: 31 Cri L Jour 206, *Man Singh* v. *Emperor.*
(1930) 1930 All 746 (748): 1930 Cri Cas 1002: 32 Cri L Jour 152, *Abdul Jalil Khan* v. *Emperor.*
(1925) 1925 Lah 19 (20): 5 Lah 396: 27 Cri L Jour 170, *Lal Singh* v. *Emperor.*
(1926) 27 Cri L Jour 946 (947): 96 Ind Cas 498 (Lah), *Ranga Singh* v. *Emperor.*
Track Evidence.

21. (1924) 1924 Pat 813 (815): 25 Cri L Jour 724, *Joharmal* v. *Emperor.*
(1930) 1930 All 45 (48): 1930 Cri Cas 61: 31 Cri L Jour 37, *Mt. Bantawari* v. *Emperor.*
(1917) 1917 Lah 48 (48): 18 Cri L Jour 490 (491): 1917 Pun Re Cri No. 1, *Emperor* v. *Buta Singh.*
(1924) 1924 Cal 611 (613): 26 Cri L Jour 71, *Supdt. of Legal Bengal* v. *Purna Chandra Ghose.*
(1930) 1930 Oudh 460 (463): 1930 Cri Cas 1084: 32 Cri L Jour 94, *Gendan Lal* v. *Emperor.*
(1919) 1919 All 167 (167, 168): 20 Cri L Jour 370, *Alay Muhammad* v. *Emperor.*
(1886) 1886 All W N 20 (20), *Empress* v. *Masheshu.*

22. (1902) 6 Oudh Cas 204 (211), *Sri Kishen* v. *King-Emperor.*
(1919) 1919 Pat 111 (115): 20 Cri L Jour 289, *Satrughan Pater* v. *Emperor.*
(1919) 1919 All 345 (347). 20 Cri L Jour 283, *Jai Narain* v. *Emperor.*
(1904) 1 Cri L Jour 589 (589) (Bom), *In re A Fonseca.*
(1904) 1 Cri L Jour 99 (101): 1903 Pun Re Cri No. 27 *Nurdin* v. *Emperor.*
(1931) 1931 Sind 127 (128): 1931 Cri Cas 719: 25 Sind L R 213: 32 Cri L Jour 923, *Shambhuram* v. *Emperor.*

of facts which were never put forward by the prosecution and were never suggested to the accused as being the case he had to meet.[22a] Mere suggestions by counsel in cross-examination, however ingenious, are of no evidentiary value unless accepted by the witness or proved by other evidence.[23] The evidence relating to *alibi* should be scrutinised very carefully.[24]

The standard of proof required in criminal cases does not vary with the magnitude or enormity of the crime,[25] though it is usual and prudent to observe the rule "the fouler the crime is, the clearer and plainer ought the proof of it to be."[26] In cases based on circumstantial evidence, such evidence should be so strong as to point very clearly to the guilt of the accused.[27] It is of utmost importance in such cases that in order to justify an inference of guilt, the inculpatory facts should be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.[28] Thus where the action of the accused was open to two constructions, one criminal and the other honest, the Court should not assume that it was criminal and the

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(1925) 1925 Lah 166 (167) : 25 Cri L Jour 808, *Walli Muhammad* v. *Emperor*. [See also (1933) 1933 Cal 36 (39): 1933 Cri Cas 71 : 34 Cri L Jour 36 (39), *Jagadish Narain* v. *Emperor*.]

22a (1910) 11 Cri L Jour 245 (246): 5 Ind Cas 771 (Cal), *Bhanga Hadua* v. *Emperor*.
(1926) 27 Cri L Jour 1346 (1346) : 98 Ind Cas 466 (All), *Ram Sarat* v. *King-Emperor*.

23. (1932) 1932 Cal 375 (377) : 33 Cri L Jour 725: 1932 Cri Cas 318, *Emperor* v. *Karimuddi Sheikh*.

24. (1928) 1928 Mad 791 (793) : 29 Cri L Jour 717, *Public Prosecutor* v. *Chidambaram*.
(1933) 1933 Oudh 369 (370) : 1933 Cri Cas 1047 : 34 Cri L Jour 1146, *Suraj Baksh Singh* v. *Emperor*.

25. (1933) 1933 Sind 166 (168) : 34 Cri L Jour 808: 1933 Cri Cas 530, *Salu Mangan* v. *Emperor*.
(1918) 1918 Cal 314 (316) : 19 Cri L Jour 81, *Ashraf Ali* v. *Emperor*.

26. (1920) 1920 Pat 616 (620) : 22 Cri L Jour 154, *Raghunandan* v. *Emperor*.

27. (1930) 1930 Mad 632 (635): 1930 Cri Cas 632: 53 Mad 590 : 31 Cri L Jour 712, *Shankaralinga Thevan* v. *Emperor*.
(1926) 27 Cri L Jour 1254 (1255): 98 Ind Cas 102 (Cal), *Arajali* v *King-Emperor*.

28. (1923) 1923 Lah 488 (490) : 26 Cri L Jour 161, *Bahali* v. *The Crown*.
(1932) 1932 Oudh 251 (253) : 6 Luck 658 : 32 Cri L Jour 1184 : 1932 Cri Cas 592, *Gaya Prasad* v. *Emperor*.
(1928) 30 Cri L Jour 757 (759) : 117 Ind Cas 348 (All), *Abdul Aziz* v. *Emperor*.
(1928) 29 Cri L Jour 289 (2) (290) : 107 Ind Cas 774 (Lah), *Gulam Rasul* v. *Emperor*.
(1914) 1914 Cal 433 (435) : 1914 Pun Re Cr No. 1 : 15 Cri L Jour 344, *Fazal Ahmad* v. *Emperor*.
(1919) 1919 Lah 440 (446) : 19 Cri L Jour 187, *Emperor* v. *Jagatram*.
(1920) 1920 Pat 674 (676) : 21 Cri L Jour 278, *Emperor* v. *Mt. Zohara*.
(1920) 1920 Pat 616 (620) : 22 Cri L Jour 154, *Raghunandan* v. *Emperor*.
(1928) 1928 Nag 257 (261) : 29 Cri L Jour 561, *Mt. Shevanti* v. *Emperor*.
(1933) 1933 Lah 308 (311) : 34 Cri L Jour 714 : 1933 Cri Cas 542, *Gowardan Lal* v. *Emperor*.
(1917) 1917 Lah 87 (88) : 18 Cri L Jour 897 (898), *Saleh* v. *Emperor*.
(1928) 1928 Lah 382 (392) : 30 Cri L Jour 18, *Pritchard* v. *Emperor*.
(1928) 1928 Bom 130 (131): 52 Bom 385 : 29 Cri L Jour 403, *Emperor* v. *Ismail*.
(1932) 1932 Oudh 324 (325, 326) : 7 Luck 623 : 33 Cri L Jour 379 : 1932 Cri Cas 879, *Havaldar* v. *Emperor*.
(1929) 1929 Lah 61 (63) : 29 Cri L Jour 996, *Mohammad Ali* v. *Emperor*.
(1930) 1930 Lah 659 (662) : 31 Cri L Jour 871 : 1930 Cri Cas 803, *Feroz* v. *Emperor*.
(1914) 1914 Cal 65 (68): 41 Cal 621: 14 Cri L Jour 660 (662), *Emperor* v. *Surarамoyee Biswas*.
(1913) 14 Cri L Jour 316 (317) : 19 Ind Cas 1004 (Lah), *Bishen Das* v. *Emperor*.
(1910) 11 Cri L Jour 82 (86) : 4 Ind Cas 941 (Lah), *Gurdit Singh* v. *Emperor*.
(1926) 27 Cri L Jour 1297 (1303): 98 Ind Cas 241 (Pat), *Dinamani Udai Pal Ram Tewary* v. *Emperor*.
(1917) 1917 Lah 366 (367) : 18 Cri L Jour 375 (376) : 1916 Pun Re Cr No. 32, *Thakar Das* v. *The Crown*.
(1926) 1926 Lah 691 (691) : 27 Cri L Jour 1004: 7 Lah 561, *Ghauns* v. *Emperor*.
(1926) 1926 Lah 88 (90) : 7 Lah 84 : 27 Cri L Jour 709, *Ranun* v. *Emperor*.
(1925) 1925 Lah 323 (325) : 26 Cri L Jour 760, *Majhi* v. *Emperor*.

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presumption of innocence should prevail.[29]

As to what constitutes proof of guilt of an accused person in any case depends upon the bundle of facts which serve to convince the Court, of the prosecution story and of the charges against the accused. Absolute certainty amounting to a demonstration of guilt can seldom be had and it must only be judged whether in the circumstances of each particular case, the degree of probability is so high as to justify one in regarding it as certainty and in acting accordingly.[30] A number of facts each having some probative value, but inconclusive by itself, may be quite sufficient in their cumulative effect to justify a conviction;[30a] but a collection of separate circumstances each by itself insufficient being quite consistent with the innocence of the accused cannot have such evidentiary value.[31] Where, however, the evidence for the prosecution case is in the main trustworthy, it cannot be held that it is unsupportable merely because the prosecution failed to prove a motive for the crime;[31a] or because there are discrepancies in detail[32] unless such discrepancies

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29. (1927) 1927 Pat 292 (296) : 28 Cri L Jour 611, *Kumar Prasad* v. *King-Emperor.*
(1913) 14 Cri L Jour 251 (252): 19 Ind Cas 507 (Bom), *Emperor* v. *Shedas Omkar Marvadi.*
(1930) 1930 Sind 99 (101) : 24 Sind L R 96 : 31 Cri L Jour 117 : 1930 Cri Cas 282, *Nur Khan* v. *Emperor.*
(1931) 1931 Mad 689 (693): 1931 Cri Cas 929: 54 Mad 931: 33 Cri L Jour 51, *Venkatasubba* v. *Emperor.*
(1904) 1 Cri L Jour 610 (611) (Bom), *Emperor* v. *Ramchandra Dhondoo.*
(1931) 1931 Oudh 385 (386): 32 Cri L Jour 851 : 1931 Cri Cas 817, *Hazari* v. *King-Emperor.*
(1924) 1924 Mad 816 (817): 25 Cri L Jour 1221, *Narayana, In re.*

30. (1933) 1933 Oudh 340 (342): 1933 Cri Cas 775: 34 Cri L Jour 538, *Emperor* v. *Ram Dat.*
[See (1933) 1933 Lah 1055 (1055): 35 Cri L Jour 470: 1933 Cri Cas 19, *Mohammad Rafiq* v. *Emperor.*]

30a (1926) 27 Cri L Jour 775 (775): 95 Ind Cas 311 (Lah), *Abdullah* v. *Emperor.*

31. (1927) 1927 Pat 257 (261): 28 Cri L Jour 497, *Devendra Bhattacharya* v. *Emperor.*

31a (1925) 1925 Lah 328 (330): 26 Cri L Jour 774, *Mohna* v. *The Crown.*
(1934) 1934 Lah 413 (415): 15 Lah 814: 36 Cri L Jour 97: 1934 Cri Cas 640, *Chanan Singh* v. *Emperor.*
(1928) 1928 Lah 657 (659): 29 Cri L Jour 378, *Chandu* v. *Emperor.*
(1930) 1930 Lah 490 (490): 31 Cri L Jour 1069: 1930 Cri Cas 602, *Seqia Singh* v. *Emperor.*
(1933) 1933 Oudh 340 (343): 1933 Cri Cas 775: 34 Cri L Jour 538, *Emperor* v. *Ram Dat.*
(1910) 11 Cri L Jour 498 (500): 4 Sind L R 38, *Emperor* v. *Balochkhan.*
(1929) 31 Cri L Jour 765 (766): 125 Ind Cas 55 (Lah), *Fazal Din* v. *Emperor.*
(1928) 29 Cri L Jour 768 (768): 110 Ind Cas 800 (Oudh), *Tilak Ram* v. *Emperor.*
(1929) 1929 Mad W N 946 (950), *Doraiswamy Pillay* v. *Emperor.*
(1929) 1929 Mad W N 592 (595), *Pedda Pullappa* v. *Emperor.*
(1921) 1921 Pat 109 (111): 6 Pat L Jour 147: 22 Cri L Jour 417, *Fatu Santal* v. *King-Emperor.*
(1933) 1933 Oudh 333 (335, 336): 35 Cri L Jour 45: 8 Luck 570: 1933 Cri Cas 780, *Ratan Lal* v. *Emperor.* It is not the bounden duty of the prosecutor to prove the motive for a crime. It is sufficient if the prosecution prove by clear and reliable evidence that certain persons committed the offence.
(1933) 1933 Oudh 340 (343): 1933 Cri Cas 775: 34 Cri L Jour 538, *Emperor* v. *Ram Dat.* Prosecution is not bound to furnish evidence of motive of accused.

32. (1928) 1928 All 280 (282): 29 Cri L Jour 472, *Kashi Ram* v. *Emperor.*
(1928) 1928 Pat 100 (101): 6 Pat 627: 29 Cri L Jour 239, *Ghanshyam Singh* v. *Emperor.*
[See (1933) 1933 Oudh 269 (271): 35 Cri L Jour 58: 1933 Cri Cas 596, *Chhote Lal* v. *Emperor.*
(1933) 1933 Sind 166 (168): 1933 Cri Cas 530: 34 Cri L Jour 808, *Salu Mangan* v. *Emperor.*
(1929) 1929 Nag 325 (327): 1929 Cri Cas 529: 30 Cri L Jour 944, *Kisandas* v. *Emperor.*]
[See also (1930) 1930 Nag 108 (109, 110): 31 Cri L Jour 417: 1930 Cri Cas 316, *Bageshwar* v. *Emperor.*
(1934) 1934 Lah 710 (714): 36 Cri L Jour 419: 1934 Cri Cas 1020, *Emperor* v. *Muhammad Khan.*

are material and important and go to the root of the matter.[33] As to belief of oral testimony, *see* the undermentioned cases.[33a]

Since it is the duty of the prosecution to establish the case against the accused to a certainty, the accused is entitled to the benefit of any doubt which may reasonably arise in the prosecution case.[34] The maxim of law is that it is better that ten guilty men should escape punishment than that a single innocent person should be made to suffer.[35]

But the doubt, the benefit of which the accused is entitled to, should be such as any rational thinking and sensible man may fairly and reasonably entertain: not the doubts of a vacillating mind that has not the moral courage to decide but

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(1910) 11 Cri L Jour 66 (67): 1909 Pun Re Cr No, 15 (Lah), *Emperor* v. *Harnama.*]

33. (1929) 1929 Mad W N 592 (595), *Pedda Pullappa* v. *Emperor.*
(1933) 1933 Oudh 226 (228, 229): 8 Luck 397: 34 Cri L Jour 935: 1933 Cri Cas 432, *Har Dayal Singh* v. *Emperor.*
(1915) 1915 Lah 438 (438): 16 Cri L Jour 699 (699), *Mohabli* alias *Mubba* v. *Emperor.*
(1913) 14 Cri L Jour 314 (315): 19 Ind Cas 1002 (Cal), *Kalu Khalashi* v. *Emperor.*
(1921) 1921 Pat 496 (497): 22 Cri L Jour 485, *Mayadhar Mahanti* v. *Danardhan Kund.*
[See (1921) 1921 Pat 473 (474): 22 Cri L Jour 479, *Ghurpat Pandey* v. *Emperor.*
(1933) 34 Cri L Jour 227 (230): 141 Ind Cas 786 (790) (Pat), *Sadhu Dome* v. *Emperor.*]

33a (1907) 6 Cri L Jour 304 (310) (Cal), *Nibran Chandra Roy* v. *King-Emperor.*
(1904) 1 Cri L Jour 305 (310): 28 Bom 479, *Emperor* v. *Bal Gangadar Tilak.*
(1933) 1933 Lah 667 (668): 1933 Cri Cas 889: 34 Cri L Jour 606 (607), *Abbas Ali Shah* v. *Emperor.* Evidence of children.

34. (1923) 1923 Lah 195 (197), *Muhamad* v. *King-Emperor.*
(1917) 1917 All 394 (395): 18 Cri L Jour 435 (437), *Raghubar Dayal* v. *Emperor.*
(1927) 1927 Oudh 611 (612): 28 Cri L Jour 688, *Gur Charan* v. *Emperor.*
(1925) 1925 Oudh 676 (678): 26 Cri L Jour 1042, *Bishambhar Nath* v. *Emperor.*
(1917) 1917 Cal 687 (687): 17 Cri L Jour 9 (9, 10), *Deputy Legal Remembrancer* v. *Matukdhari Singh.*
(1933) 1933 Lah 899 (900): 1933 Cri Cas 1287: 35 Cri L Jour 143, *Godha Waryam* v. *Emperor.*
(1933) 1933 Lah 714 (716): 1933 Cri Cas 900: 35 Cri L Jour 81: 14 Lah 290, *Chenchal Singh* v. *Emperor.*
(1933) 1933 Lah 511 (512): 1933 Cri Cas 768: 34 Cri L Jour 1213, *Jahana* v. *Emperor.*
(1932) 1932 Lah 195 (196): 33 Cri L Jour 501: 1932 Cri Cas 216, *Dila Ram* v. *Emperor.*
(1926) 28 Cri L Jour 114 (115): 99 Ind Cas 322 (Lah), *Muzaffar* v. *Emperor.*
(1929) 30 Cri L Jour 727 (728): 117 Ind Cas 212 (Nag), *Ram Lal Lodhi* v. *Emperor.*
(1928) 29 Cri L Jour 208 (208): 106 Ind Cas 800 (Lah), *Kallu* v. *Emperor.*
(1897-1901) 1 Upp Bur Rul 316 (317), *King-Emperor* v. *Nga Tok Hla.*
(1933) 1933 Rang 117 (118): 34 Cri L Jour 794: 1933 Cri Cas 642, *Nga Ba Pa* v. *Emperor.*
(1933) 1933 Rang 95 (96): 34 Cri L Jour 747: 1933 Cri Cas 577, *Nga Khan Htu* v. *Emperor.*
(1907) 5 Cri L Jour 67 (70) (Lah), *Munshi Sant Singh* v. *Crown.*
(1911) 12 Cri L Jour 561 (561): 12 Ind Cas 649 (Lah), *Muhamada* v. *Emperor.*
(1913) 14 Cri L Jour 320 (320): 19 Ind Cas 1008 (Lah), *Kesar Singh* v. *Emperor.*
(1877) Ratanlal 127 (128), *Queen-Empress* v. *Shivgod.*
(1934) 1934 Lah 693 (694): 36 Cri L Jour 778: 1934 Cri Cas 1008, *Sardar Ahmed* v. *Emperor.*
(1934) 1934 Lah 211 (211): 1934 Cri Cas 446: 36 Cri L Jour 32, *Ghulam Ahmad* v. *Emperor.*
(1934) 1934 Lah 10 (10): 35 Cri L Jour 615: 1934 Cri Cas 29, *Lalu Rahim Mirasi* v. *Emperor.*
(1911) 12 Cri L Jour 497 (500): 12 Ind Cas 217 (Mad), *Teli Khaja Hussain* v. *Emperor.*
[See (1916) 1916 All 363 (366): 17 Cri L Jour 102 (105), *Mt. Anandi* v. *Emperor.*
(1931) 1931 Mad 42 (42): 32 Cri L Jour 262, *Public Prosecutor* v. *Nagaraju.*
(1914) 1914 Sind 116 (117): 7 Sind L R 108: 15 Cri L Jour 488, *The Crown* v. *Tikha Lakhi.*
(1914) 1914 Sind 115 (116): 7 Sind L R 96: 15 Cri L Jour 379, *The Crown* v. *Imambux.*]

35. (1931) 1931 Cal 752 (757): 1931 Cri Cas 1016: 33 Cri L Jour 85, *Sali Sheikh* v. *Emperor.*

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shelters itself in a vain and idle scepticism.[36]

The judgment in a criminal case should scrutinise and discuss the evidence, oral and documentary[37] and should contain findings that all the ingredients required to make up the offence are proved or are not proved as the case may be.[38] Where the judge makes any local inspection, the nature of such inquiry should be set forth in the judgment if it has influenced his judgment.[39]

7. Reasons for the decision.—*See* Notes to Section 424.

8. Remarks on the judgment.—*See* Notes to Section 424.

9. Offence to be specified.

It is necessary that the judgment should distinctly specify the offence or offences of which the accused is convicted.[1] This Section also requires that, where the offence is under the Penal Code or under any other law, the Section of the act under which the accused is convicted, should be stated.[2]

Where a Judge convicts the accused on a charge of culpable homicide not amounting to murder, he should state in his judgment under which of the exceptions in Section 300 of the Penal Code, the case falls.[3]

10. Punishment to which he is sentenced.

Where a Court finds an accused person guilty, it is bound to pass some sentence.[1] This Section shows that the sentence is part of the judgment[2] and a Court has, therefore, no power to postpone the passing of the sentence to some future date once it convicts the accused.[3]

It is the duty of a Court, pronouncing a sentence, to define precisely the nature of the sentence intended to be passed; the sentence ought to be self-contained, so that the functionary, who has to execute it, should have nothing to do, but to obey the directions given therein, without making an inquiry on his own account.[4] Thus, a direction in a sentence that the accused should be detained in a

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36. See (1924) 1924 All 511 (513): 26 Cri L Jour 324, *Lakhan* v. *Emperor*.
37. (1920) 1920 Nag 71 (72, 73): 21 Cri L Jour 140, *Pirbax* v. *Mt. Baji*.
38. (1920) 1920 Nag 71 (73): 21 Cri L Jour 140, *Pirbax* v. *Mt. Baji*.
(1870) 13 Suth W R Cri 50 (50), *The Queen* v. *Mahomed Ali*.
(1930) 1930 Lah 1051 (1052): 1930 Cri Cas 1221: 32 Cri L Jour 271, *Ahmad Ali* v. *Emperor*.
(1905) 9 Cal W N 286*n* (286*n*), *Mahammed* v. *King-Emporor*.
39. (1896) 1896 All W N 73 (74), *In the matter of the Petition of Kala*.
(1925) 1925 Cal 353 (353): 25 Cri L Jour 705, *Bhola Nath Nandi* v. *Kedar Nandi*.
(1923) 1923 Cal 320 (321): 23 Cri L Jour 502, *Aziz Mandal* v. *Girish Chandra*.

Note 9.

1. (1875) 7 N W P H C R 137 (144), *Queen* v. *Jamurha*.
(1922) 1922 All 21 (22): 23 Cri L Jour 248, *Munshi Lal* v. *Emperor*.
(1865) 4 Suth W R Cr 19 (19), *Queen-Empress* v. *Bhoburnesshur*.
2. (1895) Ratanlal 806 (806), *Queen-Empress* v. *Kallappa*.
[See also (1909) 9 Cri L Jour 271 (272): 1 Sind L R 32, *The Crown* v. *Haji Mir Mahmand*.]
3. (1866) 1 Agra H C R Cr 3 (6), *Government* v. *Kalika Misser*.

Note 10.

1. (1884) 1884 All W N 219 (219), *Empress* v. *Kalua*.
(1886) Ratanlal 291 (292), *Jakin kom Diwal*.
(1891) Ratanlal 545 (546), *Queen-Empress* v. *Lakshmibai*.
(1897) Ratanlal 892 (893), *Queen* v. *Sadu*.
(1895) 22 Cal 805 (809), *Dewan Singh* v. *Queen-Empress*.
(1869) 2 Weir 305 (306), *High Court Proceedings, 12th August* 1869, *No.* 1513.
(1868-69) 4 Mad H C Rul 66*n* (67*n*), *High Court Proceedings, 12th August* 1869.
(1872-1892) 1872-1892 Low Bur Rul 409 (409), *Queen-Empress* v. *Mi Bauk*.
[But see (1928) 1928 Nag 188 (189): 24 Nag L R 110: 29 Cri L Jour 506, *Sitaram Kunbi* v. *Emperor*.]
2. (1884) 1884 All W N 219 (219), *Empress* v. *Kalua*.
(1895) Ratanlal 804 (805), *Queen-Empress* v. *Sahadat Miran*. Cannot therefore be subsequently altered.
3. (1912) 13 Cri L Jour 288 (288): 14 Ind Cas 672 (Bom), *Emperor* v. *Keshavlal*.
4. (1901) 24 Mad 13 (15, 16), *Queen* v. *Rama*.

reformatory school for a period of five years unless he should sooner attain the age of eighteen years would not be a legal sentence, as it would leave to the officer-in-charge of the jail to determine when the sentence would expire, otherwise than by reference to the warrant.[5]

11. "Shall be dated and signed by the presiding officer...at the time of pronouncing it."

The judgment must be dated and signed by the presiding officer,[1] at the time of pronouncing it in open Court.[2]

The word 'sign' has not been defined in this Code. It has been held to mean the "writing of the name of the person who is the signatory, so that it may convey a distinct idea to others that the writing indicates a particular individual, whose signature it purports to be."[3] Merely putting the initials of the presiding officer has been held not to amount to signing the judgment within the meaning of this Section.[4] The signature should be made with a pen and ink and not with a stamp.[5]

The omission to date and sign a judgment by the presiding officer is, however, only an irregularity covered by S. 537, *infra* and will not render the judgment void.[6] Similarly the affixing of a signature with a stamp instead of with pen and ink is merely an irregularity.[7]

Where a case was heard by only three Magistrates of a Bench, but the judgment was signed by seven, it was held that this was an illegality.[8]

12. Judgment in the alternative—Sub-section 3.

Sub-section 3 of this Section allows a judgment to be given in the alternative, where there is a doubt as to which of two Sections or which of two parts of the same Section applies.[1] Such a judgment in the alternative can be passed only in cases in which, not the *facts* but the application of the *law* to the facts is doubtful.[2] *See also* Note 1 to S. 236, *ante*.

(1893) 15 All 208 (209), *Queen-Empress* v. *Narain.*

5. (1893) 15 All 208 (209), *Queen-Empress* v. *Narain.*

Note 11.

1. (1889) 1889 All W N 181 (184), *Queen-Empress* v. *Jia Lal.*
2. (1917) 1917 Mad 340 (341) : 17 Cri L Jour 166 (166) : 40 Mad 108, *In re, Saimuthu Pillai.*
   (1889) Ratanlal 429 (429, 430), *Queen Empress* v. *Ganpat.*
   (1923) 1923 Rang 44 (44, 45) : 24 Cri L Jour 584, *Rambit* v. *Emperor.* Judgment dated and signed and sent to the clerk to deliver—*Held* it cannot be treated as a mere irregularity.
3. (1930) 1930 Mad 867 (868): 1930 Cri Cas 1123: 54 Mad 252: 32 Cri L Jour 430, *Brahmiah* v. *Emperor.*
4. (1930) 1930 Mad 867 (868): 54 Mad 252: 32 Cri L Jour 430: 1930 Cri Cas 1123, *Brahmiah* v. *Emperor.*
5. (1883) 6 Mad 396 (398), *Subramanya Ayyar* v. *The Queen.*
   (1870) 14 Suth W R Cr 81 (81), *Queen* v. *Dedar Nushyo.*
6. (1898) 2 Weir 711 (712), *In re Venkataramanayya.*
   (1925) 1925 All 299 (300) : 47 All 284 : 26 Cri L J 688, *Ram Sukh* v. *Emperor.*
   (1930) 1930 Rang 77 (78) : 1930 Cri Cas 203 : 7 Rang 370 : 30 Cri L Jour 1166, *Mohamed Hayat Mulla* v. *Emperor.*
7. (1883) 6 Mad 396 (398, 399), *Subramanya Ayyar* v. *The Queen.*
8. (1931) 1931 Mad 494 (495) : 1931 Cri Cas 558 : 32 Cri L Jour 971, *Picha Kudumban* v. *Servaikara Thevan.*

Note 12.

1. (1921) 1921 Bom 3 (13) : 45 Bom 834 : 22 Cri L Jour 241, *Purshottam Ishwar* v *Emperor.*
   (1886) 1886 Pun Re Cr No. 5, page 7 (8), *Bura* v. *Empress.*
2. (1913) 14 Cri L Jour 664 (665) : 1913 Pun Re Cr No 11, *Partapa* v. *Emperor.*
   (1875) 7 N W P H C R 137 (143), *Queen* v. *Jamurha.*
   (1887) 1887 Pun Re Cri No. 11, p. 19 (21, 22), *Khan Muhammed* v. *Empress.*

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Where a judgment does not state in *express* terms that the Court is in doubt under which of two Sections or which of two parts of the same Section the offence falls, as required by this Section, it is only an irregularity which will not vitiate the judgment.[3]

13. Judgment in cases of acquittal.

Where the accused is acquitted, the judgment should state what the offences are, of which he is acquitted and should direct that he be set at liberty.[1] When a verdict of not guilty is recorded, the Court should not, in its judgment, make any suggestion against the accused, except that of establishing his innocence.[2]

As soon as a judgment of acquittal is pronounced, the accused is entitled to be discharged from custody and his further detention is illegal and no formal warrant of release addressed by the Court to the Superintendent of the jail is necessary.[3]

14. Judgment in capital cases—Sub-section 5.

This sub-section requires that if an accused person is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, it shall, in its judgment, state the reasons why the sentence of death was not passed.[1] It, therefore, contemplates sentences of death in capital cases as the ordinary rule and sentences of transportation for life as the exception. Before passing the lesser sentence, the Judge should find that there are really extenuating circumstances, not merely an absence of aggravating circumstances ; it is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so.[2] But if the Judge is in doubt whether a sentence of death or a sentence other than death should be passed, the doubt, like all other doubts, should result in favour of the accused.[3]

This Section, however, does not indicate what reasons should be considered

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3. (1899) 2 Weir 440 (440), *Boya Takirugadu* v. *Chatakonda Sivayya.*

Note 13.

1. (1892) 1892 All W N 157 (157), *Empress* v. *Abdul Majid Khan.*
2. (1922) 1922 Pat 97 (99): 23 Cri L Jour 371, *Bir Narainsingh* v. *King-Emperor.*
3. (1869-70) 5 Mad H C Rul App 2 (3), *High Court Proceedings, 30th October* 1869.

Note 14.

1. (1910) 11 Cri L Jour 481 (481) : 7 Ind Cas 397 (Mad), *In re Kurumba Hosakeri.*
   (1927) 1927 Oudh 588 (590): 28 Cri L Jour 980, *Dwaraka* v. *Emperor.*
   (1893-1900) 1893-1900 Low Bur Rul 112 (113), *Maung U* v. *Empress.*
   (1922) 1922 Low Bur 32 (33): 11 Low Bur Rul 323 : 23 Cri L Jour 437, *King-Emperor* v. *Nga Shwe Hla U.*
   (1933) 1933 Rang 61 (61): 34 Cri L Jour 699: 1933 Cri Cas 456, *Nga Sein Tun* v. *Emperor.*
   (1864) Suth W R Cr Gap 27 (27), *Queen* v. *Dabee.*
2. (1906) 3 Cri L Jour 25 (26): 3 Low Bur Rul 111, *Shwe Cho* v. *Emperor.* This sub-section applies also to the High Court on its original criminal jurisdiction.
   (1922) 1922 Low Bur 32 (33): 11 Low Bur Rul 323: 23 Cri L Jour 437, *Emperor* v. *Nga Shwe Hla U.*
   (1900-1902) 1 Low Bur Rul 216 (219), *Crown* v. *Nga Tha Sin.*
   (1903-1904) 2 Low Bur Rul 63 (64), *Hamid* v. *King-Emperor.*
   (1924) 1924 Rang 179 (180): 25 Cri L Jour 1121: 1 Rang 751, *Mi She Yi* v. *King-Emperor.*
   (1930) 1930 Cal 193 (195): 31 Cri L Jour 817: 1930 Cri Cas 225, *Emperor* v. *Dukari Chandra.* (Per *Cumming, J.*).
   (1906) 3 Cri L Jour 25 (26): 3 Low Bur Rul 111, *Shwe Cho* v. *Emperor.* Judge should not in such a case pass death sentence and thus leave the responsibility to the High Court of commuting it.
3. (1872-1892) 1872-1892 Low Bur Rul 459 (461), *Nga Po Aung* v. *Queen Empress.*
   [But See (1900-1902) 1 Low Bur Rul 216 (220), *Crown* v. *Tha Sin.* Dictum of Irwin, J., that such doubt should be left to the High Court disapproved in 3 Cri L Jour 25.]

sufficient for not passing a sentence of death in a capital case.[4] Such reasons must be in accordance with established legal principles.[5] For instances in which death sentence or transportation for life should be passed, *see* notes to Section 300, Penal Code.

15. Trial by jury—Heads of charge to the jury—Proviso.

Where the case is tried by jury, the Judge is not bound to write a judgment; it is enough if he records the heads of the charge to the jury. As the law allows an appeal in cases of trial by jury on the ground of misdirection in the charge to the jury, the Judge should record the heads of charge in such a form as to enable the Court of appeal to judge whether the facts and circumstances of the case were properly placed before the jury and the law correctly explained to them.[1] It is not sufficient for the Judge merely to state in his record that the law on the subject was explained and that the abstract of the evidence recorded in Court was given to the jury.[2]

Although there is nothing in this Section as to when the heads of charge should be written, it is desirable that the Judge should write them out as soon as

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4. (1906) 4 Cri L Jour 132 (133) : 3 Low Bur Rul 163, *Emperor* v. *Nga Tun.*
5. (1926) 1926 Lah 428 (429) : 7 Lah 141 : 27 Cri L Jour 764, *Waryam Singh* v. *The Crown.*

Note 15.

1. (1926) 1926 Cal 139 (145, 146) : 53 Cal 372 : 27 Cri L Jour 266, *Khijiruddin* v. *Emperor.*
(1898) 25 Cal 736 (738), *Abbas Peada* v. *Queen Empress.*
(1927) 1927 Cal 936 (936) : 28 Cri L Jour 478, *Tuka Mia* v. *King-Emperor.*
(1929) 1929 Cal 170 (171) : 30 Cri L Jour 912, *Dwarka* v. *Emperor.*
(1927) 1927 Cal 460 (461) : 28 Cri L Jour 278, *E. St. O. Moss* v. *Emperor.*
(1926) 1926 Cal 895 (897) : 27 Cri L Jour 926, *Emperor* v. *G. C. Wilson.*
(1925) 1925 Cal 926 (927) : 26 Cri L Jour 1279, *Abdul Rahim* v. *Emperor.*
(1907) 5 Cri L Jour 427 (431) : 34 Cal 698, *Jatindra Nath Chatterjee* v. *Emperor.*
(1922) 1922 Cal 192 (192) : 24 Cri L Jour 8, *Abdul Gafur Khan* v. *King-Emperor.*
(1921) 1921 Cal 269 (270) : 23 Cri L Jour 41, *Gangadhar Goala* v. *Reed.*
(1919) 1919 Cal 439 (442) : 20 Cri L Jour 661, *Afiruddi* v. *King-Emperor.*
(1897) 25 Cal 561 (563), *Biru Mandal* v. *Queen-Empress.*
(1875) 23 Suth W R Cr 32 (33), *The Queen* v. *Kasim Sheik.*
(1909) 9 Cri L Jour 452 (453) : 38 Cal 281, *Fanindra Nath Banerjee* v. *Emperor.*
(1917) 1917 All 173 (175): 18 Cri L Jour 491 (493) : 39 All 348, *Ikramuddin* v. *Emperor,*
(1908) 8 Cri L Jour 35 (37) (Bom), *In re, Shambula.*
(1895) 2 Weir 499 (499), *In re, Dara Narayana Reddi.*
(1898) 2 Weir 385 (385), *In re Laxumana.*
(1888) 2 Weir 493 (495, 496), *In re Anchula.*
(1916) 1916 Pat 236 (237, 238): 17 Cri L Jour 353 (355), *Eknath Sahay* v. *Emperor.*
(1868) 9 Suth W R Cri 52 (53), *Queen-Empress* v. *Denonath.*
[See also (1924) 1924 Cal 771 (772): 51 Cal 79: 25 Cri L Jour 945, *Kiamuddi* v. *King-Emperor.* Judge is not bound to write down everything he says to the jury.
(1896) Ratanlal 850 (850), *Queen-Empress* v. *Fakirabin Venkappa.* Judge should, in cases of protracted trial, say what evidence he read to the jury.
(1897) Ratanlal 917 (917), *Queen-Empress* v. *Baswantappa.* It cannot be presumed that the Judge said only that which is recorded.]
2. (1903) 1903 All W N 232 (232), *Emperor* v. *Baij Nath.*
(1925) 1925 Cal 1055 (1056): 26 Cr L Jour 1151, *Rahamali* v. *Emperor.*
(1925) 1925 Pat 797 (801, 802): 4 Pat 626: 27 Cri L Jour 49, *Rupan Singh* v. *King-Emperor.*
(1928) 1928 Pat 420 (425): 7 Pat 361: 29 Cri L Jour 804, *Chotan Singh* v. *Emperor.*
(1920) 1920 Cal 564 (564): 47 Cal 795: 21 Cri L Jour 694, *Kasimuddin* v. *Emperor.*
(1930) 1930 Cal 712 (713): 1930 Cri Cas 1112: 32 Cri L Jour 236, *Hafiz Ali Haldar* v. *Emperor.*
(1930) 1930 Pat 243 (244, 245): 9 Pat 148: 31 Cri L Jour 786: 1930 Cr Cas 511, *Dhanpat Tiwari* v. *Emperor.* Per Dhavle, J.

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possible after the delivery of the charge to the jury and while the facts are still fresh in his mind.[3]

In cases of trials by jury, the written heads of charge are the only record of the Judge's address to the jury and the Court of appeal must perforce base its decision in an appeal upon that record.[4]

See also the undermentioned case.[5]

16. Appellate judgment.

See Notes to Section 424, *infra*.

Judgment not in conformity with Section—Procedure in appeal.—Where an appellate Court finds that the trial Court has not written a judgment in conformity with the provisions of this Section, the proper procedure is to reverse the judgment of the lower Court and to order a *de novo* hearing and not to retain the case on its own file and ask the lower Court to record a proper judgment.[1]

17. Sub-section 6.

Even before the addition of sub-section 6 to this Section in 1923, it was held by the High Court of Madras that the words "offence (if any)" in sub-section 2 of this Section and the wording of sub-section 2 of Section 117, *ante*, suggested that the provisions of this Section would apply to orders under Section 118 and sub-section 2 of Section 123, *ante*.[1] The High Court of Calcutta held in the undermentioned case[2] that, whether this Section applies or not, the order should show that the case of each counter-petitioner had been considered on its own merits. The enactment of sub-section 6 to the Section in 1923 gives legislative recognition to the view of the Madras High Court mentioned above.

Sec. 368

368.* (1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

Sentence of death.

Sentence of transportation.

(2) No sentence of transportation shall specify the place to which the person sentenced is to be transported.

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* (Code of 1882—S. 368—Same.)

(Code of 1872—Ss. 321 and 319.)

Sentence of death.

321. When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

Governor-General in Council to appoint places to which persons sentenced

319. The Governor-General of India in Council may. from time to time, appoint a place or places within British India to which persons sentenced to transportation shall be sent; the

3. (1909) 9 Cri L Jour 452 (453): 38 Cal 281, *Fanindra Nath* v. *Emperor*.

4. (1908) 8 Cri L Jour 35 (37) (Bom), *In re Shambhulal Jivandas*.
[See also (1898) 2 Cal W N 702 (706), *Queen-Empress* v. *Bhairab*.]

5. (1930) 1930 Rang 351 (352): 1930 Cri Cas 1179: 8 Rang 372 : 32 Cri L Jour 23, *U Ba Thein* v. *Emperor*. Practice of Rangoon High Court in taking short hand notes in murder cases only deprecated—Record of charge must be made in all appealable cases.

Note 16.

1. (1920) 1920 Mad 171 (172): 21 Cri L Jour 52, *Karuppiah Pillai* v. *Emperor*.

Note 17.

1. (1920) 1920 Mad 337 (342): 43 Mad 511 : 21 Cri L Jour 402, *Venkatachinnayya* v. *Emperor*.

2. (1910) 11 Cri L Jour 23 (23): 37 Cal 91, *Kaul Mirza* v *Emperor*.
[See also (1916) 1916 Lah 412 (413): 17 Cri L Jour 142 (143), *Muhammad Hussain* v. *Emperor*.
(1908) 8 Cri L Jour 207 (208): 35 Cal 929, *In re, Ajodhya Prasad Singh*.
(1909) 10 Cri L Jour 591 (591): 1910 Pun Re Cri No. 4, *Bahadur* v. *Emperor*.

369. No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in Sections 395 and 484 or to correct a clerical error.

Court not to alter judgment.

369.* *Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court*, when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

Court not to alter judgment.

Sec. 369

Synopsis.

Other Topics.

Acquittal under Section 247—Cannot be reviewed. See Note 2, F-N (3a)
Amendment—Referring to commencement of sentence—Is not alteration of sentence See Note 4, F-N (9).
Clerical mistakes — Can be corrected. See Note 2, F-N (4).
Damaging observations against witness — Power to re-consider. See Note 4, Pt. 7.
Dismissal of revision application by High Court—Fresh application—Whether can be entertained. See Note 5, Pt. 9.
Final orders—Cannot be reviewed—Examples. See Note 2, Pts. 3b to 8.
Inherent power of High Court—Power to review its own order not included. See Note 6, Pt. 5.
Interlocutory orders—Can be re-considered—Examples. See Note 2, Pts. 10 to 15.
Judgment—Final only after pronouncing and signing. See Note 3, Pt. 1.
Judgment— Means decision in a trial. See Note 2, Pt. 3a.
Principle—Not applicable to administrative or ministerial orders. See Note 2 Pt. 16.
Revision application in High Court—Dismissal for default—Fresh application—Whether can be entertained. See Note 5, Pts. 11 to 13.
Revision rejected for non-payment of printing charges—No power to re-hear. See Note 5, F-N (11).
Section 133—Order under, passed—Magistrate not precluded from passing another order under Section 144 on same facts. See Note 2. F-N (2).
Sections 437, 438—Order under — Cannot be reviewed. See Note 2, F-N (1).

to transportation may be sent. Local Government to direct removal of such persons to places appointed.

Local Government, or some officers duly authorized by such Government, shall give orders for the removal of such persons to the place or places so appointed ; and no sentence of transportation shall specify the place to which the person sentenced is to be transported.

(Code of 1861—Ss. 53, 50 and 51.)

Sentence of death.

53. When any person shall be sentenced to death, the sentence shall direct that such person be hanged by the neck till he is dead.

Place of transportation not to be specified in sentences.

50. When any person shall be sentenced to transportation, the Court passing the sentence shall not specify in its sentence the place to which such person shall be sent for the purpose of undergoing the sentence.

Governor-General in Council to appoint a place or places.

Local Government to direct removal of persons sentenced to such place or places.

51. It shall be lawful for the Governor-General of India in Council from time to time to appoint a place or places within British India to which persons sentenced to transportation shall be sent: and the Local Government, or some Officer duly authorized by such Government, shall give orders for the removal of such person to the place or places so appointed.

* **(Code of 1882—S. 369—The words "and 484" were added in 1898 ; otherwise same.)**

Sec. 369 Notes 1—2

1. Legislative changes.

There was no provision corresponding to this Section in the Code of 1861. Section 464 of the Code of 1872, provided that a judgment or final order cannot be altered or reviewed by the Court giving such judgment or order.

Changes made by Codes of 1882 *and* 1898 :—

(*a*) Section 369 of the Code of 1882 excluded High Courts from the purview of this Section. (*See* Note 6, *infra.*)

(*b*) The words "except as provided in Sections 395 and 484 or to correct a clerical error" were introduced.

Changes made in 1923 :—

(*a*) The words "Save as otherwise provided . . . . . such High Court" were added. (*See* Note 6, *infra.*)

(*b*) The words "as provided in Sections 395 and 484" were deleted. (*See* Note 6, *infra.*)

2. Scope of the Section.

It is a universal principle of law that, when a matter has been finally disposed of by a Court, the Court is, in the absence of a direct statutory provision, *functus officio* and cannot entertain a fresh prayer for the same relief unless and until the previous order of final disposal has been set aside. (*See* Note 19 to Section 435, *infra.*) This Section is based on this principle. The judgment of a criminal Court is final, as far as that Court is concerned ; and, on signing and pronouncing it, such Court becomes *functus officio* and has, therefore, no power to review, override, alter or interfere with the judgment in any manner except

(*a*) where it is otherwise provided by the Code or by any other law for the time being in force (*see* Note 7, *infra*) ; or

(*b*) for the purpose of correcting clerical errors.[1]

(Code of 1872—S. 464, Para 1.)

464 *Judgment what to contain.*	* * * * * When a judgment or final order has been so signed, it cannot be altered or reviewed by the Court which gives such judgment or order. * * * *

(Code of 1861—Nil.)

Section 369—Note 2.

1. See cases in foot-notes to Note 5, *infra.*

[See also (1866) 5 Suth W R Cr 61 (64) (FB), *Queen* v. *Godai Racut.* Dissenting from 3 Suth W R Cr 45.

(1872) 17 Suth W R Cr 2, *In re Krishno Churan.* 5 S W R Cr 61 foll.

(1926) 1926 Mad 420 (420) : 27 Cri L Jour 184, *Arumuga, In re.*

(1924) 1924 Mad 640 (641) : 26 Cri L Jour 370 : 47 Mad 428, *Tadisomu Naidu, In re.*

(1930) 1930 Mad 1001 (1002) : 53 Mad 870 : 32 Cri L Jour 429 : 1930 Cr Cas 1055, *Ekambara* v. *Alamelammal.*

(1868) 4 Mad H C Rul App 19 (19), *High Court Proceedings 13th November* 1868.

(1925) 1925 Oudh 476 (477) : 26 Cri L Jour 543, *Paras Ram* v. *Emperor.*

(1911) 12 Cri L Jour 473 (474), : 12 Ind Cas 81 (Rang), *Emperor* v. *Nga Ke Maung.*

(1871) 3 N W P H C R 273 (275), *Queen* v. *Tiloke Chund.*

(1866) 6 Suth W R Cr 70 (70), *In re Gunoree Bhooea.* A lower Court has no power to quash its own conviction though illegal.

(1870) 7 Bom H C R Crown Cas 67 (67), *Reg.* v. *Mehetraji.*

(1882) 8 Cal 580 (582), *Bradley* v. *Jameson.*

(1917) 1917 Pat 110 (111) : 19 Cri L Jour 225, *Lachmi Singh* v. *Bhusi Singh.* Assumes the applicability of this Section to orders under S. 146 of the Code.

(1916) 1916 Mad 1220 (1220) : 16 Cri L Jour 584 (585), *T. Narasinga Rao* v. *Vittoba Rao.*

(1912) 13 Cri L Jour 301 (301) : 14 Ind Cri 765 (Rang), *Nga Than* v. *Emperor.* An order under S. 437 cannot be reviewed.]

[See also (1918) 1918 Bom 110 (113) :

The Court cannot also entertain any fresh application on the same facts for the same relief, as it would in effect amount to a re-consideration of the previous order.[2] **Sec. 369 Note 2**

The prohibition will, however, extend only to all matters which were the subject-matter of the prior adjudication. The Section does not bar any application to consider a matter which was not the subject of the prior adjudication. Thus where a prior appeal by an accused against his conviction was dismissed, it was held that a revision application by the Government for *enhancement* of the sentence is not barred inasmuch as the question of enhancement was not the subject-matter of adjudication in the prior appeal.[3]

The word "judgment" for the purposes of this Chapter, and, therefore, for the purposes of this Section also, means a decision in a *trial* which decides a case finally, so far as the Court trying the case is concerned and terminating in a *conviction* or *acquittal*.[3a]

In respect of *final orders*, which do not amount to judgments in trials, the Section does not in terms apply, but the general principle on which the Section is based, would apply and such orders cannot be reviewed or altered by the Court which passed them or by any Court of co-ordinate jurisdiction. Thus, an order under Section 145,[3b] or Section 146,[4] or Section 488,[5] or an order accepting the verdict of a jury and postponing the case for passing the sentence,[6] or an order in a case to the effect "enter as false, mistake of law" passed on a perusal of a police report,[7] are all final orders disposing of the case, so far as the Court passing the

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43 Bom 134: 19 Cri L Jour 771, *Emperor* v. *Somaya Hira*.
(1934) 1934 Oudh 85 (85): 1934 Cri Cas 255: 35 Cri L Jour 417, *Rameshwar Dutt Singh* v. *Bharath Singh*. Order of reference under S. 438 cannot be reviewed by subsequent order.] [But see (1869-70) 5 Mad H C Rul App 19 (20), *High Court Proceedings*. 29*th March* 1870. A Magistrate was held at liberty to alter his sentence at any time before the despatch of the Calender to the appellate authority.
(1870) 6 Mad H C Rul App 7 (8), *High Court Proceedings*, 8-12-1870. (Do.)
(1869-71) 6 Mad H C Rul App 18 (18), *H. C. Proceedings*, 1-2-1871. (Do.)]

2. (1912) 13 Cri L Jour 301 (301): 14 Ind Cas 765 (Rang), *Nga Than* v. *Emperor*.
(1906) 3 Cri L Jour 274 (275, 276): 29 Mad 126 (F B), *In re Chinna Kalippa Gounden*.
(1911) 12 Cri L Jour 556 (557): 12 Ind Cas 644 (Mad), *Kulandai* v. *Ramawamy*.
(1869) 12 Suth W R Cri 40 (41), *Kalidass Bhuttacharjee* v. *Mohendro Nath Chatterjee*. But where the Magistrate first passes an order under S. 133, he is not precluded from passing another order under S. 144 on the same facts.

3. (1926) 1926 Nag 323 (324): 27 Cri L Jour 339, *Local Government* v. *Doma*.

3a (1908) 9 Cri L Jour 80 (82): 31 Mad 543 (545) (F B), *Emeror* v. *Maheshwara*.
(1901) 28 Cal 652 (660), *Dwaraka Nath Mundol* v. *Beni Madhab Banerjee*.
(1930) 1930 Mad W N 190 (190), *Anjayya* v. *Subbamma*. An order of acquittal under S. 247, is final and cannot be reviewed.
(1924) 1924 Cal 96 (96): 24 Cri L Jour 716, *Nityananda* v. *Rakhadhari*. (Do.)

3b (1925) 1925 Nag 457 (458): 26 Cri L Jour 1289, *Narayan* v. *Chandrabhaga*.
(1908) 7 Cri L Jour 401 (402, 403): 35 Cal 350, *Parbati Churn Roy* v. *Sajjad Ahmad Chowdry*.
(1926) 1926 All 242 (242): 48 All 258: 27 Cri L Jour 466, *Lallan Misser* v. *Ram*.

4. (1917) 1917 Pat 28 (30): 19 Cri L Jour 105, *Ballam Singh* v. *Lal Babu*.
(1869) 11 Suth W R Civil 532 (533), *Chowdhry Zuhoorul Huq* v. *Mt. Bagoo Jan*.
(1913) 14 Cri L Jour 605 (606): 16 Oudh Cas 192, *Ramdulare* v. *Ajudhya*. Assumed that S. 369 applied to the case.
(1917) 1917 Pat 110 (111): 19 Cri L Jour 225, *Lachmi Singh* v. *Bhusi Singh*. It was assumed in this case that S. 369 applied to such orders and it was further stated that *clerical* mistakes could be corrected.

5. (1917) 1917 Cal 799 (800): 18 Cri L Jour 556 (557), *Nanda Narain* v. *Manmaya*. Such an order is in effect a judgment.

6. (1900) 4 Cal W N 683 (683), *Queen-Empress* v. *Mojahar Rahman*. Assumed that S. 369 would apply.

7. (1923) 1923 Pat 532 (535): 24 Cri L Jour

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order is concerned, and cannot be reviewed or re-considered by such Court. *See also* the undermentioned case.[8] In *Emperor* v. *Chinna Kaliappa Gounden*,[9] there are, however, certain observations, made by White, C. J., tending to show that there is no such general principle as that mentioned above. It is submitted that they are not correct. The decision itself is supportable on the ground that the order in question in that case was not a *final* order.

Where the order in question is neither a "judgment" within the meaning of this Section nor a final order, there is nothing in law preventing the Court which passed it from re-considering it or from entertaining a fresh application for the same relief as was asked for in the proceeding in which the order was passed. Thus *interlocutory* orders such as an order for transfer of a case,[10] or for issue of a summons to an accused person under Section 204,[11] or to a witness[12] can be re-considered by the Court. An order of discharge not amounting to an acquittal[13] or an order of dismissal under Section 203 of the Code[14] or an order cancelling a notice under Section 107 of the Code, for the absence of the complainant,[15] is not a final order and can be re-considered by the Court.

The general principle abovementioned has no application to administrative or ministerial orders.[16]

3. Judgment when final.

A judgment of a criminal Court becomes final only after it is *pronounced* and *signed*.[1] A judgment, therefore, which, though signed, has not been pronounced, is inoperative and incomplete and the Judge has power to alter or vary

481, *Gojochowdhry* v. *Debey Chaudhry*. S. 369 assumed to apply.

8. (1898) 22 Bom 949 (958), *In re Harilal Buch*. Order refusing to deliver property seized by the Police.
9. (1906) 29 Mad 126 (132): 3 Cri L Jour 274 (F B), *Emperor* v. *Chinna Kaliappa*.
10. (1881) 8 Cal 63 (72), *In re Abdool Sobhan*.
[See also (1893) 20 Cal 513 (519), *Danput* v. *Chhatterput*.
(1920) 1920 Pat 563 (564, 565): 21 Cri L Jour 594: 5 Pat L Jour 47, *Ram Barai* v. *RamPratab*. Inadvertent order of transfer.]
11. (1923) 1923 Cal 662 (662): 25 Cri L Jour 464, *Lalit Mohan Battacharjee* v. *Noni Lal Sarkar*.
12. (1931) 1931 Pat 81 (82): 1931 Cri Cas 201: 9 Pat 240: 32 Cri L Jour 551 (S B), *Assistant Government Advocate* v. *Upendranath Mukerjee*.
13. (1930) 1930 Cal 61 (62): 1930 Cri Cas 13: 31 Cri L Jour 260, *Deby Das Karmakar* v. *Emperor*.
(1901) 28 Cal 652 (658, 662), *Dwarknath Mondul* v. *Benimadhab Banerjee*.
(1925) 1925 Nag 432 (432): 26 Cri L Jour 1040, *Asjar Ali* v. *Akbar Ali*.
(1908) 9 Cri L Jour 80 (82): 31 Mad 543 (545) (F B), *Emperor* v. *Maheshwara*.
(1927) 1927 Mad 503 (504): 28 Cri L Jour 304, *Venkkanna* v. *Emperor*.
(1902) 29 Cal 726 (732) (F B), *Mir Ahward* v. *Muhamad Askari*. No difference between order of discharge passed by a Presidency Magistrate and one passed by a Provincial Magistrate.
(1929) 1929 Bom 134 (134): 30 Cri L Jour 594, *Emperor* v. *Amanath Kadar*. 1925 Bom 258; 29 Cal 726 (F B); 29 Mad 126 (FB) and 36 All 129, followed.
(1903) 7 Cal W N 527 (529), *Walters* v. *Ibrahim*. 28 Cal 652, followed.
[But see (1935) 1935 All 59 (60): 1935 Cri Cas 38: 36 Cri L Jour 128, *Phonsia* v. *Emperor*.]
14. (1930) 1930 Cal 61 (62): 31 Cri L Jour 260: 1930 Cri Cas 13, *Debi Das* v. *Emperor*.
(1906) 29 Mad 126 (131): 3 Cri L Jour 274 (F B), *Emperor* v. *Chinna Kaliappa*.
(1932) 1932 Mad 369 (371): 55 Mad 622: 33 Cri L Jour 454: 1932 Cri Cas 353 (FB). *Ponnuswamy Goundan* v. *Emperor*.
15. (1923) 1923 All 332 (333): 24 Cri L Jour 232, *Jasua* v. *Emperor*. It only amounts to a discharge—It was however, held in this case that the Magistrate cannot *re-institute* the enquiry though a fresh complaint is not barred.
16. (1933) 1933 Pat 242 (243): 12 Pat 234: 1933 Cri Cas 714: 34 Cri L Jour 1198. *Pande Satdeo Narain* v. *Ramayan Tewari*.

Note 3.

1. (1889) Ratanlal 429 (429). *Queen* v. *Ganpat*.
(1912) 13 Cri L Jour 120 (120, 121): 38 Cal 828, *Amodini* v. *Darsan*.
(1887) 14 Cal 42 (48) (F B), *In re Gibbons*.
(1870) 5 Mad H C Rul App 19 (20), *High Court Proceedings*, 29-3-1870. Under old law, the Magistrate had power to alter sentence or order, before despatch of Calender to appellate authority.

it before pronouncing it.[2] Similarly where the Magistrate is pronouncing a judgment before signing it, and his attention is drawn to certain matters in it showing an error or mistake therein, he has ample powers to correct any mistake or alter the judgment before signing it.[3] Under the rules of the Allahabad High Court, a judgment becomes final only after it is sealed, and, therefore, the High Court has power to alter or add to its judgment before it is actually sealed.[4] *See also* the case cited below.[5]

A "judgment" within the meaning of this Section should be taken to mean and refer only to the judicial act of the Court in finally disposing of the case and must refer to, and indicate only the order of the Court when it is read out and signed by the Judge. It does not refer to any formal orders which are contemplated to be drawn up and issued[6] in consequence by a ministerial officer of the Court. Such ministerial orders, which are issued, may be corrected or altered.[7]

4. "Alter or review the same."

It has been seen in Note 2, *ante*, that the Court after signing and pronouncing its judgment becomes *functus officio* and has no power thereafter to add to or alter such judgment in any manner. Any such alteration or addition if made would be without jurisdiction, and a nullity.[1] Thus, the following alterations and additions are all nullities :—

1. The addition of an explanatory note to the judgment after it is pronounced.[2]
2. The enhancement, of the sentence passed, even though it be at the request of the accused himself in order to make his case appealable.[3]
3. The addition of a sentence of imprisonment in default of payment of fine even though it had been omitted to be passed by oversight.[3a]

In the last mentioned case, the Court can only report the matter to the High Court under Section 438.[4] Even in cases where the Court finds that the conviction and sentence passed by it are illegal,[4a] or where the innocence of the accused is discovered from facts which come to light subsequent to the conviction

2. (1913) 14 Cri L Jour 562 (563) : 21 Ind Cas 162 (All). *Ramdhir Rai* v. *Emperor.*
3. (1866) 5 Suth W R Cri 61 (64), *Queen* v. *Godai Raout.*
   (1893) Ratanlal 659 (663), *Queen* v. *Waman.*
4. (1899) 21 All 177 (178), *Queen* v. *Lalit*
   (1904) 1 Cri L Jour 710 (711) : 27 All 92, *Kallu* v. *King-Emperor.*
5. (1903) 7 Cal W N 7*n* (8*n*), *Bibhutti* v. *Sasi Mone.*
6. (1926) 1926 Mad 420 (420) : 27 Cri L Jour 184, *Arumuga Padayachi, In re.*
7. (1870) 2 N W P H C R 117 (118, 119), *Queen* v. *Nyan.*

Note 4.

1. (1895) Ratanlal 804 (805), *Queen* v. *Sahadat.*
   (1898) 22 Bom 949 (958), *In re, Harilal.*
   (1862-63) 1 Bom H C R Crown Cas 3 (3) *Tukia* v. *Reg.*
   (1878) Ratanlal 137 (137), *Queen-Empress* v. *Tukaram.*
   (1873) Weir 3rd Edition 983 (984), *High Court Proceedings*, 13-11-1873.
   (1906) 4 Cri L Jour 210 (211) (Cal), *In re Surendra Nath Bannerjee.*
   (1896) Ratanlal 877 (877), *Queen-Empress* v. *Ranchhod Hari.*
   (1919) 1919 All 329 (330) : 20 Cri L Jour 486, *Raj Kumar Das* v. *Emperor.*
2. (1878-80) 2 All 33 (35), *Empress* v. *Chattar.*
3. (1883) 1883 All W N 16 (16), *Qurban Ali* v. *Azizuddin.*

3a See cases in foot-note (4).

4. (1892-1896) 1892-1896 Upp Bur Rul 18 (18), *Queen-Empress* v. *Mi E Gywe.*
   (1921) 1921 Bom 368 (368) : 22 Cri L Jour 608, *In re Dhondi Nathaji Raut.*

4a (1875) 23 Suth W R Cri 49 (49), *The Queen* v. *Poran Mal*
   (1872-1892) 1872-1892 Low Bur Rul 354 (354, 355), *Nga E* v. *Queen-Empress.*
   (1904) 2 Low Bur Rul 43 (45), *King-Emperor* v. *Maung Cho.*
   (1930) 1930 Mad 1001 (1002) : 53 Mad 870 : 32 Cri L Jour 429 : 1930 Cri Cas 1055, *Ekambara Mudali* v. *Alamelammal.*
   (1865) 6 Suth W R Cri 70 (70), *Gunowree Dhorea* v. *Jhandoo.*
   (1868) 4 Mad H C Rul App 19 (19), *High Court Proceedings*, 13-11-1868.

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and sentence passed by the Court,[5] the only remedy would be to report the matter to the High Court, under S. 438 or to refer the matter to the Local Government, as the case may be, for necessary action under Chapter XXIX and not to review or re-consider the matter itself.

This rule against review of judgments applies only to cases where the portion of the judgment or order sought to be reviewed forms an integral part of the judgment, which cannot be treated as *separate* and *distinct* from such judgment.[6] Where, however, the judgment contains damaging observations against a witness, who at the time had no opportunity of explaining or defending himself, it has been held that the Judge had power to re-consider that portion of it for the purpose of expunging such observations, if thereby the *judgment against the accused* is not affected, reviewed or varied.[7] Similarly where the Magistrate accidentally omits to pass an order regarding the disposal of property at the time of the judgment, he or his successor can subsequently pass an order for its disposal as such an addition is not an alteration of the judgment.[8] A judgment cannot be said to be altered within the meaning of this Section in the following cases:—

1. Where the Sessions Judge sentences the accused to transportation in ignorance of the fact that the accused is already serving a sentence of imprisonment and after becoming aware of it, directs that the sentence of transportation should take effect immediately.[9]

2. Where the Court adds a direction as to costs in a proceeding under Section 145.[10]

3. Where the appellate Court setting aside a conviction on the ground of want of jurisdiction, but omitting to order a re-trial, adds the necessary directions subsequently.[11]

5. Power of High Court to review its judgment.

Before the amendment of 1923, the Section ran as follows:

"No Court other than a High Court when it has signed its judgment shall alter or review the same except as provided in Sections 395 and 484 or to correct a clerical error."

The question arose whether the express negation of the power of review in respect of criminal tribunals other than the High Court, had the effect of conferring upon the High Court such a power by implication. It was held in a series of decisions that the exclusion of judgments of the High Court from the purview of the Section could not, in the absence of any provision expressly conferring the power, be read as conferring upon the High Court, any such power,[1] and that the Legislature in thus excluding High Courts from the purview of that Section had in mind Section 434 and the Letters Patent which provide for review of judgments

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5. (1923) 1923 All 473 (474): 45 All 143: 24 Cri L Jour 766, *Kale* v. *King-Emperor.*
   (1877) 1 Ind Jur N S 333, *Reg.* v. *Hart*
6. (1917) 1917 Lah 163 (164): 18 Cri L Jour 332 (333): 1916 Pun Re Cri No. 25, *Official Receiver, Karachi* v. *Ganga Ram.*
7. (1910) 11 Cri L Jour 178 (179): 5 Ind Cas 611 (Lah), *In re Malik Umar Hayat.*
8. (1922) 1922 Mad 329 (329): 24 Cri L Jour 159, *In re, Subba Naidu.*
   [But See (1901) 4 Bom L R 12 (13), *Sakharam* v. *Jairam.*]
9. (1888) Ratanlal 391 (391), *Queen* v. *Hari.*
   1865) 3 Suth W R Cr Letters 16 (16). An amendment referring to the time at which the sentence should commence is not an alteration of the sentence itself.
10. (1920) 1920 Cal 320 (320): 40 Cal 974: 21 Cri L Jour 751, *Nafar Chandra Pal* v. *Sidhartha Krishna.*
11. (1881) 3 Mad 48 (51), *Rami Reddy, In re.*

Note 5.

1. (1886) 14 Cal 42 (48) (F B), *In re Gibbons.*
   (1923) 1923 Mad 426 (427): 46 Mad 382: 24 Cri L Jour 439, *Kunhamad Haji* v. *Emperor.*
   (1895) Ratanlal 791 (791), *Queen* v. *Mohun.*

where questions of law are reserved for consideration.[2]

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The amended Section has been re-drafted in order to give effect to the view abovementioned,[3] and it is now clear that where the High Court has pronounced its judgment and signed it, it becomes *functus officio* and neither the Judge, who passed the judgment nor any other Bench of the High Court has any power to review, re-consider or alter it except for correcting a clerical error,[4] whether the judgment was passed in revision,[5] or on appeal,[6] or on a reference to it under Section 432, or Section 434,[7] or in its original criminal jurisdiction.

Where the High Court dismisses a criminal revision application for default, or where it passes an order to the prejudice of a party without providing such party an opportunity for being heard in support of his case, has the High Court power to restore the case and re-hear the matter again on its merits? The answer to this question depends upon the nature of the order passed by the Court. The powers of revision vested in the High Court under Section 439 could only be exercised at the discretion of the Court if the circumstances require it and ordinarily no party has a *right* to be heard in support of his case.[8] But where such a right is expressly given to the accused as under sub-section 2 to Section 439, the High Court is bound to provide an opportunity to the accused before passing any order to his prejudice. It has, therefore, been held that where an order is passed to the prejudice of an accused and by mistake or inadvertence, no opportunity had been given to him to be heard in his defence, such an order being *without*

2. (1885) 7 All 672 (674), *Queen* v. *Durga.*
(1895) Ratanlal 791 (791), *Queen* v. *Mohun.*
(1886) 10 Bom 176 (180) (F B), *Queen-Empress* v. *C. P. Fox.*
(1923) 1923 Mad 426 (433): 46 Mad 382 : 24 Cri L Jour 439, *Kunhamad Haji* v. *Emperor.*
(1924) 1924 Mad 640 (641): 47 Mad 428 : 26 Cri L Jour 370, *Somu Naidu, In re.*
(1895) Ratanlal 791 (791), *Queen* v. *Mohun.*
(1935) 1935 All 60 (61): 56 All 990 : 1935 Cri Cas 102 : 35 Cri L Jour 1485, *Kunji Lal* v. *Emperor.* The reference to Letters Patent is Clauses 18 and 19 in the case of Allahabad High Court.

3. Statement of objects and reasons, 1921.
(1935) 1935 All 466 (467): 36 Cri L Jour 1286 : 1935 Cri Cas 507, *Banwari Lal* v. *Emperor.*
(1924) 1924 Mad 640 (643) : 47 Mad 428 : 26 Cri L Jour 370, *Somu Naidu, In re.*

4. (1887) 14 Cal 42 (48) (F B), *In re Gibbons.*
(1909) 10 Cri L Jour 314 (318) : 1909 Pun Re Cri No. 8, *Hira* v. *Emperor.*
(1899) 23 Bom 50 (54), *Queen* v. *Ganesh.*
(1909) 9 Cri L Jour 306 (307) : 1909 Pun Re Cri No. 1, *Hale* v. *Emperor.*
(1917) 1917 Bom 238 (238) : 18 Cri L Jour 889 (889), *Nagangouda* v. *Emperor.*
(1927) 1927 Mad 961 (962) : 28 Cri L Jour 974 (S B), *Muthu Balu Chettiar* v. *Chairman, Madura Municipality.* But where a Bench of the High Court heard the case, but did not *finally* dispose of the case—*Held* another Bench of the Court had power to hear and dispose of the case.

5. (1935) 1935 All 466 (467) : 36 Cri L J 1286 : 1935 Cr. C. 507, *Banwari* v. *Emperor.*
(1929) 1929 Lah 797 (799) : 10 Lah 241 : 30 Cri L Jour 815 : 1929 Cri Cas 429, *Emperor* v. *Dhanna Lal.*
(1889) Ratanlal 458 (458), *Queen-Empress* v. *Chimmba.*
(1898) 26 Cal 188 (191), *Hurbullabh* v. *Luchmeswar.*
(1905) 2 Cri L Jour 465 (467) : 1905 Upp Bur Rul Cr P C 35, *Ahlok* v. *King.*
(1919) 1919 Pat 514 (514) : 20 Cri L Jour 447, *Nand Kishore* v. *Emperor.*
(1916) 1916 All 183 (183) : 17 Cri L Jour 47 (48) : 38 All 134, *Gobind* v. *Emperor.* [But see (1927) 1927 All 724 (726) : 29 Cri L Jour 88, *Sripat Narain Singh* v. *Gahbar Rai.* Dissented from in 1935 All 466.]

6. (1881) 2 Weir 573 (573), *In re Venkatachalam.*
(1872) 17 Suth W R Cri 47 (48, 49), *Queen-Empress* v. *Chundro.*
(1923) 1923 All 473 (474) : 45 All 143 : 24 Cri L Jour 766, *Kale* v. *King-Emperor.* Even if any new materials had been discovered which if they had been placed before Court the Court might have come to a different conclusion—The Court has no power of review and the only remedy is to apply to Government.
(1879) 4 Bom 101 (102, 103), *Empress* v. *Mahomed Yashin.*
[See also (1897) 23 Bom 50 (54), *Queen* v. *Ganesh.* Following 4 Bom 101.]

7. (1893) Ratanlal 638 (638), *Queen* v. *Canji.*

8. (1924) 1924 Mad 640 (644): 47 Mad 428 : 26 Cri L Jour 370, *Somu Naidu, In re.*

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jurisdiction is not a judgment contemplated by this Section and that the High Court has power to entertain a fresh revision application to re-consider the matter.[9] Where, however, the sentence against an accused is reduced without notice to the Crown, the Court has no power to re-consider the matter as the Crown has *no right* to be heard in the matter of sentence.[10] In all other cases where a criminal revision application is dismissed for default of the petitioner, the High Court has no right to entertain a fresh application for the same relief.[11] It has, however, been held by the High Courts of Lahore,[12] and Rangoon,[13] that even in such cases the High Court has power to set aside the order of dismissal, as an order of dismissal for default is not a judgment (which is presumably a judgment on merits) contemplated by this Section.

As to the inherent power of the High Court in such cases, *see* Note 6, *infra*.

6. "Save as otherwise provided by the Code."

The provisions of the Section should be read as subject to any provision of the Code which provides specifically for a review of judgment. The following cases admit of review of judgments in particular cases:—

1. Section 395, providing for review of the sentence of whipping.
2. Sections 432 and 434, providing for review of a case where questions of law are reserved for decision by the High Court.
3. Section 484, providing for review of judgment in contempt cases where the accused tenders an apology.[1]
4. Section 437, providing for a District Magistrate making further inquiry himself in respect of an order passed by himself.[2]
5. Judgments and orders passed by an appellate Court are final except in cases provided for in Chapter 32. (See Section 430, *infra*.)

This Section must be read only as subject to Section 430 which, in turn, is subject to the provisions of Section 439, sub-section 2. The High Court is not precluded from entertaining an application under Section 439, sub-section 2, to enhance the sentence passed even after it has, as appellate Court, passed a judgment affirming the conviction of the accused.[3] The High Court cannot, however, in such cases inquire into the merits or the legality of the conviction.[4]

The inherent powers of the High Court, as stated in Section 561-A, *infra*, do not include the power to review an order made by the High Court in its criminal jurisdiction. That Section merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code; it does not confer on the Court any new powers such as any power to review or alter orders passed by itself.[5]

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9. (1924) 1924 Mad 640 (644) : 47 Mad 428 : 26 Cri L Jour 370, *Somu Naidu, In re.*
   (1927) 1927 Cal 702 (704): 55 Cal 417: 28 Cri L Jour 831, *Ramesh* v. *Kadambini.*
10. (1933) 1933 Cal 870 (871): 1933 Cri Cas 1481: 61 Cal 155: 34 Cri L Jour 1100, *Dahu Raut* v. *Emperor.*
11. (1912) 13 Cri L Jour 710 (711): 16 Ind Cas 518 (Mad), *Ranga Row* v. *Emperor.*
    (1916) 1916 Mad 516 (517): 16 Cri L Jour 697 (698), *In re Kanakasabhai.*
    (1923) 1923 Mad 276 (276): 23 Cri L Jour 746, *Appayya* v. *Venkatapayya.* Revision rejected for non-payment of printing charges—*Held* Court had no power to re-hear.
12. (1924) 1924 Lah 310 (310) : 23 Cri L Jour 750, *Kishen Singh* v. *Girdhari Lal.*
13. (1928) 1928 Rang 288 (288): 30 Cri L Jour 749, *Ibrahim* v. *Emperor.*

Note 6.

1. (1935) 1935 All 60 (61): 56 All 990: 1935 Cri Cas 102: 35 Cri L Jour 1485, *Kunji Lal* v. *Emperor.*
2. (1901) 28 Cal 102 (104), *Bidhu* v. *Mati.*
   (1906) 11 Cal W N 11*n*, *Dedar* v. *Emperor.*
3. (1933) 1933 All 485 (486): 55 All 715: 1933 Cri Cas 830: 34 Cri L Jour 1205, *Emperor* v. *Abdul Qayum.*
   (1926) 1926 Bom 555 (557): 50 Bom 783: 27 Cri L J 1173, *Emperor* v. *Jorabhai.*
4. (1926) 1926 Bom 555 (557): 50 Bom 783: 27 Cri L J 1173, *Emperor* v. *Jorabhai.*
5. (1933) 1933 Cal 870 (874): 61 Cal 155: 34

370.* **Presidency Magistrate's judgment.** Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars :—

(*a*) the serial number of the case ;
(*b*) the date of the commission of the offence ;
(*c*) the name of the complainant (if any) ;
(*d*) the name of the accused person, and (except in the case of an European British subject) his parentage and residence ;
(*e*) the offence complained of or proved ;
(*f*) the plea of the accused and his examination (if any) ;
(*g*) the final order ;
(*h*) the date of such order ; and
(*i*) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

Synopsis.

Other Topics.

Failure to examine accused—Serious irregularity. See Note 3, Pt. 2.

"Imprisonment"—Refers only to substantive sentence. See Note 5, Pt. 1.

Magistrate—Referring to document on record—No serious objection. See Note 4, F-N (1).

Omission to record accused's plea—Only irregularity. See Note 3, F-N (2).

Omission to record particulars—Only irregularity. See Note 2, Pt. 3.

Reasons—To be recorded briefly—Omission to do so not seriously prejudicing accused—Irregularity cured by S. 537. See Note 4, Pts. 1, 6, 7.

Section—No application to proceedings under Workmen's Compensation Act. See Note 1, Pt. 2.

1. Scope of the Section.

This Section is an exception to Section 367 and enacts that a Presidency Magistrate shall record the particulars specified instead of recording a judgment as provided by Section 367.[1] This Section has no application to proceedings under the Workmen's Compensation Act.[2]

2. Record of particulars.

The direction to record particulars should be strictly followed.[1] The

* (Code of 1882—S. 370—Same.)

(Codes of 1872 and 1861—Nil.)

Cri L Jour 1100 : 1933 Cri Cas 1481, *Dahu Raut* v. *Emperor*.

(1928) 1928 Lah 462 (463) : 10 Lah 1 : 29 Cri L Jour 669, *Raju* v. *Emperor*. 1927 Lah 139, dissented from.

(1929) 1929 Lah 797 (799) : 1929 Cri Cas 429 : 10 Lah 241 : 30 Cri L Jour 815, *Emperor* v *Dhanna Lal*.

(1935) 1935 All 466 (467, 468) : 36 Cri L Jour 1286 : 1935 Cri Cas 507, *Banwari Lal* v. *Emperor*.

(1931) 1931 Nag 169 (169) : 27 Nag L R 163 : 32 Cri L Jour 1222 : 1931 Cri Cas 830, *Ganpat* v. *Emperor*.

(1935) 1935 All 60 (61) : 56 All 990 : 1935 Cri Cas 102 : 35 Cri L Jour 1485, *Kunji Lal* v. *Emperor*.
[But see (1928) 1928 Oudh 402 (403) : 29 Cri L Jour 893 : 3 Luck 680, *Emperor* v. *Shiva Datta*. Following 1927 Lah 139 which was, however, dissented from in 1928 Lah 462.

Section 370—Note 1.

1. (1921) 1921 Bom 374 (375, 376) : 45 Bom 672 : 22 Cri L Jour 17, *G. S. Fernandez* v. *Emperor*.
2. (1900) 27 Cal 131 (132, 133), *Averam Das* v. *Abdul Rahim*.

Note 2.

1. (1932) 1932 Cal 62 (63) : 33 Cri L Jour 264 :

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various particulars should be recorded in the form prescribed by the various High Courts.[2] Where, however, all the important particulars have been recorded, the omission to record *all* the particulars in the form prescribed is only an irregularity which can be cured under Section 537, *infra*.[3]

3. Examination of the accused—Clause (f).

The words "if any" in Clause (f) do not control the provisions of Section 342, under which the Magistrate is bound to record the examination of the accused.[1] A failure to examine the accused and make a record thereof is therefore a serious irregularity which may vitiate the trial if prejudice is thereby caused to the accused.[2] *See* Section 342, *ante*.

4. Recording reasons—Clause (i).

In all cases where the Magistrate passes a sentence of imprisonment or fine exceeding Rs. 200, he should record briefly his *reasons* for the conviction. It is enough if the reasons are briefly stated,[1] but it should be done in such a manner that the High Court may in revision be in a position to judge whether there were sufficient materials before the Magistrate to support the conviction.[2] Thus a mere statement that the offence is proved,[3] or that the accused has no defence to make,[4] or that the Magistrate believes the prosecution witnesses,[5] is not a compliance with the provisions of the Section; where, however, the omission to record the reasons has not seriously prejudiced the accused,[6] as where the trying Magistrate has made a record of the evidence and other important matters and the records are made available to the Court,[7] the irregularity will be cured under Section 537. Section 441, *infra*, further enables the Magistrate to submit a statement of reasons where the records are called for by the High Court (under Section 435) even in cases where no reasons are recorded at all by the Presidency Magistrate in his judgment. But where the conviction is passed without proper reasons therefor, on evidence of which no record is taken and which is therefore not available to the

1932 Cri Cas 10, *Man Mohan Pande* v. *Corporation of Calcutta*.
(1932) 1932 Cal 64 (64): 1932 Cri Cas 12 : 33 Cri L Jour 265, *Probodh Chandra Guha* v. *Corporation of Calcutta*.
2. (1926) 1926 Cal 1109 (1110): 27 Cri L Jour 1131, *Bishnu Pada Deb* v. *Emperor*.
3. (1926) 1926 Cal 1109 (1110): 27 Cri L Jour 1131, *Bishnu Pada Deb* v. *Emperor*.

Note 3.

1. (1921) 1921 Bom 374 (375, 377): 45 Bom 672 : 22 Cri L Jour 17, *G. S. Fernandez* v. *Emperor*.
2. (1926) 1926 Cal 692 (692): 27 Cri L Jour 110, *Ismail Sha* v. *Emperor*.
[See also (1905) 2 Cal L Jour 63*n* (63*n*), *Sheikh Soleman* v. *Emperor*. Omission to record plea of accused —Only an irregularity in the absence of prejudice to accused.
(1929) 1929 Cal 406 (406): 1929 Cri Cas 30 : 56 Cal 1067 : 30 Cri L Jour 526, *Sadagar* v. *Emperor* (Do).]

Note 4

1. (1904) 1 Cri L Jour 839 (841): 31 Cal 983, *Emamdu* v. *Emperor*.
(1926) 1926 Cal 1109 (1111): 27 Cri L Jour 1131, *Bishnu Pada Deb* v. *Emperor*. Under S. 370 there is no serious objection to the Magistrate's referring to a document on the record instead of taking the trouble to rewrite those portions of it which should have been included in his final order.
2. (1904) 1 Cri L Jour 527 (528) (Cal), *Toolsey Kaharin* v. *Emperor*.
(1886) 13 Cal 272 (274), *Yakoob* v. *Adamson*.
(1923) 1923 Mad 144 (144): 23 Cri L Jour 602, *In re Varadarajulu*.
3. (1887) 14 Cal 174 (175), *Moteeram* v. *Balaseeram*.
(1886) 13 Cal 272 (273), *Yacoob* v. *Adamson*.
[See (1926) 1926 Cal 692 (692): 27 Cri L Jour 110, *Ismail* v. *Emperor*.]
4. (1900) 27 Cal 461 (462), *Natabar* v. *Provash*.
5. (1915) 1915 Bom 137 (137): 16 Cri L Jour 771 (771), *Shankar* v. *Emperor*.
6. (1924) 1924 Mad 799 (800): 25 Cri L Jour 1084, *In re Thurman*.
(1900) 27 Cal 461 (462), *Natabar Ghose* v. *Provash Chunder Chatterjee*.
(1915) 1915 Bom 137 (137) : 16 Cri L Jour 771 (771), *Shankar* v. *Emperor*.
(1932) 1932 Cal 655 (656): 1932 Cri Cas 632 : 33 Cri L Jour 729, *Shamlal Khettry* v. *Emperor*.
7. (1923) 1923 Mad 185 (186): 46 Mad 253: 24 Cri L Jour 84, *In re Denish*.

High Court, the omission to record the reasons in such cases is a grave irregularity which will be a sufficient ground for interference by the High Court.[8]

The Presidency Magistrate is not bound to give any statement of reasons in case he inflicts a fine of less than Rs. 200, but if he chooses to write a judgment in such a case it is his duty to give his findings on the facts proved.[9]

5. "Imprisonment."

The word "imprisonment" contemplated by this Section refers to the substantive sentence passed ; it does not include the sentence of imprisonment ordered in default of payment of fine.[1]

371.* (1) On the application of the accused a copy of the judgment, or when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons case be given free of cost.

Copy of judgment, etc., to be given to accused on application.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall. on the application of the accused. be given to him without delay and free of cost.

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Case of person sentenced to death.

Synopsis.

Other Topics.

Copy—Granted free of cost—Court-fee stamp not necessary for it when preferring appeal. See Note 2, Pt. 1.

Limitation—For appeal from sentence of death. See Note 3.

1. On the application of the accused.

Under this Section the accused is entitled to a copy of the judgment only on his application. The undermentioned cases decided under the Code of 1872 wherein the grant of copies has been held to be compulsory and independent of any request on the part of the accused are no longer of any importance.[1]

See also Notes to Section 548, *infra*.

* (Code of 1882—S. 371—Same.)

(Code of 1872—S. 464, Para. 2.)

464. * * * The judgment or order shall be explained to the accused person, or person affected by it; and a copy shall be given to him in his own language as soon as possible. * * * *

(Code of 1861—Nil.)

8. (1923) 1923 Mad 185 (186): 46 Mad 253: 24 Cri L Jour 84, *In re Denish.*
(1904) 1 Cri L Jour 527 (528) (Cal), *Toolsey* v. *Emperor.*
(1929) 1929 Mad W N 892 (893), *Mahaboob Khan* v. *Emperor.*
(1886) 13 Cal 272 (274), *Yacoob* v. *Adamson.*
Prejudice is presumed.

9. (1933) 1933 Cal 532 (533): 60 Cal 656: 1933 Cri Cas 891: 34 Cri L Jour 1059, *Nishikant Chatterjee* v. *Behari Kahar.*

Note 5.

1. (1887) 14 Cal 174 (175), *Motiram* v. *Belaseeram.*

Section 371—Note 1.

1. (1873) Ratanlal 73, *Nasik Magistrate's reference No.* 1181.
(1868) 9 Suth W R Cr 19, *Re Ram Chunder.*

Sec. 371 Notes 2—3

2. Court-fees.

Where a copy is granted under this Section free of cost, it is not also necessary to affix any Court-fee Stamp on it when preferring an appeal.[1]

3. Limitation for appeal against sentence of death.

The period of limitation prescribed for an appeal from a sentence of death passed by a Court of Session is seven days from the date of the sentence. *See* Article 150 of Schedule II, Indian Limitation Act.

Sec. 372

Judgment when to be translated.

372.* The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the Court and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

Synopsis.

Scope of the Section. Note No. 1

Other Topics.

Section has no application to interlocutory or administrative orders. See Note 1, Pt. 2.

1. Scope of the Section.

The Court is bound, where the accused so requires to furnish a translation of the judgment where it is recorded in a different language from that of the Court[1] but this Section applies only to judgments and final orders in the nature of a judgment and has no application to orders on interlocutory applications or to administrative orders.[2] *See also* Section 369, *ante*.

Sec. 373

Court of Session to send copy of finding and sentence to District Magistrate.

373.† In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

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* **(Code of 1882—S. 372—Same.)**

(Code of 1872—S. 464, para. 3.)

464. * * * The original shall be filed with the record of proceedings, and a translation thereof, where the original is recorded in a different language from that in ordinary use in the district, shall be incorporated in the record of the case. * * *

Judgment to be translated.

(Code of 1861—S. 429—Materially the same as that of 1872 Code)

† **(Code of 1882—S. 373—Same.)**

(Code of 1872—S. 302, Para. 1.)

302. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence to the Magistrate of the District in which the trial was held. * * *

Court of Session to send copy of finding and sentence to District Magistrate.

(Code of 1861—S. 384.)

384. In cases tried by the Court of Session, the Court shall forward a copy of its sentence, together with a warrant for the execution of the same, directed to the Magistrate of the District in which the trial was held or to such other officer as aforesaid.

Court of Session to direct warrant to District Magistrate.

Note 2.

1. *Govt. Notification No.* 4650 *dated* 10-7-1889. (1888) Ratanlal 364, *Queen* v. *Ragba*.

Section 372—Note 1.

1. See (1863) 1 Bom H C R Crown Cas 17 (18), *Reg* v. *Ratanji Bhukan*.

2. (1872) Ratanlal 61 *Reg.* v. *Pandurang*. Case under Code 1861—Section applies to final orders passed.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

374.* When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death to be submitted by Court of Session.

Synopsis.

Scope and object. Note No. 1

Other Topics.

Powers of High Court—Wide. See Note 1, Pt. 1.
Provision for confirmation under special laws. See Note 1, Pt. 2.
Records sent to High Court to be complete. See Note 1, Pt. 4.
References only in sentences of death. See Note 1, Pt. 3.
When references to be made. See Note 1, Pt. 5.

1. Scope and object.

The Legislature has provided in the confirmation proceedings a final safeguard of the life and liberty of the subject in cases of capital sentences. The High Court has been given wide powers under this Chapter in order to prevent any possible miscarriage of justice.[1] Similar reference is also provided under special laws in the case of sentences of death passed thereunder.[2]

References for confirmation can be made only in cases of sentences of *death*.[3]

The records transmitted to the High Court in a confirmation case must be complete.[4]

As to the time within which reference should be made, *see* the undermentioned case.[5]

375.† (1) If, when such proceedings are submitted, the High

* (1882—S. 374 ; 1872—S. 287, Para. 1; 1861—S. 380.)

† (Code of 1882—S. 375—Same.)

(Code of 1872—S. 289.)

289. If the High Court thinks further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused person to be necessary, it may direct such inquiry to be made, or such additional evidence to be taken.

Power to direct further inquiry, &c.

Unless the Court of reference otherwise directs the presence of the convicted person may be dispensed with when the further inquiry is made or evidence taken and neither under this

Section 374—Note 1.

1. (1921) 1921 Sind 84 (85, 87, 88, 89) : 23 Cri L Jour 33 : 15 Sind L R 103, *Gul* v. *Emperor*.
(1895) Ratanlal 806 (814), *Empress* v. *Kallappa*.

2. (1933) 1933 Cal 1 (2) : 1933 Cri Cas 21 : 33 Cri L Jour 837 (F B), *Prodyot Kumar Bhattacharjya* v *Emperor*. See S. 3 (2), Bengal Criminal Amendment Supplementary Act.
(1932) 1932 Cal 818 (818) : 1932 Cri Cas 857 : 33 Cri L Jour 722 (F B), *Monoranjan Bhattacharjya* v. *Emperor* (Do.).

3. (1873) 5 N W P H C R 130 (132), *Empress* v. *Aman*.
[See (1872) 17 Suth W R Cr 11 (11), *Empress* v. *Boydonath*.]

4. (1871) 15 Suth W R Cr 16 (17), *In re Gopal Hajjan*. The record of the defence set up in the Sessions Court wanting in this reference.

5. (1884) 7 Mad H C R App 21 (21). *High Court proceedings*, 3rd April 1873.

Sec. 375 Note 1

Power to direct further inquiry to be made or additional evidence to be taken.

Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

Synopsis.

Other Topics.

Comparison with Section 428. See Note 2, Pts. 5 and 6.

Confession tutored by Magistrate—Examination of Magistrate directed. See Note 1, Pt. 2.

Confession wrongly rejected by Sessions Court. See Note 2, Pt. 1.

Further enquiry — Additional evidence not needed. See Note 1, Pt. 3.

Insanity of accused—Direction for medical observation and report. See Note 1, Pt. 1.

Reference to prior statements to police. See Note 2, Pt. 6.

1. Further enquiry.

If on the reference under Section 374, the High Court thinks that a further enquiry is to be made, or additional evidence is to be taken regarding the guilt or innocence of the accused, it may make such further enquiry, or take such additional evidence itself, or direct the Court of Session to do so. Further enquiry would ordinarily be ordered, when there is any defect in the procedure adopted in the Court of Session. Thus where the question was, if the accused was insane at the time he committed the murder of his wife, and where, there was evidence that the accused spoke like an insane man on the day previous to the murder, and there was no evidence of any reasonable or probable cause for any jealousy on his part by reason of any evil

Section nor under Section 282 is such inquiry to be made or evidence taken in the presence of jurors or assessors.

The result of the further inquiry and the additional evidence shall be certified to the High Court, and the High Court shall thereupon proceed to pass judgment of acquittal, or to confirm the sentence or to pass such sentence as it thinks fit.

(Code of 1861—S. 400.)

400. If the case so referred shall have been tried by the Court of Session with the aid of assessors, it shall be competent to the Sudder Court, if it think further enquiry or further evidence upon any point bearing upon the guilt or innocence of the accused person to be necessary, to direct such enquiry to be made, or such additional evidence to be taken. The result of further enquiry and the additional evidence shall be certified to the Sudder Court, and the Sudder Court shall thereupon proceed to pass judgment of acquittal or such sentence as to that Court shall seem right.

Competence of Sudder Court to direct further enquiry, &c.

conduct on the part of his wife, and the assessors found that the accused was not of sound mind, the High Court held, that it was a "defect of enquiry" not to have placed the accused under medical observation. The High Court consequently directed the Court of Session to place the convicted person under medical observation for a month, and then forward the case to them, with the evidence of the medical officer, and opinion of the Sessions Judge.[1] Where again the prisoner was convicted on the sole evidence of his confession, which he alleged had been tutored by the Magistrate who recorded it, the High Court directed the examination of that Magistrate on the question of the alleged tutoring.[2] The words "further enquiry should be made into or additional evidence taken upon" show that "further enquiry" does not always involve the taking of additional evidence. "Further enquiry" also includes the consideration of the evidence already taken.[3]

2. Additional evidence.

Additional evidence will be directed to be taken, or taken by the High Court itself when such evidence has been improperly rejected by the Court of Session as in the case of a confession wrongly rejected,[1] or when the evidence already on record is insufficient for arriving at a proper decision. Thus when the evidence as to the prisoner's state of mind was insufficient, additional evidence was called for.[2] Likewise when the report of the Chemical Examiner was defective, his evidence was directed to be taken.[3] In Referred Trial No. 36 of 1932 (Madras) the question was as to the identification of the accused. The thumb-impression of the accused had to be taken in the Court for the purpose of comparing it with his signatures, one taken several years ago when under arrest on a charge of murder, and the other taken before the committing Magistrate in the case under reference. The prisoner under sentence of death was sent for, and his thumb-impression was taken. An expert witness was also examined and the convicted person was asked, if he had anything to say on the additional evidence taken.

Where during the course of the trial, the accused applied to be allowed to call for certain evidence material to his defence, and the Court of Session improperly refused to grant his application, the High Court permitted him under this Section to produce such evidence.[4]

Under this Section additional evidence can be taken on any point bearing on guilt or innocence of the accused; while under Section 428 additional evidence can be taken whenever the appellate Court thinks it necessary. Thus under Section 428, an appellate Court may test the value of a statement made by a defence witness by taking additional evidence in appeal;[5] while under this Section testimony of witnesses cannot be tested by admitting additional evi-

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Section 375—Note 1.

1. (1864) 1 Suth W R Cr 1 (1), *Empress* v. *Sheikh Mustafa.*
2. (1895) 19 Bom 195 (198), *Empress* v. *Pahuji.*
3. (1891) 14 Mad 334 (337, 341), *Empress* v. *Balasinnatambi.*
   [See also (1888) 15 Cal 608 (620, 621), *Hari Das Sanyal* v. *Saritulla.*]

Note 2.

1. (1901) 25 Bom 168 (174), *Empress* v. *Basavanta.*
2. (1886) Ratanlal 229 (236, 237), *Empress* v. *Nepal.*
3. (1882) 2 Weir 660 (661), *Mantapampalla Padigadu, In re.*
4. (1911) 12 Cri L Jour 412 (420) : 11 Ind Cas 596 (Lah), *Bhagwan Kaur* v. *The Crown.*
   (1925) 1925 Mad 106 (109) : 25 Cri L Jour 401, *M. P. Narayana Menon, In re.*
5. (1928) 1928 Mad 1174 (1175) : 30 Cri L Jour 133, *Subramania Iyer* v. *Emperor.*
   (1925) 1925 Mad 106 (109) : 25 Cri L Jour 401, *M. P. Narayana Menon, In re.*

Sec. 375 Notes 2—4

dence. Thus the High Court cannot refer to the earlier statements made by the witnesses to the Police, with a view to discredit such witnesses.[6]

Where the circumstances called for the re-opening of the whole case owing to a grave irregularity in procedure, it was held that the proper course was to set aside the conviction and order a retrial instead of directing additional evidence to be taken under this Section.[7]

3. Presence of the accused.

The presence of the accused could be dispensed with when the High Court is recording additional evidence.[1]

4. Appeal.

Where on a reference, the High Court had pronounced its decision, the accused has no further right of appeal, though at the time of reference he could have preferred an appeal.[1]

Sec. 376

Power of High Court to confirm sentence or annul conviction.

376.* In any case submitted under Section 374, whether tried with the aid of assessors or by jury, the High Court—

(*a*) may confirm the sentence, or pass any other sentence warranted by law, or

(*b*) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(*c*) may acquit the accused person :

Provided that no order of confirmation shall be made under this Section until the period allowed for preferring an

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* **(Code of 1882—S. 376**—Same.)

(Code of 1872—S. 288.)

Power of High Court to confirm sentence or annul conviction.

288. In any case so referred, whether tried with assessors or by jury, the High Court may either confirm the sentence, or pass any other sentence warranted by law, or may annul the conviction and order a new trial on the same or an amended charge, or may acquit the accused person.

(Code of 1861—S. 399.)

Power of Sudder Court to confirm, reverse, &c., sentence.

399. In any case so referred, the Sudder Court may either confirm the sentence or pass any other sentence warranted by law or may annul the conviction and order a new trial on the same or an amended charge. If the case shall have been tried by the Court of Session with the aid of assessors, it shall further be competent to the Sudder Court to acquit the accused person and order his discharge.

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6. (1917) 1917 P C 25 (29) : 44 Cal 876 : 18 Cri L Jour 471 : 44 Ind App 137: 13 Nag L R 100 (P C), *Dal Singh* v. *Emperor.*

7. (1935) 1935 Sind 145 (179) : 1935 Cri Cas 753 : 28 Sind L R 397 : 36 Cri L Jour 1161, *Emperor* v. *Hari.* Failure to supply to accused copies of statements made to police by witnesses under S. 162.

Note 3.

1. (1906) 3 All L J 112 (Notes), *Sheo Achal Singh* v. *Emperor.*

Note 4.

1. (1867) 1867 Pun Re No. 33, page 55 (55), *Crown* v. *Soojun Singh.*

appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of. Sec. 376 Note 1

Synopsis.

Other Topics.

Age or sex—Reduction of sentence. See Note 2, Pts. 6 and 7.
Appointment of advocates for defence by Court. See Note 6.
Circumstantial evidence—Death sentence—Or transportation for life. See Note 2, Pts. 4 and 5.
Compared with Sections 423 and 418. See Note 1, Pt. 3.
Compared with Section 374. See Note 1, Pts. 1 and 4 to 6.
Competency of jurisdiction. See Note 2, Pt. 11.
Conviction, annulment and acquittal. See Note 4, Pt. 1.
Dead body not found—Lesser sentence. See Note 3, Pts. 10 and 11.
Delay—No confirmation of death sentence. See Note 2, Pt. 9 ; Note 3, Pts. 1, 2 and 3.
Doubt as to part taken by accused—Lesser sentence. See Note 3, Pt. 12.
Insufficient grounds for refusal of confirmation. See Note 2, Pts. 13 and 14.
Judge's summing up enforcing his own view—Re-trial. See Note 6, Pt. 3.
Jury verdict—High Court's power. See Note 1, Pts. 2 and 7 ; Note 4, Pts. 1 and 2.
Legislative changes. See Note 5, Pts. 4 and 5.
Non-compliance with Section 297—Re-trial. See Note 6, Pt. 4.
Physical condition of convict. See Note 3, Pt. 13.
Proof of motive. See Note 2, Pt. 12.
Reduction of sentence. See Note 3, Pt. 5.
Re-trial on different charge. See Note 6, F-N (1).
Several convicts for one murder—No ground for commutation. See Note 3, Pt. 14.
Section 84, Indian Penal Code. See Note 3, Pt. 4.
Wrong and improper—Sentence not confirmed. See Note 2, Pt. 10.

1. Scope.

In dealing with an appeal the High Court cannot interfere with the verdict of the jury unless such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by the Judge. But in the case of a reference under Section 374, the powers of the High Court are not so limited and it is open to the High Court to go into the *facts* and to come to the conclusion that the finding of the jury is an unsafe finding, or is not justified by the evidence on record.[1] The High Court is thus empowered in such cases to substitute its own finding in the place of the verdict of the jury, even though the verdict is unanimous.[2] There seems to be no statutory limit to the power of the High Court in this behalf. The whole broad question of the guilt or innocence of the accused is before the High Court, and not merely the question of law as to evidence as in an appeal under Section 418, or questions of misdirection by the Judge or of misunderstanding on the part of the jury as under Section 423 (2).[3] As a matter of fact, it has been held that in the case of a reference under Section 374

Section 376—Note 1.

1. (1931) 1931 Cal 178 (183): 32 Cri L Jour 190: 1931 Cri Cas 242 (F B), *Emperor* v. *Panchu Shaikh.*
(1921) 1921 Sind 84 (87, 88): 15 Sind L R 103: 23 Cri L Jour 33, *Gul* v. *Emperor.*
(1932) 1932 Pat 302 (302): 34 Cri L Jour 83: 1932 Cri Cas 774, *Emperor* v. *Rash Behari Lal.*
(1898) 2 Cal W N 49 (50), *Empress* v. *Chatradhari Goala.*
(1873) 19 Suth W R Cr 57 (57), *Empress* v. *Jaffir Ali.*
(1894) Ratanlal 710, *Empress* v. *Abdul Razak.*
2. (1915) 1915 Bom 243 (244): 16 Cri L Jour 818, *Daji Yesaba* v. *Emperor.*
(1921) 1921 Sind 84 (87, 88): 15 Sind L R 103: 23 Cri L Jour 33, *Gul* v. *Emperor.*
3. (1921) 1921 Sind 84 (88): 15 Sind L R 103:

Sec. 376 Notes 1—2

the question of misdirection is not of much importance as the High Court is obliged to come to its own independent conclusion as to the guilt or innocence of the accused, independently of the verdict of the jury or even of the opinion of the Judge.[4] Indeed the Legislature has provided in a reference under Section 374, a final safeguard analogous to the functions of the Home Office in England, and has laid this duty on the High Court.[5] Of course, the High Court has got this power only in cases where the sentence of death has been passed.[6]

But the High Court will act with great circumspection before it sets aside the verdict of the jury. It will generally interfere where the evidence which might have materially affected the finding, has been improperly rejected or admitted, or where the jury were improperly charged, or where they misunderstood the trial Judge's directions, or where the proved facts are wholly insufficient to support their verdict.[7]

2. May confirm the sentence.

Before the High Court confirms the sentence of death, it will see if the verdict of the jury is supported by the evidence on record[1] and is right on the facts before it.[2] As a matter of fact the death sentence will not be confirmed unless the High Court feels completely satisfied about the guilt of the accused even though the trial has been with the aid of a jury. In confirming, Court should scrutinise the evidence and see whether the verdict of the jury is perverse, whether the evidence has been improperly excluded or improperly admitted and whether the trial Judge has properly directed the jury on the points of decision, and has pointed out to them how far those points in his opinion are established or not, by admissible and relevant evidence, and has otherwise directed the jury properly.[3]

Where the evidence is totally *circumstantial*, some Judges have been averse to confirming the sentence of death and have commuted it to one of transportation for life.[4] There is, however, no rule of law that where the evidence is wholly circumstantial, death sentence should not be awarded.[4a] In the undermentioned cases[5] where the evidence was entirely circumstantial and the accused was a young man of 19 years, the sentence of transportation for life awarded by the Sessions Judge was not enhanced to one of death.

There seems to be some difference of opinion on the question, if the *age* or *sex* of the accused can, of itself, be a sufficient reason for reducing the sentence. It may, however, be safely said that the age of the accused is a fact which might well be taken into consideration and has been, in fact, taken

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23 Cri L Jour 33, *Gul* v. *Emperor*.

4. (1928) 1928 Cal 430 (432): 29 Cri L Jour 546, *Hazrat Gul Khan* v. *Emperor*.
5. (1921) 1921 Sind 84 (88): 15 Sind L R 103: 23 Cri L Jour 33, *Gul* v. *Emperor*.
6. (1873) 5 N W P H C R 130 (132), *Empress Aman*.
7. (1921) 1921 Sind 84 (88): 15 Sind L R 103: 23 Cri L Jour 33, *Gul* v. *Emperor*.

Note 2.

1. (1926) 27 Cri L Jour 378 (379): 92 Ind Cas 890 (Cal), *Arshed Ali* v. *Emperor*.
   (1926) 1926 Nag 363 (370): 27 Cri L Jour 731, *Dadi Lodhi* v. *Emperor*.
2. (1924) 1924 Cal 625 (628): 26 Cri L Jour 5, *Hassenulla Sheikh* v. *Emperor*.
   (1886) Ratanlal 229 (230), *Empress* v. *Nepal*.
3. (1921) 1921 Sind 84 (86): 15 Sind L R 103: 23 Cri L Jour 33, *Gul* v. *Emperor*.
   (1922) 1922 Cal 124 (127): 23 Cri L Jour 567, *Emperor* v. *Durga Charan*.
4. (1890) 13 Mad 426 (436), *Empress* v. *Sami*.
   (1886) 2 Weir 736, *Vemulada Janaki, In re*.

4a (1929) 1929 Mad 667 (668): 30 Cri L Jour 971: 1929 Cri Cas 138, *Indrammal* v. *Emperor*. Mere fact that conviction is based on circumstantial evidence is no reason why a lesser sentence should be passed.

5. (1915) 1915 Mad 542 (543, 544): 16 Cri L Jour 28, *Muniandi* v. *Emperor*.

into consideration in determining the sentence to be passed in cases of murder.[6]

One view is that the age or sex of the accused is not of itself a sufficient reason for awarding the lesser sentence.[6a] "If there are other reasons which very nearly justify the passing of the sentence of transportation for life but do not quite do so, or when it is doubtful whether they do so or not, then the youth or sex of the criminal may certainly tip the scale to the side of mercy."[7] This view has been dissented from, in a later case of the same Court and the

[See also (1890) 13 Mad 426 (436), *Empress* v. *Sami*.]

(1915) 1915 Mad 821 (824): 16 Cri L Jour 20, *In re Rasammal*.

6. (1915) 1915 Mad 542 (545): 16 Cri L Jour 28, *Muniandi* v. *Emperor*.

(1915) 1915 Mad 821 (823, 824): 16 Cri L Jour 20, *In re Rasammal*.

(1911) 12 Cri L Jour 448 (450): 1 Upp Bur Rul 87, *Nga Tha Kin* v. *Emperor*.

(1927) 28 Cri L Jour 217 (218): 99 Ind Cas 1017 (Lah), *Mangal Singh* v. *Emperor*. Murder by juvenile not wholly deliberate or cold-blooded—Some. provocation—Lesser sentence to be passed.

(1918) 1918 Low Bur 58 (59): 9 Low Bur Rul 165: 19 Cri L Jour 648, *Chit Tha* v. *Emperor*. Ordinarily youth is in itself an extenuating circumstance except in cases of extreme depravity.

(1928) 1928 Nag 108 (111): 29 Cri L Jour 400, *Sheobalak Prasad* v. *Emperor*.

(1926) 1926 Lah 144 (144): 26 Cri L Jour 1373, *Mt. Daulan* v. *Emperor*. Where a young girl of 15 years killed her step-son by a stick blow because her husband was ill-treating her, the Court setenced her to transportation for life.

(1928) 1928 Lah 855 (856): 29 Cri L Jour 682, *Harnaman* v. *Emperor*. Youthful accused mere tool in the hands of third persons—Death sentence not called for.

(1929) 1929 Lah 64 (66): 30 Cri L Jour 65, *Thakar Singh* v. *Emperor*. Age of discretion not attained — Death penalty not to be given.

(1931) 1931 Lah 177 (178): 32 Cri L Jour 682: 1931 Cri Cas 297, *Mohan Lal* v. *Emperor*.

(1933) 1933 Rang 134 (136): 34 Cri L Jour 835: 1933 Cri Cas 720, *Mi Hein* v. *Emperor*. Murder by youth of 18 acting under instructions and semi-compulsion of elder brother—Death sentence commuted.

(1924) 1924 Lah 654 (656): 26 Cri L Jour 349: *Pirthi* v. *Emperor*. Youth-Violent quarrel—No motive for premeditated murder—Lesser punishment awarded.

(1933) 1933 Lah 229 (231): 34 Cri L Jour 375: 1933 Cri Cas 349, *Yara Dost Mohammad* v. *Emperor*. Where a boy of 17 committed murder without premeditation under a sudden impulse, *held* that he should be given a *locus poenitentiae* and the irrevocable sentence of death should not be passed upon him.

6a (1933) 1933 Cal 1 (2, 3): 1933 Cri Cas 21: 33 Cri L Jour 837 (F B), *Prodyot Kumar Bhattacharjya* v. *Emperor*.

(1928) 29 Cri L Jour 540 (541): 109 Ind Cas 364 (Lah), *Ismail* v. *Emperor*.

(1924) 1924 Rang 179 (181): 1 Rang 751: 25 Cri L Jour 1121, *Mi She Yi* v. *Emperor*. Accused being woman not conclusive reason for not awarding death penalty.

(1928) 29 Cri L Jour 211 (212): 107 Ind Cas 99 (Lah), *Muhammad Sultan* v. *Emperor*. In case of brutal and ruthless crime, the fact that the murderer is 18 years of age is wholly insufficient reason for not imposing sentence provided by law.

(1924) 1924 Nag 29 (32): 25 Cri L Jour 147, *Sukhwaria* v. *Emperor*.

(1930) 1930 Lah 50 (51): 31 Cri L Jour 81: 1930 Cri Cas 18, *Gehna Sardara* v. *Emperor*.

(1931) 1931 Rang 171 (172): 9 Rang 81: 32 Cri L Jour 941: 1931 Cri Cas 667, *Tiri* v. *Emperor*.

(1933) 1933 Oudh 52 (53): 34 Cri L Jour 250: 1933 Cri Cas 92, *Bhawani* v. *Emperor*.

(1933) 1933 Lah 305 (306): 34 Cri L Jour 720: 1933 Cri Cas 540, *Hari Kishan* v. *Emperor*. Youth led astray by mischievous literature *held* no ground for leniency.

(1931) 1931 Lah 536 (537): 32 Cri L Jour 645: 1931 Cri Cas 776, *Sikandar* v. *Emperor*. Youth not necessarily sufficient ground for reducing sentence—But youth possibly influenced by elder associates—Sentence reduced.

[See (1915) 1915 Lah 237 (238): 16 Cri L Jour 167, *Wadhawa Singh* v. *Emperor*. *Held* that the accused was guilty of a foul murder which in spite of his youth called for the extreme penalty of the law.]

7. (1922) 1922 Nag 65 (66): 18 Nag L R 101, *Kacharia Mahar* v. *Emperor*.

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learned Judges said: "We are not prepared to affirm that the tender age of an accused is not of itself a sufficient reason for passing the lesser sentence."[8]

Delay in hearing the appeal for which the accused were in no way responsible has been considered a sufficient ground for not confirming the sentence of death. Carnduff, J., felt oppressed by the fact that the convicted persons had had the capital sentences suspended over their heads for nearly six months and he refused to confirm the sentences of death.[9] Where, again, the High Court thinks it is "wrong and improper" that the sentence of death passed on the accused should be carried out, it will refuse to confirm the sentence.[10]

In determining whether the sentence is to be confirmed, the High Court may consider if the commitment and the conviction were by Courts of competent jurisdiction.[11]

Satisfactory proof of motive is not always necessary before confirming the sentence.[12]

The fact that the accused murdered his sister to vindicate the honour of his family[13] or that murder was committed out of a feeling of revenge[14] are not enough grounds for refusing to confirm the sentence of death.

3. Commutation of sentence.

In a case of murder a sentence of death should ordinarily be imposed unless there is a mitigating circumstance which would justify the Court in awarding the lesser sentence prescribed by law.[1a] *See* Section 367, sub-section 5.

Doubt as to the guilt of the accused is ground not for awarding the lesser punishment but for acquitting the accused.[1b]

It has been seen in Note 2 above, that Carnduff, J., refused to confirm the sentence of death on account of the delay in confirming such sentence, and the Nagpur Judicial Commissioner's Court has expressed its agreement with the view expressed by that learned Judge.[1] The Sind Judicial Commissioner's Court, while distinguishing the above case, however, says, "in the case of an ordinary murder, the delay in confirming a sentence of death may perhaps be taken into

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8. (1926) 1926 Nag 461 (463) : 22 Nag L R 104 : 27 Cri L Jour 955, *Madho* v. *Emperor*.
9. (1913) 14 Cri L Jour 642 (653) : 21 Ind Cas 882 (Cal), *Autar Singh* v. *Emperor*.
10. (1926) 1926 Nag 461 (463) : 22 Nag L R 104: 27 Cri L Jour 955, *Madho* v. *Emperor*.
11. (1879) 2 All 218 (233), *Empress* v. *Sarmukh Singh*.
12. (1917) 1917 Cal 492 (492) : 17 Cri L Jour 386, *Jorap Ali* v. *Emperor*.
13. (1866) 1866 Pun Re Cri No. 48, page 56 (57), *Crown* v. *Kurmoo*.
14. (1867) 1867 Pun Re Cri No.5, page 9 (11), *Crown* v. *Jumma*

Note 3.

1a (1923) 1923 Lah 598 (599) : 24 Cri L Jour 935, *Waryam Singh* v. *Crown*.
(1930) 1930 Pat 252 (255) : 31 Cri L Jour 727 : 1930 Cri Cas 520, *Khudu Rajak* v. *Emperor*.
(1928) 29 Cri L Jour 540 (541) : 109 Ind Cas 364 (Lah), *Ismail* v. *Emperor*.
(1932) 1932 Sind 201 (206) : 26 Sind L R 302 : 34 Cri L Jour 147 : 1932 Cri Cas 810, *Pharho Shakwali* v. *Emperor*.
(1932) 1932 Lah 245 (246) : 33 Cri L Jour 576 : 1932 Cri Cas 257, *Amir Singh* v. *Emperor*. In cases of premeditated, cold-blooded and brutal murder, only death sentence should be awarded.
1b (1926) 1926 Nag 368 (370) : 27 Cri L Jour 731, *Dadi Lodhi* v. *Emperor*.
(1930) 1930 Pat 252 (255) : 31 Cri L Jour 727 : 1930 Cri Cas 520, *Khudu Rajak* v. *Emperor*.
[Compare (1918) 1918 Bom 212 (214) : 19 Cri L Jour 593, *Hari Ramji Pavar* v. *Emperor*. There is a certain degree of reluctance on the part of Judges to pass a capital sentence, when the substantial part of the evidence which the prosecution rely upon is evidence recorded without an oath or affirmation as required by the Oaths Act.]
1. (1913) 14 Cri L Jour 642 (653) : 21 Ind Cas 882 (Cal), *Autar Singh* v. *Emperor*.
(1926) 1926 Nag 461 (463) : 22 Nag L R

consideration."[2] Where an accused was once sentenced to death, but the High Court quashed the conviction on the ground of want of territorial jurisdiction, and the accused was for a second time sentenced to death by a Court of competent jurisdiction, the High Court of Lahore commuted the sentence of death to one of transportation for life as "this is a second trial for an offence committed in August 1921, four and a half years ago."[3]

Where murder is committed under *grave provocation* but not under grave and sudden provocation, the accused will not be free from legal responsibility by reason of Section 84 of the Indian Penal Code; yet the High Court in such a case, will commute the sentence of death to one of transportation for life.[4] In a case in Calcutta the accused killed his brother-in-law, a lad of 8 years, under the belief that the deceased was helping in the infidelity of his wife. Yet the murder not having been committed under the "immediate influencee" of provocation induced by that belief, the High Court confirmed the sentence of transportation for life but expressed the view that the Government might consider the question of reduction of sentence.[5]

Where the accused at the time of the murder was "suffering from mental derangement of some sort," but was not by reason of such unsoundness of mind incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law, it was held that he was entitled to every indulgent consideration though guilty of murder.[6] Thus where the

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104 : 27 Cri L Jour 965, *Madho* v. *Emperor*.

2. (1930) 1930 Sind 225 (244) : 31 Cri L Jour 1026 : 1930 Cri Cas 865, *Mohammad Yusuf* v. *Emperor*.

3. (1926) 1926 Lah 582 (584) : 7 Lah 396 : 27 Cri L Jour 1168, *Guta Singh* v. *Emperor*.

4. (1916) 1916 Oudh 138 (138) : 17 Cri L Jour 190, *Puran* v. *Emperor*.
(1932) 1932 Lah 369 (370) : 33 Cri L Jour 338 : 1932 Cri Cas 487, *Abdulla* v. *Emperor*. Provocation sufficient to justify not awarding death penalty.
(1923) 1923 Lah 408 (409) : 25 Cri L Jour 298, *Partapa* v. *Emperor*. Requirment as to grave and sudden provocation not satisfied—But accused having lost his temper and in view of his youth, sentence reduced to transportation for life.
(1933) 1933 All 533 (535) : 35 Cri L Jour 232 : 1933 Cri Cas 868, *Sheo Baran Singh* v. *Emperor*. Accused having illicit connection with deceased for 11 years—Deceased changing paramour—Provocation.
(1916) 1916 Mad 833 (833) : 16 Cri L Jour 611, *In re Krushno Kariko*. A provocation though insufficient to bring the case within exception to S. 300, may still be sufficient for the reduction of sentence.
[See (1920) 1920 All 199 (200) : 21 Cri L Jour 607, *Goshain* v. *Emperor*.
(1932) 1932 Lah 302 (303) : 33 Cri L Jour 577 : 1932 Cri Cas 382, *Hari Singh* v. *Emperor*. Provocation though not sufficient to reduce guilt of accused to offence under S. 304 held sufficient ground for not sentencing him to death.]
[See also (1930) 1930 Mad 972 (973) : 53 Mad 861 : 32 Cri L Jour 261 : 1930 Cri Cas 1188, *Kolanda Nayakan* v *Emperor*. Where the murder by a juvenile was not wholly deliberate or cold blooded and there was some provocation rankling in his mind, lesser sentence should be passed.]

5. (1901) 28 Cal 613 (620), *Ghatu Pramanik* v. *Emperor*.

6. (1896) 23 Cal 604 (609), *Empress* v. *Kadar Nasyer Shah*.
(1932) 1932 Cal 658 (660) : 33 Cri L Jour 476 : 1932 Cri Cas 650, *Mahajjan Bibi* v. *Emperor*.
(1889) 12 Mad 459 (462), *Queen-Empress* v. *Venkatasami*. Death sentence reduced to transportation for life.
(1931) 1931 Mad W N 719 (723), *Narayanaswamy Goundan* v. *Emperor*. Death sentence reduced to transportation for life.
(1933) 1933 Lah 123 (124) : 34 Cri L Jour 909 : 1933 Cri Cas 228, *Mitha* v. *Emperor*. Mental unhingement though not sufficient to bring case within S. 84, I. P. C., may justify reduction of sentence.
(1932) 1932 All 233 (236) : 33 Cri L Jour 714 : 1932 Cri Cas 231, *Emperor* v. *Pancha*. Accused, a person of weak intellect, subject to fits and not possessed of a normal mind.

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accused killed his own children of whom he was very fond, at a time when he was suffering from fever and was consequently irritable and sensitive to sound, because they cried and vexed him, he was held guilty of murder and that the sentence of transportation for life would satisfy the ends of justice.[7] Similarly, where the medical opinion was that the murder was perhaps committed in *post febrile* lunacy under the foolish belief that some one had done an injury to the accused, the sentence of death was commuted.[8]

Akin to these is the case where a person who is not suffering from any mental derangement brought about by provocation or disease, commits a murder in the honest and strong belief, though superstitious "absurd and unfounded", that witchcraft was practised upon his wife or children as a result of which they took ill, and that it is only the murder of the supposed witch that will cure them. In such cases it cannot be said that the accused was by reason of unsoundness of mind incapable of knowing what he was doing was wrong or contrary to law. They are cases of deliberate and intentional murder. But such belief is to be taken into account and some distinction should be made "between such cases as these and cases in which deliberate murder has been committed from *baser motives*." The distinction that is made is in the sentence passed and the death sentence will be commuted to one of transportation for life.[9]

Where the dead body has not been found, some Judges have awarded the lesser sentence. "As the body was not actually found we think the Judge exercised a proper discretion in not passing the sentence of death," said their Lordships in 11 W. R. 20 (20). In a case in Allahabad their Lordships altered a conviction under Section 302 into one under Section 307, I. P. C., on the ground, that the dead body not having been recovered, the fact of death was not proved beyond doubt.[10] In a later case in Allahabad where the corpse was not found and the fact of death was proved by the retracted confession of the accused and by no other substantial evidence, Mukerji J., was for commutation while the other two learned Judges were for confirmation of the sentence of death.[11]

Where the evidence was enough to convict the accused of murder, yet there was doubt as to the precise part taken by the accused in the murder, it was thought "safer" to remit the capital sentence and pass one of transportation for life.[12]

Where the condition of the convict was such that if he were hanged decapitation would ensue owing to an aperture in the neck communicating with the larynx, the High Court commuted the sentence of death into one of

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(1932) 1932 Oudh 18 (21): 7 Luck 341: 33 Cri L Jour 163: 1932 Cri Cas 50, *Ramadhin* v. *Emperor*.

(1933) 1933 Rang 144 (146): 34 Cri L Jour 791: 1933 Cri Cas 734, *Nga Kan Tha* v. *Emperor*.

(1914) 1914 Upp Bur 31 (33): 2 Upp Bur Rul 28: 16 Cri L Jour 95, *Nga Kan Hla* v. *Emperor*.

[Compare (1931) 1931 Oudh 77 (79): 32 Cri L Jour 327: 1931 Cri Cas 133, *Mahomed Islam* v. *Emperor*. Accused was shown to have been eccentric in the past and had very inadequate motive for the murders —*Held*, that there were not sufficient grounds for not passing death sentence.]

7. (1885) 10 Bom 512 (518), *Empress* v. *Lakshman Dagdu*.

8. (1889) 12 Mad 459 (461), *Empress* v. *Venkataswami*.

9. (1921) 1921 Pat 63 (66): 21 Cri L Jour 603, *Mata Ho* v. *Emperor*.

(1866) 6 Suth W R Cr 82 (82), *Empress* v. *Ooram Sungra*.

10. (1924) 1924 All 662 (663): 25 Cri L Jour 900, *Bandhu* v. *Emperor*.

11. (1925) 1925 All 627 (631, 637): 26 Cri L Jour 1431, *Raggha* v. *Emperor*.

12. (1864) 1 Suth W R Cr 48 (49), *Empress* v. *Baboo Lall Jhah*.

transportation for life.[13] The fact that for the murder of one person more than one has to be sentenced to death is no ground for commuting the sentence.[14]

See also the undermentioned cases.[15]

13. (1878) 2 Cal L R 215 (216), *In re Boodhoo Jolaha.*
14. (1916) 1916 Lah 408 (410) : 1916 Pun Re Cr No. 12 : 17 Cri L Jour 267, *Kaimi* v. *Emperor.*
15. (1875) 24 Suth W R Cr 28 (28), *Queen* v. *Ram Charan Kurmakar.* Transportation for life, a sufficient punishment where murder is unpremeditated.
(1866) 5 Suth W R Cr 20 (20), *Queen* v. *Khoaz Sheikh.* Death not intended to be caused, but a reckless assault with a deadly weapon—Sentence reduced.
(1866) 6 Suth W R Cr 46 (47), *Queen* v. *Tanoo.* Murder committed in retaliation for an injury rather than under the influence of any worse passion—Death sentence commuted.
(1927) 1927 All 105 (106): 27 Cri L Jour 1392, *Abdul Alim* v. *King-Emperor.* Where there has been some provocation and there is no premeditation, and the crime is committed in the heat of passion, transportation for life is enough.
(1911) 12 Cri L Jour 214 (216): 10 Ind Cas 119 (Lah), *Rakhia* v. *Emperor.* Misconduct of wife who was murdered for same—Death penalty not awarded.
(1924) 1924 All 233 (251): 27 Cri L Jour 193, *Abdullah* v. *King Emperor.* Accused ignorant peasants guilty under Sections 149, 302 by misrepresentations made by one whom they believed was a worker of miracles—Lesser sentence is sufficient.
(1932) 1932 Cal 818 (820) : 33 Cri L Jour 722 : 1932 Cri Cas 857 (F B), *Manoranjan* v. *Emperor.* The fact that a murder was committed when the offender a dacoit was being brought to bay and in his desire to escape, is not an extenuating circumstance.
(1928) 1928 Oudh 221 (223): 29 Cri L Jour 230, *Madaru* v. *Emperor.* When a man rushes into a brawl with a heavy hatchet and strikes with all his force one of his neighbours, who is unable to defend himself, upon the head with the hatchet and kills him. then it is not a case for the exercise of clemency and capital sentence should not be reduced.
(1924) 1924 Rang 179 (180): 1 Rang 751: 25 Cri L Jour 1121, *My She Syi* v. *Emperor.* Accused person entitled to benefit of reasonable doubt in matter of sentence as in that of conviction.
(1914) 1914 Sind 136 (136): 7 Sind L R 118 : 15 Cri L Jour 501, *Emperor* v. *Rahim Khan Arzee.* A so-called Baluch custom justifying murder for unchastity is no ground for mitigation of sentence.
(1933) 1933 Rang 95 (96) : 34 Cri L Jour 747 : 1933 Cri Cas 577, *Nga Khan Htu* v. *Emperor.* Party fight not started by accused—Death sentence commuted.
(1933) 1933 Rang 61 (61) : 34 Cri L Jour 699 : 1933 Cri Cas 456, *Nga Sein Tun* v. *Emperor.* Dacoity—Death caused by one of the dacoits other than appellant—General disregard of human life not present—Sentence reduced.
(1932) 1932 Pat 209 (212) : 11 Pat 280 : 33 Cri L Jour 574 : 1932 Cri Cas 522, *Hikayat Singh* v. *Emperor.* Brutal and premeditated and concerted assassination - Sentence of death is proper.
(1933) 1933 Pat 180 (182) : 34 Cri L Jour 395 : 1933 Cri Cas 511, *Tulsi Gangota* v. *Emperor.* Death is penalty for deliberate fratricidal assassination for basest of all motives.
(1924) 1924 Nag 119 (120) : 25 Cri L Jour 63, *Dhania Kunbi* v. *Emperor.* Where a woman in order to hide her shame, murders her newly born illegitimate child, there are mitigating circumstances sufficient to reduce the penalty of death very much below transportation for life ; so also father killing illegitimate child born to him by his own sister —Sentence of death commuted.
(1923) 1923 Nag 251 (254) : 24 Cri L Jour 570, *Manjoo* v. *Emperor.* Where appellant constituted himself a tribunal and decided that making a charge of paternity against him was an offence punishable with death and he carried out the sentence himself, a sentence of death was proper one.
(1928) 1928 Lah 93 (94) : 28 Cri L Jour 966, *Preman* v. *Emperor.* Sudden and unpremeditated attack—Lesser sentence awarded.
(1928) 1928 Lah 913 (914) : 30 Cri L Jour 571, *Gaman* v. *Emperor.* Murder occurring suddenly after mutual abuse—Accused not belonging to a turbulent class — Lesser sentence should be passed.
(1927) 1927 Lah 516 (518) : 29 Cri L Jour 35, *Nihal Singh* v. *Emperor.* Sudden quarrel—Elements of premeditation or preparation absent — Lesser sentence proper.

Sec. 376 Note 4

4. May annul the conviction.

The High Court will annul the conviction though the verdict of the jury was unanimous and there was no misdirection, if the evidence is not enough to sustain a conviction for murder.[1a] Thus, where there were no eye-witnesses to the murder, and there was a real doubt as to the identification of the accused and the retracted confession of the accused did not appear to be free and voluntary, the High Court annulled the conviction and acquitted the accused.[1] Where again the sole evidence on which the conviction was based was the uncorroborated testimony of an accomplice, the conviction was annulled.[2]

(1922) 23 Cri L Jour 140 (141) : 65 Ind Cas 572 (573) (Lah), *Ghaji* v. *Crown*. Woman of depraved character — Refusal to allow husband to have sexual intercourse—Murder by husband—Lesser punishment awarded.

(1930) 1930 Lah 154 (155): 31 Cri L Jour 731 : 1930 Cri Cas 162, *Bhana Mal* v. *Emperor*.

(1930) 1930 Lah 171 (172): 31 Cri L Jour 759 : 1930 Cri Cas 179, *Khanun* v. *Emperor*. Deceased seen talking to her paramour and when reprimanded, she replied that she would elope with the lover and she persisted in this statement when husband strangulated her to death. *Held*, a sentence of transportation was proper.

(1925) 1925 Lah 584 (586): 26 Cri L Jour 1133, *Gulab* v. *Emperor*. Two accused—One striking blow—Other not striking but present and acting under the influence of former—Extreme penalty not to be exacted.

(1932) 1932 Lah 500 (501) : 33 Cri L Jour 497 : 1932 Cri Cas 664, *Lakshminarain* v. *Emperor*. No immunity from capital punishment on ground of accused belonging to a particular community or sect.

(1933) 1933 Lah 434 (435) : 34 Cri L Jour 711 : 1933 Cri Cas 675, *Bhagwana* v. *Emperor*. Party fight not started by accused—Sentence reduced.

(1933) 1933 Lah 718 (720): 34 Cri L Jour 1251 : 1933 Cri Cas 904, *Mt. Sardaran* v. *Emperor*. Illiterate woman causing death of child being urged by superstition — Lesser penalty to be imposed.

(1933) 1933 Lah 623 (625, 626): 34 Cri L Jour 372 : 1933 Cri Cas 879, *Asa Ram* v. *Emperor*. Absence of personal grudge no ground for reducing sentence.

(1929) 1929 Mad W N 789 (790), *Subbiah Thevan* v. *Emperor*. Where there has been some provocation and there is no premeditation, and the crime is committed in the heat of passion, transportation for life is enough.

(1931) 1931 Lah 538 (539): 32 Cri L Jour 1083 : 1931 Cri Cas 778, *Sersingh* v. *Emperor*. Where origin of the assault is in obscurity, death sentence not proper.

(1932) 1932 Lah 5 (7): 33 Cri L Jour 184 : 1932 Cri Cas 15, *Bhawal* v. *Emperor*. Complainant side deliberately provoking conflict and no previous intention on the part of the accused to kill anybody—Proper sentence would be one of transportation for life.

(1932) 1932 Lah 14 (16) : 32 Cri L Jour 1118 : 1932 Cri Cas 24, *Rahman* v. *Emperor*. Wife going to father's house to inquire after his health but without husband's permission—Husband annoyed and murdered her—No provocation.

(1932) 1932 Lah 189 (192) : 33 Cri L Jour 457: 1932 Cri Cas 173, *Tara Singh* v. *Emperor*. When all the accused joined in beating the deceased mercilessly but it was not shown who inflicted the fatal blow, the accused may be sentenced to transportation for life instead of death.

(1919) 1919 Upp Bur 23 (23) : 3 Upp Bur Rul 137 : 20 Cri L Jour 540, *Nga Nan* v. *Emperor*. Plea of drunkardness—Court should see if there is ground for awarding the lesser punishment.

(1917) 1917 Lah 226 (230) : 1917 Pun Re Cr No. 28: 18 Cri L Jour 868, *Pal Singh* v. *Emperor*. Drunkardness may be sufficient ground for not awarding death penalty.

(1866) 1866 Pun Re Cr No. 41, page 47 (47), *The Crown* v. *Boodh Das*. (Do.)

Note 4.

1a (1933) 1933 Cal 426 (429) : 34 Cri L Jour 533: 1933 Cri Cas 624 (S B), *Emperor* v. *Asraf Ali*. Re-trial need not be ordered.

1. (1928) 29 Cri L Jour 833 (834) : 111 Ind Cas 385 (Cal), *Emperor* v. *Panchu Mondal*.

2. (1873) 20 Suth W R Cr 19 (20, 21), *Empress* v. *Ramsodoy Chuckerbutty*.

5. Conviction for any other offence.

While annulling the conviction for murder, the High Court is empowered to convict the accused of any other offence of which the Sessions Judge might have convicted him and which the evidence on record would warrant. Thus when the evidence on record showed that the accused took no actual part in the murder but that he helped in the disposal of the dead body and other articles, the High Court acquitted him of the charge of murder, but convicted him under Section 201 of the Penal Code.[1] Where the intention to kill was not clearly proved, the conviction for murder was annulled and altered into one for an offence under Section 326, Penal Code.[2] Where again the case of the accused came under the first exception to Section 300, Penal Code, the conviction under Section 302 was altered into one of conviction under Section 304.[3] *See also* the undermentioned cases.[3a]

It may in this connection be noted that under Section 288 of the Code of 1872, the High Court was empowered to "annul the conviction and order a new trial." This was interpreted to mean that the High Court could only order a new trial after annulling the conviction, but could not "convict the accused for any other offence of which the Sessions Court might have convicted him."[4] But under the present Section the High Court is empowered to annul the conviction and convict the accused of any other offence of which the Sessions Court might have convicted him. Thus when a person was charged with murder and an offence under Section 211, the High Court, while annulling the conviction for murder, might convict the accused under Section 211, even though the Sessions Judge had recorded a finding on the alternative charge under Section 211.[5]

6. New trial.

After annulling the conviction the High Court may order a new trial and send the case to the Court of Session. Where the evidence is incomplete and further evidence is felt necessary for giving judgment, a new trial may be ordered.[1] Where an accused was tried for murder without any pleader or

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Note 5.

1. (1913) 14 Cri L Jour 278 (280) : 1913 Pun Re Cr No. 8, *Mohammad Shah* v. *Emperor.*
2. (1928) 1928 Cal 430 (432) : 29 Cri L Jour 546, *Hazrat Gul Khan* v. *Emperor.*
3. (1913) 14 Cri L Jour 208 (208) : 1913 Pun Re Cr No. 3, *Ralia* v. *Emperor.*

3a (1932) 1932 Lah 11 (12) : 33 Cri L Jour 186, 1932 Cri Cas 21, *Umar Khan* v. *Emperor.* The *onus* of proving grave and sudden provocation lies on the accused.

(1919) 1919 Lah 256 (259) : 1919 Pun Re Cr No 21 : 20 Cri L Jour 635, *Haranam Singh* v. *Emperor.* Conviction altered from S. 302 to S. 394, I. P. C.

(1919) 1919 Lah 375 (380) : 1919 Pun Re Cr No. 24 : 20 Cri L Jour 711, *Bahal Singh* v. *Emperor.* Conviction altered from Ss. 302/34 to 325/109, I. P. C.

(1932) 1932 Lah 438 (440) : 34 Cri L Jour 94 : 1932 Cri Cas 584, *Jumma Fateh Mohammad* v. *Emperor.* Mother with her young daughter behaving shamelessly in running away with her paramour—Paramour suspected and killed—Provocation held not to be "grave and sudden" in spite of pangs of shame and humiliation caused.

(1932) 1932 Lah 369 (370) : 33 Cri L Jour 338 : 1932 Cri Cas 487, *Abdulla* v. *Emperor.* Mere vulgar abuse is not such a grave and sudden provocation as is contemplated by exception 1 to S. 300, I. P. C.

4. (1877) 1 Bom 639 (641), *Reg* v. *Balapa.*
(1866) 5 Suth W R Cr 41 (42), *Empress* v. *Sheik Solim.*
5. (1904) 27 Mad 271 (280), *Ramaswami Goundan* v. *Emperor.*
(1913) 14 Cri L Jour 278 (279) : 1913 Pun Re Cr No. 8, *Mohammed Shah* v. *Emperor.*

Note 6.

1. (1902) 6 Cal W N 921, *Emperor* v. *Daulat Kunjra.*
(1894) 2 Weir 302 (302), *Savari Ayee, In re.*

Sec. 376 Note 6

advocate having been appointed to defend him and where the difficulties appearing in the evidence had not been cleared up in the course of cross-examination, either by the accused himself or by the learned Judge and the High Court felt it difficult to confirm the sentence of death on the evidence before it, a re-trial was ordered.[2] Where the Judge practically withdrew the case from the jury by so summing it up as to make the jury register merely his own opinion, it was held that there was no proper trial and that there should be a new trial.[3] *See* Criminal Rules of Practice (Madras) 1931, Rules 117, 157, 158, 159 and 160, as to the appointment of advocates for the defence of accused who have no advocates of their own. *See also* the under-mentioned cases.[4]

Sec. 377

Confirmation or new sentence to be signed by two Judges.

377.* In every case so submitted, the confirmation of the sentence or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

Sec. 378

Procedure in case of difference of opinion.

378.† When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Synopsis.

Other Topics.

* (1882—S. 377; 1872—S. 290 and 1861—S. 401.)

† (Code of 1882—S. 378—Same.)

(Codes of 1872 and 1861—Nil.)

New trial on a di..erent charge directed.

2. (1916) 1916 Cal 79 (79) : 16 Cri L Jour 481, *Emperor* v. *Mohar Ali Sheikh.*

3. (1927) 1927 Cal 631 (632) : 28 Cri L Jour 742, *Emperor* v. *Rajah Ali Fakir.*

4. (1927) 1927 Cal 631 (633) : 28 Cri L Jour 742, *Emperor* v. *Rajah Ali Fakir.* If there has been no proper trial then the only course that is open to the High Court is to direct a re-trial.

(1905) 9 Cal W N 228*n* (228*n*), *Kangal Mali* v. *Emperor.* Same officer committing accused and holding trial in Sessions Court — Commitment order showing that before trial in Sessions Court the Judge had formed a strong opinion in the case—Conviction set aside and re-trial ordered.

1. Scope.

Section 377, enacts that any order made on a reference under Section 374, shall be by a Bench consisting of at least two Judges. This Section provides, that when the Judges constituting the Bench, are equally divided in their opinion, the case with their opinions shall be laid before another Judge. The Judge to whom the case is referred on a difference of opinion, is required to deliver his opinion "after such examination and hearing as he thinks fit" and the order or judgment in the case, shall follow such opinion. The difference of opinion may be either as regards the guilt or innocence of the accused or as to the appropriate sentence to be passed. In either of these cases, the Section requires the reference to be made to another Judge[1] who is entitled to pass any order he thinks proper including an order directing re-trial of the accused.[2]

2. Difference of opinion as to the guilt of the accused.

Where the Bench is equally divided in its opinion as to the guilt of the accused, Mr. Justice Mahmood felt that the order should be one of acquittal "without the necessity of either a remand or a dissentient opinion being recorded." While admitting that this Section rendered it necessary for the case to be placed before another Judge in this circumstance, he observed:

> "I cannot help feeling as a matter of judicial etiquette when one Judge differs from his brother Judge on a pure question of the weight of evidence as to the propriety of a conviction, the opinion of the Judge in favour of acquittal should prevail . . . . at least as a general rule. * * * * * * * * * * * * * * I have always felt that the deliberate opinion of one Judge in favour of acquittal upon a *grave* question of the weight of evidence in a case heard by a Bench consisting of only two Judges should *ipso facto* constitute in most cases a sufficient reason for creating such a serious doubt that the benefit of doubt should be given to the prisoner."[1]

In the undermentioned case,[2] Edge, C. J., disagreeing with the above view observed that the view of Mahmood, J., involved the subordination of the opinion of the Judge who was for conviction, to that of the Judge who was for acquittal, apart from its being opposed to the statute, as admitted by that learned Judge himself. He further observed:

> "I know of no rule of judicial etiquette which prescribes that a Judge in a capital or any other case should subordinate his judgment to that of his brother Judge."

The working of this Section has often led to anomalous results. Where, on the evidence of a lad of 18 years, Subramaniya Iyer, Offg. C. J., was for confirming the conviction for murder, Boddam, J., was for acquitting the accused. Bhashyam Aiyangar, J., to whom the case was referred on account of this difference of opinion, agreed with Subramaniya Iyer, O. C. J., as regards the conviction, but differed from him as regards the sentence. The Officiating Chief Justice was for commuting the sentence of death to one of transportation for life on the ground that the accused committed the murder in consequence of the deceased attempting to blackmail him, but Bhashyam Aiyangar, J., passed the sentence of death, without even considering the extenuating circumstance referred to by Subramaniya Iyer, Offg. C. J.[3] This,

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Section 378—Note 1.

1. [See (1886) Ratanlal 229 (241), *Empress* v. *Nepal.*]

2. (1921) 1921 Mad 679 (681) : 23 Cri L Jour 697, *Nainamalai Konan, In re.*

Note 2.

1. (1886) 1886 All W N 275 (276, 277), *Empress* v. *Debisingh.*
2. (1887) 1887 All W N 125 (126, 127), *Empress* v. *Bandu.*
3. (1904) 27 Mad 271 (290) : 1 Cri L Jour 641,

Sec. 378 Notes 2—3

it is submitted, is a very hard case. If Boddam, J., had agreed entirely with Subramaniya Aiyer, Offg. C. J., both as regards the conviction and the sentence, thus taking a more favourable view to the accused, the lesser sentence of transportation would undoubtedly have been passed. The fact that one of the learned Judges took a view entirely favourable to the accused resulted in a reference to the third who passed the sentence of death. While the sentence passed by Bhashyam Aiyengar, J., was perfectly legal, under the Code it is most respectfully submitted, that it gives rise to the anomaly that a more unfavourable view to the accused on the part of Boddam, J., would have saved his life. Indeed the accused in this case, lost the benefit of the Officiating Chief Justice's judgment as regards the sentence, and the benefit of Boddam, J.'s judgment as regards the conviction. The course adopted by Carnduff. J., in similar circumstances of passing the sentence of transportation for life, even when the Judge who confirmed the conviction was for passing the sentence of death, is, it is submitted, a very salutary one.[4]

3. Difference of opinion as to the sentence to be passed.

Where the difference of opinion is as to the appropriate sentence to be passed, one Judge favouring the death penalty, and the other recommending that transportation for life would meet the ends of justice, Woodroffe, J., of the Calcutta High Court laid it down that the difference of opinion itself was a sufficient ground for holding that the death sentence should not be passed.[1] This view has been followed by Mr. Justice Ghose.[2] It has, however, been said that it is not an inflexible rule and the third Judge to whom the case is referred is entitled to award the death sentence if he thinks it proper. The rule of "judicial etiquette and practice" strongly advocated by Mahmood, J., can be more easily followed in this case, than in a case where the difference is as to the guilt of the accused.

Sec. 379

Procedure in cases submitted to High Court for confirmation.

379.* In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court, and attested with his official signature, to the Court of Session.

Sec. 380

Procedure in cases submitted by Magistrate not empowered to act under Section 562.

380. Where proceedings are submitted to a Magistrate of the first class or a Subdivisional Magistrate as provided by Section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he

* (1882—S. 379; 1872—S. 301, Para 1 and 1861—S. 383.)

Ramaswamy Goundan v. *Emperor.*

4. (1913) 14 Cri L Jour 642 : 21 Ind Cas 882 (Cal), *Autar Singh* v. *Emperor.*

Note 3.

1. (1930) 1930 Cal 193 (198) : 31 Cri L Jour 817 : 1930 Cri Cas 225, *Emperor* v. *Dukari Chandra Karmakar.*

2. (1930) 1930 Cal 193 (198) : 31 Cri L Jour 817 : 1930 Cri Cas 225, *Emperor* v. *Dukari Chandra Karmakar.*

may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

Synopsis.

Other Topics.

Sections 380 and 562—Comparison with Section 349. See Note 2, Pt. 1.

1. Legislative changes.

Section 380 of the Code of 1882 which dealt with the confirmation by Sessions Judges of sentences of imprisonment for a term exceeding four years, and transportation passed under Section 34, by the Assistant Judges and Magistrates, has now been omitted; such sentences now come before the High Court on appeal, under Secttion 408, Cl. (b). The present Section 380 is entirely a new one.

2. Power of the First Class Magistrate or Sub-divisional Magistrate to remand.

The first class Sub-Divisional Magistrate is not empowered to *remand* the case to the second class Magistrate who submitted the case to him under Section 562. Thus where a second class Magistrate finding the accused guilty of voluntarily causing grievous hurt under Section 325, Penal Code, sent the case to the District Magistrate under the proviso to Section 562, it was held that the order of the District Magistrate sending the case back to the second class Magistrate on the ground that Section 562 did not apply to the case, was illegal. This Section enacts that the District Magistrate should pass such order as he would have passed *if he had originally heard the case*, and a District Magistrate could not have sent the case to a second class Magistrate if he had originally heard it himself.[1]

3. Power of the First Class or Sub-divisional Magistrate to acquit.

There is a difference of opinion on the question if the 1st class or Sub-Divisional Magistrate to whom a case is sent under the proviso to Section 562, is empowered to acquit the accused.

It may be noted that in the analogous Section 349, where the trying Magistrate who is not empowered to pass a sufficiently severe sentence is required to submit the proceedings and forward the accused to the superior Magistrate, the trying Magistrate is to "record the opinion" that the accused deserves a more severe sentence than he can pass. But in Section 562 the accused is "convicted" before he is forwarded to the superior Magistrate. Under Section 349, the Magistrate is empowered to pass "such judgment, sentence or order as he thinks fit or as is according to law." Under this Section such Magistrate "may pass such sentence or make such order as he might have passed or made if the case had been originally heard by him." In the undermentioned case[1] their Lordships of the Madras High Court observed as

Section 380—Note 2.

1. (1908) 7 Cri L Jour 449 (450): 4 Low Bur Rul 150, *Emperor* v. *Abdul Lal Shein.*

Note 3.

1. (1933) 1933 Mad 728 (729): 57 Mad 85: 1933 Cri Cas 1312: 34 Cri L Jour 1045, *Public Prosecutor* v. *Gurappa Naidu.*

Sec. 380 Notes 3—4

follows:—

"When a Magistrate of the Second or Third Class submits proceedings under Section 349, he does not convict but merely expresses the opinion that an accused person is guilty. But when a case is submitted under Section 562, a conivction has first of all to be recorded and so when the proceedings reach the Magistrate for disposal under Section 380, that Magistrate has to deal with a person who has been convicted and it is not a case of the referring Magistrate having merely recorded the opinion that he ought to be convicted. Such opinion as the referring Magistrate expresses being that on the conviction, action should be taken under Section 562. It is our opinion that when an accused person comes before a Magistrate under Section 380, he can be treated only as a convicted person and that it is not permissible for the Magistrate acting under that Section to set aside the conviction and to acquit him."

It has, however, been held in Upper Burma Judicial Commissioner's Court[2] that the power given to the Magistrate to pass such sentence as he would have passed if he had heard the case originally himself, enables him to acquit the accused. The same view is expressed, though as *obiter*, in an earlier case of the Lower Burma Chief Court[3] and the Nagpur Judicial Commissioner's Court[4] has adopted the views of the Burma Courts. Support is sought for this latter view in the power given to the Magistrate to take additional evidence or make further enquiry. On this point the Madras High Court in the said case observed as follows:—

"It may be for the purpose of satisfying the Magistrate that it really is a case for applying Section 562, and possibly such evidence (additional evidence) might be taken with a view to seeing whether the conviction was correct. Even so, in our view, Section 380 does not allow a Magistrate to set aside a conviction."

4. Appeal.

The sentence or conviction under this Section is for purposes of appeal, a sentence or conviction by a first class or Sub-Divisional Magistrate. Consequently an appeal from a conviction by the first class Magistrate lies to the Court of Session.[1]

CHAPTER XXVIII.

OF EXECUTION.

Sec. 381

Execution of order passed under Section 376.

381.* When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Synopsis.

Form of warrant of execution. Note No. **1**

*** (1882—S. 381; 1872—S. 301, Para 2; 1861—S. 383.)**

2. (1915) 1915 Upp Bur 12 (12): 29 Ind Cas 663 (663): 2 Upp Bur Rul 55, *Mi Thi Hla* v. *Mi Kin.*
3. (1908) 8 Cri L Jour 476 (477, 478): 4 Low Bur Rul 277. *Morali* v. *Emperor.*
4. (1918) 1918 Nag 241 (242), *Bhikari Chamar* v. *Emperor.*

Note 4.

1. (1915) 1915 Bom 263 (263): 31 Ind Cas 338 (339): 16 Cri L Jour 738, *Emperor* v. *Bhimappa.*

1. Form of Warrant of execution.

As to the form of a warrant of execution of a sentence of death, *see* Form 35, Schedule V. As to the form of a warrant where the sentence is commuted to one of transportation or imprisonment, *see* Form 36, Schedule V., *infra*.

Sec. 381 Note 1

382.* If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

Sec. 382

Postponement of capital sentence on pregnant woman.

Synopsis.

Power to postpone. Note No. 1

Other Topics.

Power only to High Court. See Note 1, Pt. 1.

1. Power to postpone.

The power of postponing the execution of the sentence of death passed on a woman, who is found to be pregnant, should be exercised only by the High Court.[1] It may either postpone the execution till after the delivery of the child,[2] or, if it thinks fit, commute the sentence to one of transportation for life.[3]

383.† Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by Section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be, confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

Sec. 383

Execution of sentences of transportation or imprisonment in other cases.

Synopsis.

	Note No.		Note No.
"Sentenced to transportation."	1	"Shall forthwith forward a warrant to the jail."	2
		When a sentence of transportation or imprisonment commences.	3

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* (1882—S. 382; 1872—S. 306; 1861—Nil.)

† (Code of 1882—S. 383—Same.)

(Code of 1872—S. 302, Para. 2.)

302. * * * * * * *

Warrant of execution. If the accused person is sentenced to transportation, imprisonment or whipping, the Court shall forthwith forward him, with a warrant for the execution of the sentence, to the officer in charge of the jail of the district in which the trial was held. * * * *

*

(Code of 1861—Nil.)

Section 382—Note 1.

1. (1879) 2 Weir 441 (442), *High Court Proceedings, 4th June* 1879, *Extra No.* 10.
2. (1864) Suth W R Gap Cr 1 (1), *Queen* v. *Mussamat Churbhurnee.*
   (1871) 15 Suth W R Cr 66 (66), *Empress* v. *Panhee Aurut.*
3. [See also (1865) 3 Suth W R Cr 15 (15), *Empress* v. *Tepoo.*
   (1878) 1878 Pun Re Cr No. 34 (p. 83), *Mussammat Malali* v. *Crown.*]

Sec. 383 Notes 1—3

Other Topics.

Power of Court to grant bail but not to suspend its own sentence pending appeal. See Note 3, F-N (2).
Sections 58, 59 and 511, I. P. C. See Note 1.
Sentence for period already undergone in police custody—Illegal. See Note 3, Pt. 4.
Sentence of imprisonment in police lock-up illegal. See Note 2, Pt. 2.
Sentence to follow and not precede conviction. See Note 3, Pts. 3 and 3a.

1. "Sentenced to transportation."

A sentence for transportation may, under various Sections of the Penal Code, be either for life or for a lesser period. *See* Sections 59 and 511 of the Penal Code.[1]

When an offender is sentenced to transportation, he should, under this Section, be forwarded with a warrant to the jail in which he is or is to be confined and, by virtue of Section 58 of the Penal Code, he will be deemed to be undergoing the sentence of transportation during the period of his imprisonment prior to actual transportation.

Under Section 368, sub-section 2 of the Code a sentence of transportation should not specify the place to which the person sentenced is to be transported.

2. "Shall forthwith forward a warrant to the jail."

Uuder Section 541, sub-section 1, *infra*, the Local Government has to appoint the place wherein any person liable to be imprisoned or committed to custody under the Code is to be confined, and, under this Section, the Court passing the sentence should forthwith forward a warrant to the jail in which the accused is or is to be confined.[1] The words "jail" and "prison" do not include a police lock-up, and the Magistrate has no power to sentence an offender to suffer imprisonment in a police lock-up.[2]

3. When a sentence of transportation or imprisonment commences.

There are three cases under the Code in which a sentence of imprisonment or transportation may commence on a future date:—

1. Where a person is convicted of two offences at one trial and the Court sentences him to suffer imprisonment or transportation for each of the offences, the sentences to run consecutively (Section 35).
2. Where a sentence of imprisonment or transportation is passed on an escaped convict and the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped (Section 396.)
3. Where a sentence is passed on a person already undergoing a sentence of imprisonment or transportation (Section 397).

Section 383—Note 1.

1. [See the undermentioned cases :—
(1904) 1 Cri L Jour 89 (90) : 1903 Pun Re Cri No. 31, *Arura* v. *Emperor*.
(1882) 5 Mad 28 (29), *Kunhussa* v. *Empress*.
(1901) 1901 Pun Re Cri No. 27 (page 86), *Salar Baksh* v. *Emperor*.
(1865) 2 Suth W R Cri 1 (1), *Empress* v. *Mootkee Kora*.
(1865) 3 Suth W R Cri 44 (44), *Empress* v. *Tonooram Malu*.
(1866) 5 Suth W R Cri 44 (44), *Empress* v. *Shonaullah*.]

Note 2.

1. (1902) 29 Cal 286 (297) (F B), *In re Horace Lyall*. Court as Court of reference may forward offender to any jail within its jurisdiction as Court of reference.
2. (1914) 1914 Low Bur 156 (157) : 7 Low Bur Rul 62 : 15 Cri L Jour 10, *Emperor* v. *Po Thin*.

In all other cases a sentence of transportation or imprisonment will commence from the time it is passed;[1] and the Court has no power to direct that such sentence should commence on a future date.[2] Nor has the Court power to make a sentence precede a conviction.[3] The reason is that a sentence should *follow* and not *precede* a conviction.[3a] Thus it is illegal to sentence an offender for the period already undergone by him in the police custody.[4] **Sec. 383 Note 3**

A sentence of transportation or imprisonment should be definite in respect of each offence.[5]

384.* Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail, or other place in which the prisoner is, or is to be, confined. **Sec. 384**

Direction of warrant for execution.

Synopsis.

Warrant for execution of a sentence. Note No. 1

*** (Code of 1882—S. 384—Same.)**

(Code of 1872—S. 303.)

303. Every warrant for the commitment of a person to custody shall be in writing and signed and sealed by the Judge or Magistrate who issues it, and shall be directed to some jailor or other officer or person having authority to receive and keep prisoners, and shall be in the Form (C or D as the case may be) given in the Second Schedule to this Act or to the like effect.

Form and direction of warrant of commitment.

(Code of 1861—S. 222.)

222. Every warrant for the commitment of a person to custody shall be directed to some jailor, or other officer or person having authority to receive and keep prisoners, and shall be in the Form (C) given in Appendix, or to the like effect.

Warrant of commitment how to be directed, etc.

Note 3.

1. (1869) 12 Suth W R Cri 47 (48), *In re Kishen Soonder Bhattacharjee.*
   (1880) 7 Cal L R 393 (398), *In re Okhoy Kumar.*
   (1917) 1917 Low Bur 159 (159) : 17 Cri L Jour 480 (480), *Shin Taung* v. *Emperor.* See also Section 541.
2. (1868-1869) 4 Mad H C R App 1 (2) (Note), *High Court Proceedings, 17th January* 1868. The Court cannot suspend its own sentence pending appeal.
   (1869-1870) 5 Mad H C R App 1 (1), *High Court Proceedings, 25th October* 1869. The Court cannot suspend its own sentence pending appeal.
   [See however (1881) 7 Cal L R 393 (395). In this case the Magistrate granted bail to enable accused to prefer appeal—*Held*, that the *sentence* was not to be considered thereby to be one which is to take effect in future and is, therefore, not illegal.]
3. (1893-1900) 1893-1900 Low Bur Rul 42 (43), *Empress* v. *Nga Po Mya.*
   3a (1933) 1933 Rang 28 (28) : 34 Cri L Jour 447 : 1933 Cri Cas 275, *Emperor* v. *Nga Po Min.*
   (1923) 1923 Lah 104 (105) : 23 Cri L Jour 593, *Dhangar Khan* v. *Emperor.*
   (1897) Ratanlal 892 (893), *Empress* v. *Sadu.*
4. (1897) Ratanlal 892 (893), *Empress* v. *Sadu.*
   (1907) 5 Cri L Jour 217 (218) (Lah), *Bhagel Singh* v. *Emperor.*
   (1908) 7 Cri L Jour 453 (453) : 4 Low Bur Rul 152, *Emperor* v. *Tha Hmun.*
5. (1868-69) 4 Mad H C R App 27 (27), *High Court Proceedings, 15th January* 1869.
   (1864) Suth W R Gap Cri 35 (35, 36), *Queen* v. *Premchand Ousawal.*

Sec. 384 Note 1

Other Topics.

Separate warrant for each accused. See Note 1, Pt. 1.
Warrant to jailor. See Note 1.

1. Warrant for execution of a sentence.

A separate warrant for the execution of a sentence of imprisonment should be issued in respect of *each* offender,[1] and where the offender is to be confined in a jail, it should be lodged with the jailor (Section 385).

Sec. 385

Warrant with whom to be lodged.

385.* When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

Sec. 386

Warrant for levy of fine.

386. Whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence

Warrant for levy of fine.

386.† *(1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may—*

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* **(Code of 1882—S. 385—Same.)**

(Code of 1872—S. 304.)

304. The warrant of commitment shall be lodged with the jailor, if he be in the jail; and if he be not in the jail, with his deputy.

Warrant with whom to be lodged.

If the jailor has no deputy, the warrant may be lodged with any officer of the jail then being in the jail.

(Code of 1861—S. 223—Same as that of 1872 Code.)

† **(Code of 1882—S. 386**—Same.)

(Code of 1872—S. 307, Para. 1.)

307. Whenever an offender is sentenced to pay a fine the Court which sentences him *may* issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, whether or not the offence be punishable with fine only, and whether or not the sentence directs that, in default of payment of the fine, the offender shall suffer imprisonment.

Levy of fine.

(Code of 1861—S. 61.)

61. In every case in which an offender is sentenced to a fine, it shall be competent to the Court which sentences such offender, whether or not the offence be punishable with fine only, and whether or not the sentence directs that, in default of payment of the fine, the offender shall suffer imprisonment, to issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender which may be found within the jurisdiction of the Magistrate of the District.

Levy of fines.

Section 384—Note 1.

1. (1867) 7 Suth W R Cr 2 (2), *Queen* v. *Kali Churn Gangooly.*

directs that, in default of payment of the fine, the offender shall be imprisoned.

Sec. 386

(a) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender ;

(b) issue a warrant to the Collector of the District authorizing him to realize the amount by execution according to civil process against the moveable or immoveable property, or both, of the defaulter :

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The Local Government may make rules regulating the manner in which warrants under sub-section (1), Clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under sub-section (1), Clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any

Sec. 386
Note 1

decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly :

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

Synopsis.

Other Topics.

Ability but unwillingness to pay fine — Sufficient special reason. See Note 4, Pt. 1.
Abkari Act. See Note 2, F-N (4).
Applicability to Section 16, Punjab Land Alienation Act. See Note 13, Pt. 2.
Applicability to all Acts, Regulations, Rules or bye-laws. See Note 2, Pt. 4.
Applicability to recoveries under Local Boards Act. See Note 2, Pt. 7.
Applicability to Section 488. See Note 2, Pt. 5.
Comparison with S. 547 — Discretion. See Note 6, Pt. 1.
Court includes successor. See Note 5, Pt. 2.
Death and liability of property of deceased. See Note 9 ; Note 11, Pt. 2.
Deposit by surety for appearance not liable for fine. See Note 11, Pt. 1.
Direction of payment to complainant — Still Crown debt. See Note 8, Pt. 2.
Executing Court not to question warrant. See Note 13, Pt. 3.
Fine—To be specific as to each offender. See Note 3, Pt. 2.
Fine written off—No bar. See Note 2, Pt. 2a.
Form. See Note 14.
General Clauses Act. See Note 2, F-N (4).
Joint fines on several accused. See Note 3, Pt. 3 and F-N (3).
Legislative changes. See Notes 1, 4, 7, 10 and 12.
Non-applicability to Dekhan Agriculturists' Relief Act, Section 22. See Note 13, Pt. 1.
Refund of fine. See Note 4, Pt. 2.
Section 547. See Note 14, Pt. 2.
Section 88. See Note 12, Pt. 5.
Sections 63 to 70, I. P. C. See Note 3, Note 9.
Section 64, I. P. C. — When bar to recovery of fine. See Note 2, Pts. 1 and 2.
Sections 148 and 250, Court-fees or process fees under S. 546-A. See Note 2.
Simultaneous execution. See Note 7.
Suspension of imprisonment in default of fine. See Note 2, Pt. 3.
Surplus sale proceeds — Tangible moveable. See Note 10, F-N (1).
Warrant on report of Railway Inspector as to damage — Illegal. See Note 3, Pt. 1.

1. Amendments in 1923.

This Section has been newly substituted for the old Section 386. The material changes introduced are as follows:—

1. The word 'attachment' has been used in place of the word 'distress.'
2. A warrant for the levy of the fine may now be issued for execu-

tion according to *civil* process against the *moveable* as well as the *immoveable* property of the defaulter.

3. Where the offender has undergone the whole of the imprisonment awarded in default of payment of fine, no warrant against his properties should issue unless for special reasons in writing.

2. Recovery of fine.

Section 64 of the Penal Code provides that whenever an offender is sentenced to pay a fine, with or without imprisonment, it is competent to the Court to direct that, in default of payment of such fine, the offender shall suffer imprisonment for a certain period. The undergoing of such imprisonment does not, however, operate as a *discharge* or *satisfaction* of the order for payment of the fine, which may, nevertheless, be levied in the manner prescribed by this Section,[1] *i. e.*

1. by attachment and sale, under *the provisions of this Code*, of the *moveable* property of the offender, or
2. by execution by *civil process* against his *moveable* or *immoveable property* or both, or
3. by both the above methods.

There are, however, two limitations subject to which the above procedure is to be adopted, *viz.*

1. Where the offender has *undergone the whole term of imprisonment*, no warrant should be issued for levy of the fine except for *special reasons* to be recorded.
2. No fine can be levied after the period of *six years* after the passing of sentence, or, where under the sentence the offender is liable to imprisonment for a longer period than six years, then at any time after the expiration of the period.[2] The mere fact, however, that the Court has written off a fine as irrecoverable is no bar to its taking action under this Section within the said period if it subsequently appears that the offender has acquired the means of paying it.[2a]

Where an offender is sentenced to pay *fine only* and to imprisonment in default of payment thereof, the imprisonment may be *suspended* to enable the offender to pay the fine in instalments or on a future date.[3]

The provisions of this Section have been declared to apply

(a) to the levy of all fines imposed under the authority of any Act, Regulation, Rule, or bye-law, in the absence therein of any

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Section 386—Note 2.

1. (1901) 23 All 497 (498), *Emperor* v. *Sagwa*.
(1875) Ratanlal 91 (92), *Reg* v. *Gulab Chand*.
(1865) 3 Suth W R Cr Letters 19 (19).
(1865) 3 Suth W R Cr Letters 21 (21).
(1865) 3 Suth W R Cri 61 (62), *Empress* v. *Modoosoodundey*.
(1883) 6 All 61 (61), *Emperor* v. *Asghar*. Under Act VIII of 1882 and Act XLV of 1860 simple imprisonment ordered for default of fine was provided for as a process for enforcement of fines.

2. [See Section 70 of the Penal Code.]
[See also (1884) Ratanlal 207 (207), *Ganu Sakha* v. *Ram*. The liability for any sentence of imprisonment awarded in default of payment of fine continues, however, after the expiration of the six years.]

2a (1906) 4 Cri L Jour 404 (404) (All), *Latiful* v. *Mumtaz*.

3. [See Section 388, *infra*.]

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specific provision to the contrary.[4]

(b) to the recovery of the amount of maintenance ordered to be paid under Section 488, *infra*,[5]

(c) to the recovery of all moneys ordered under this Code to be paid, but for which no method is expressly otherwise provided for.[6] Thus the recovery of compensation amount ordered to be paid under Section 250, or of costs ordered to be paid under Section 148, or of the Court-fees or process-fees ordered to be paid under Section 546-A, may all be recovered in the manner provided by this Section,

(d) to the recovery by the Local Board under Section 221 of the Madras Local Boards Act, of any fee, toll, compensation or damages due to it.[7]

Where money found on an accused person at the time of his arrest is taken and placed in the custody of the Court, it has been held that the Court at the time of convicting and sentencing him can impose a fine and order that the fine should be recovered by confiscation of the money under Section 517.[8]

3. "Has been sentenced to pay a fine."

See Sections 63 to 70 of the Penal Code.

Before a warrant can be issued under this Section it is necessary that the Court issuing the warrant should have *sentenced the offender to pay a fine*. A Court cannot, for instance, issue a warrant, merely on a report of a Railway Traffic Inspector, to the effect that damage has been done to the Railway carriage and that it should be recovered.[1]

A sentence of fine should be *specific* as to *each offender* fined.[2] It is not proper to sentence two or more offenders to pay a fine jointly.[3]

4. Offender undergoing whole term of imprisonment—Levy of fine.

Under the Section, as it stood before the amendment of 1923, the Court could issue a warrant for the levy of fine even though the offender had undergone the *whole* term of the imprisonment. Under the present Section as now amended, a warrant should *not* issue for the levy of fine in such cases unless for

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4. General Clauses Act (X of 1897), S. 25;
The Bengal General Clauses Act (Act I of 1899), S. 26;
Bombay General Clauses Act (Act I of 1904), S. 26;
The United Provinces General Clauses Act (Act I of 1904), S. 25;
The Punjab General Clauses Act (Act I of 1898), S. 23;
The Burma General Clauses Act (Act I of 1898), S. 25;
Assam General Clauses Act (Act II of 1915), S. 28;
The Central Provinces General Clauses Act (Act I of 1914), S. 24;
Regulation III of 1876, S. 35; and
Regulation III of 1901, S. 61.
[See however (1872) 17 Suth W R Cri 7 (8), *Government* v. *Junglee Beldar*. S. 5 of General Clauses Act 1868 applies to fines imposed under any Act *thereafter* to be passed and has no application to the Abkari Act.]

5. Section 488, sub-section 3.

6. [See Section 547, *infra*.]

7. (1923) 1923 Mad 275 (275) : 24 Cri L Jour 464, *In re Punea*.

8. (1934) 1934 Bom 193 (194) : 1934 Cri Cas 707 : 35 Cri L Jour 1344, *Samant, In re*.

Note 3.

1. (1929) 1929 Pat 108 (109): 30 Cri L Jour 635, *Abdul* v. *Majid Mukerjee*.

2. (1869-70) 5 Mad H C Rul App 5 (5), *High Court Proceedings*, 11*th Nov.* 1869.

3. (1917) 1917 Cal 348 (359): 18 Cri L Jour 945: 44 Cal 1025 (1060-1063) (F B), *Amrita Lal Bose* v. *Corporation of Calcutta*.
(1875) Ratanlal 90. Where a joint sentence of fine was passed against several persons and one of them paid the fine but the conviction was reversed in appeal, the joint and several liability of the others revives.

special reasons to be recorded. But where the offender has been committed to jail for failure to pay the fine but the full term of imprisonment for default has *not* been completed, still the proviso does not apply and a warrant can be issued.[1a] Moreover, the proviso only forbids the *issue* of a warrant after the imprisonment in default of fine has been served; it does not require that where a warrant has been issued it must be *withdrawn* if the imprisonment in default of fine has been served for the full period.[1b] But in dealing with such warrants the Court should follow the policy underlying the proviso; so that if there are special reasons for withdrawing the warrant the Court should withdraw it.[1c] Where an offender *having the means* of paying the fine chooses to undergo imprisonment rather than pay the fine, it is a sufficient special reason which will enable the Court in its discretion to order that the fine may be levied, notwithstanding that the offender has served the full term of imprisonment ordered for default of payment of the fine.[1]

Where an offender sentenced to fine and to imprisonment in default, paid a portion of the fine, but the fact not having been communicated to the jailor, he had to serve the whole term, it was held that the Court had no jurisdiction to refund the fine, but that the party should apply to the Local Government for a refund.[2]

5. "Court passing the sentence."

The power to levy a fine is restricted to the *Court passing the sentence*.[1] It may be exercised either by the Judge or Magistrate who passed the sentence or by his successor in office.[2]

See Section 389, *infra*.

6. "May take action."

Where an offender has been sentenced to fine and to imprisonment in default of payment of the fine, it is not *imperative* that the Court should take action in all cases. The words "*may* take action" show that it is in the *discretion* of the Court to do so or not. But where an order for payment of *money* has been made under the Code, Section 547, *infra* provides that the amount *shall* be recoverable as if it were fine, and it has been held that the Court has no discretion in *such* cases to refuse to take action under this Section for the recovery of the amount.[1]

7. Execution against immoveable property.

Previous to the Amending Act of 1923, there was no provision for

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Note 4.

1a (1935) 1935 Cal 546 (547): 1935 Cri Cas 938: 36 Cri L Jour 1267, *Nil Kantha Pal* v. *Bisakha Pal*.

1b (1935) 1935 Bom 160 (161): 59 Bom 350: 1935 Cri Cas 320: 36 Cri L Jour 1034, *Digambar Kasinath Bhavarthi* v. *Emperor*.

1c (1935) 1935 Bom 160 (161): 1935 Cri Cas 320: 36 Cri L Jour 1034: 59 Bom 350, *Digambar Kasinath Bhavarthi* v. *Emperor*.

1. Statement of Objects and Reasons, 1921.
[See also (1935) 1935 Bom 160 (161): 36 Cri L Jour 1034: 1935 Cri Cas 320: 59 Bom 350, *Digambar Kasinath Bhavarthi* v. *Emperor*. Grounds for withdrawing warrant mentioned.]

2. (1866-67) 4 Bom H C R Crown Cases 37 (38). *Reg* v. *Natha Mula*.

Note 5.

1. (1870) Ratanlal 35, *Satara Sessions Judge's Letter*.

2. (1868) 9 Suth W R Cri 50 (50), *Chunder Coomar Mitter* v. *Modoosooden Dey*.
(1865) 3 Suth W R Cri Letters 9 (9).

Note 6.

1. (1923) 1923 Pat 57 (57): 24 Cri L Jour 126, *Harendra Krishna Bagh* v. *Balkumar*
(1872-1892) 1872-1892 Low Bur Rul 606 (606, 607), *Empress* v. *Alexander Augustus St. Clair Miller*.

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attachment and sale of *immoveable* property of the offender for the purpose of realising a fine and it was held that a sale of immoveable property for recovering a fine conferred no title on the purchaser as the sale itself was without jurisdiction.[1] Clause (b) now enables the Court to proceed against the immoveable properties belonging to the offender. This, however, can only be according to *civil process* and not as provided in this Code. The Court also has power to issue a warrant for attachment and sale of moveable property and *simultaneously* to order execution against immoveable property according to civil process.

8. Priority over other debts.

A fine imposed or an order for payment of money passed, by a Criminal Court is a debt due to the Crown,—and as a *Crown debt* it takes precedence over ordinary contract debts.[1] The character of the Crown debt is not lost even though there is a direction that it should be paid over to the complainant.[2]

9. Death of offender.

Section 70 of the Indian Penal Code provides that the death of the offender shall not discharge from the liability for fine, any property which would, after his death, be legally liable for his debts; and therefore a warrant for the levy of the fine may be issued under this Section even after the death of the offender, against properties in the hands of his legal representatives.[1]

10. Attachment of moveable property—Clause (a).

Prior to the Amending Act of 1923, the Section used the word "distress" and Form No. 37 of Schedule V contained the words "Make distress by *seizure*." As the words "moveable property" were used in the Section as being the subject of 'distress' that is, *actual seizure* it was held that only *tangible or corporeal* moveable property capable of being seized could be proceeded against by way of distress and not such property as debts or choses in action[1] which could not be 'seized.' It was also held that a share or interest in joint moveable property could not be seized and therefore could not be distrained under the Section[2] though a share or interest in joint property could be *attached* under

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Note 7.

1. (1921) 22 Cri L Jour 399 (399): 61 Ind Cas 527 (527) (Lah), *Madari* v. *Mehrdin*. [See also (1892) 20 Cal 478 (481), *Empress* v. *Sitanath Mitra*. (1868) 5 Bom H C R Crown Cases 63 (64), *Reg.* v. *Lallu Karwar*.]

Note 8.

1. (1876) 2 Ex D 47: 46 L J Ex. 73: 35 L T 858, *In re Arthur Heavens Smith*. (1918) 1918 Mad 1111 (1112): 40 Mad 767 (769, 774, 775): 18 Cri L Jour 426, *Pichu Vadhiar* v. *The Secy. of State*.
2. (1918) 1918 Mad 1111 (1112): 40 Mad 767 (775): 18 Cri L Jour 426, *Pichu Vadhiar* v. *The Secy. of State for India in Council*.

Note 9.

1. (1878) 2 Bom 564 (567), *Emperor* v. *Dongaji*. (1868-69) 5 Bom H C R Crown Cas 63 (64), *Reg.* v. *Lallu Karwar*.

The following cases, which were decided with reference to old S. 386, are no longer of any importance:—

(1893) 20 Cal 478 (481), *Empress* v. *Sitanath Mitra*.
(1868-69) 5 Bom H C R Crown Cas 63 (64), *Reg.* v. *Lallu Karwar*.
(1865) 4 Suth W R Cri Letters 6 (6). Under S. 70 Indian Penal Code even immoveable properties of offender will be liable for payment of fine after death of offender.

Note 10.

1. (1917) 1917 Mad 748 (748): 18 Cri L Jour 1, *Secy. of State* v. *Sengammal*. (1918) 1918 Mad 1111 (1114): 40 Mad 767 (768, 772): 18 Cri L Jour 426, *Pichu Vadhiar* v. *Secy. of State*. Surplus sale proceeds in the hands of a mortgagee under power of sale is not a debt but tangible moveable property and could be attached under S. 386.
2. (1892) 20 Cal 478 (479), *Empress* v. *Sitanath Mitra*. Only moveable property of which the offender was the sole owner could be attached under S. 386.

Section 88, *ante* by the issue of a prohibitory order or the appointment of a receiver.[2a] The substitution in the present Section of the word "attachment" for the word "distress" shows that even a debt due to or a share in joint moveable property belonging to an offender could be attached.[3] Sub-section 2 provides that the Local Government may make rules for regulating the manner in which the attachment is to be made. In the absence, however, of any such rules the question arises as to the mode in which an attachment of a debt or share in joint moveable property is to be effected. It has been held in the undermentioned cases[4] that an attachment by *seizure* cannot be made of such property. According to the High Court of Madras[5] the proper course in such cases is to follow the principle adopted in the Civil Procedure Code and to proceed under Order 21, Rules 46 and 47.

The High Court of Patna[6] and the Judicial Commissioner's Court of Sind[7] have expressed the view that the better method to adopt in such cases would be to proceed under Clause (b) rather than Clause (a) of the Section.

Under this Section, *any* property belonging to the offender can be attached. The provisions of the Civil Procedure Code exempting certain property from attachment and sale do not apply to criminal Courts.[8]

Salary not yet drawn by the offender is not moveable property within the meaning of this Section.[9]

11. "Belonging to the offender."

The Court has power under sub-section 1 (a) to attach only moveable property *belonging to the offender*, and therefore cannot order the attachment of the money deposited by a surety for the appearance of the offender, in execution of a sentence of fine passed against the offender.[1] Similarly, where joint moveable property passes by *survivorship* to the other members of the family on the death of the person, such property cannot be attached as it is no longer property of the person in the hands of the other members.[2]

(1876) 2 Weir 442 (443), *High Court Proceedings, 16th of February* 1876.

2a (1917) 1917 Mad 366 (367, 368) : 39 Mad 831 (833) : 17 Cri L Jour 296 (F B), *Secy. of State in Council* v. *Rangaswamy Iyengar.*

3. [See (1926) 1926 Bom 103 (104, 105) : 49 Bom 906 : 27 Cri L Jour 652, *Shivlingappa Nijappa Tubchi* v. *Gurlingava Basappa*, (Per Fawcett, J.)] [But see (1933) 1933 Nag 248 (248, 249) : 1933 Cri Cas 932 : 29 Nag L R 320 : 34 Cri L Jour 1263, *Shrawan* v. *Emperor.*]

4. (1933) 1933 Cal 402 (404) : 1933 Cri Cas 580 : 60 Cal 932 : 34 Cri L Jour 503, *Emperor* v. *Pramatha Bhusan Roy.*

(1933) 1933 Cal 401 (402) : 1933 Cri Cas 579: 60 Cal 851: 34 Cri L Jour 579, *Manmathanath Kundu* v. *Emperor.*

(1932) 1932 Mad 538 (540): 1932 Cri Cas 566 : 55 Mad 1041 : 33 Cri L Jour 622, *Marina Narasanna* v. *Emperor.*

(1932) 1932 Pat 292 (293): 1932 Cri Cas 764: 12 Pat 29 : 33 Cri L Jour 872 (S B), *Rajendra Prasad Misser* v. *Emperor.*

(1933) 1933 Nag 248 (248, 249) : 1933 Cri Cas 932 : 29 Nag L R 320 : 34 Cri L Jour 1263, *Shrawan* v. *Emperor.*

5. (1932) 1932 Mad 538 (540): 1932 Cri Cas 566: 55 Mad 1041 : 33 Cri L Jour 622, *Marina Narasanna* v. *Emperor.*

6. (1932) 1932 Pat 212 (213) : 1932 Cri Cas 493 : 33 Cri L Jour 671, *Sahadeo Singh* v. *Ram Kishun Singh.*

7. (1933) 1933 Sind 43 (44) : 1933 Cri Cas 189 : 34 Cri L Jour 354, *Pritam Das Mangaram* v. *Emperor.*

8. (1889) 1889 Pun Re Cri No. 3 (page 7), *Sirdar Raghubir Singh* v. *Mela Singh.*

9. (1934) 1934 Rang 82 (83) : 1934 Cri Cas 514, *Maung Soe Hlaing* v. *Ma Thein Khin.*

Note 11.

1. (1921) 1921 All 71 (71) : 22 Cri L Jour 744, *Girdhari Lal* v. *Emperor.*

2. (1932) 1932 Pat 301 (301) : 1932 Cri Cas 773 33 Cri L Jour 958 (FB), *Ramchander*

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It is the duty of an officer entrusted with the execution of a warrant of attachment to ascertain by all possible means whether the property belongs to the offender.[3]

12. Claims to property attached under sub-section 1 (a).

Under the Section before the amendment there was no provision for the determination of claims which might be preferred to the property attached,[1] but the Court had however to satisfy itself that the property attached *belonged* to the offender.[2] In cases of doubt it was held that the proper procedure was to stay the sale to enable the claimant to establish his title to the property in a civil Court.[3]

Sub-section 2 of the present Section now provides that the Local Government may make rules for the *summary determination of* any claims that may be made in respect of the property attached under sub-section 1 (a) and it is the duty of the Court in such cases to hold a proper inquiry into the title of the claimant.[4] In the absence of such rules, it has been held that the procedure prescribed for the inquiry into claims under Section 88 of this Code should be adopted.[5]

The summary procedure for the determination of claims under sub-section 2 applies only during the *subsistence* of the attachment. Where, therefore, money is attached and *credited* to the Government, an application for the refund of the money by the Government does not lie, the reason being that the attachment must be deemed to be put an end to as soon as the money is credited to the Government.[6]

13. Execution according to civil process—Sub-section 1 (b).

Where it is sought to execute a sentence of fine against the immoveable property of the offender or against such moveable property as cannot be attached by seizure under sub-section 1 (a) the better procedure is to issue a warrant as provided under sub-section 1 (b) for execution according to *civil process*. Sub-section 3 provides that such a warrant should be deemed to be a decree and the Collector to be the decree-holder and the nearest civil Court can execute the decree in accordance with the provisions of the Code of Civil Procedure relating to the execution of decrees (*see* Order XXI of the Civil

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Pandey v. *Emperor*.

3. (1935) 1935 Pat 214 (217): 1935 Cri Cas 577: 36 Cri L Jour 714 (SB), *Ram Singh* v. *Emperor*.

Note 12.

1. (1915) 1915 Lah 227 (228): 16 Cri L Jour 166 (166, 167), *Hira Lal* v. *Emperor*.
(1895) 22 Cal 935 (938), *Empress* v. *Gasper*. [See (1902) 4 Bom L R 109 (114), *Ganesh* v. *Narayan*. There is nothing in law indicating that it is the Magistrate's business to do more than issue the warrant.]
(1898) 1898 All W N 173 (177), *Secretary of State* v. *Sukhdeo*
(1872-1892) 1872-1892 Low Bur Rul 332 (332), *Empress* v. *Mi Myaing*.
(1932) 1932 Bom 476 (478): 1932 Cri Cas 604: 33 Cri L Jour 805: 56 Bom 364, *Pandurang Venkatesh Malgi, In re*.
(1898) Ratanlal 976, *Empress* v. *Chhagan Jagannath*.
(1897) 20 Mad 88 (89), *Empress* v. *Kandappa Goundan*.
(1881) 2 Weir 445 (445), *High Court Proceedings, 15th September* 1881.
4. (1933) 1933 All 135 (135): 1933 Cri Cas 278: 34 Cri L Jour 847, *Harimal* v. *Emperor*.
(1931) 1931 Lah 543 (543): 1931 Cri Cas 783: 32 Cri L Jour 812, *Parshotam Das* v. *Emperor*.
5. (1932) 1932 Mad 538 (541): 1932 Cri Cas 566: 55 Mad 1041: 33 Cri L Jour 622, *Marina Narasamma* v. *Emperor*.
[But see (1932) 1932 Bom 476 (477, 478): 1932 Cri Cas 604: 33 Cri L Jour 805: 56 Bom 364, *Pandurang Venkatesh Malgi, In re*.]
6. (1934) 1934 Pat 181 (182, 184): 1934 Cri

Procedure Code). The Bombay High Court has held that a warrant under this Section is deemed to be a decree of the Civil Court *only* for the purposes of execution and therefore the exemption of agriculturists' lands from *execution of decrees* under Section 22 of the Dekhan Agriculturists' Relief Act does not extend to *such warrants*.[1] The Lahore High Court has, however, held that by virtue of sub-section 3 the warrant *becomes* a decree of the civil Court, and therefore the land of an agriculturist cannot be attached and sold in execution of such "decree" by virtue of Section 16 of the Punjab Land Alienation Act.[2]

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It is not permissible for the executing Court to go behind the warrant sent for execution or to question the validity of the warrant in respect of some antecedent defect in proceedings before the Criminal Court.[3]

14. Revision.

See Section 435, *infra*.

An order of the Magistrate passed under this Section in his *judicial* capacity is subject to revision under Section 435.[1] But an order of the Magistrate directing recovery of an amount ordered to be paid (*see* Section 547), such as an amount due to the Port Trust though passed under this Section is only an *executive order* and is, therefore, not open to revision.[2]

See Note 6, Pt. 1, *ante*.

For form, *see* Sch. 5, Form No. 37.

387. Effect of such warrant. Such warrant may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the distress and sale of any such property without

387.* Effect of such warrant. *A warrant issued under Section 386, sub-section (1), Clause (a), by any Court* may be executed within the local limits of the jurisdiction of such Court, and it shall

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* **(Code of 1882—S. 387**—Same.)

(Code of 1872—S. 307, Para 2.)

307. * * * * * * *

Such warrant may be executed within the jurisdiction of the Court that issued it, and it shall authorise the distress and sale of any moveable property belonging to the offender without the jurisdiction of the said Court, when endorsed by the Magistrate of the District in which such property is situated.

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(Code of 1861—S. 61—See under S. 386 of 1898 Code.)

Cas 370 : 13 Pat 317 : 35 Cri L Jour 682 (S B), *Suraj Narain Prasad Singh* v *Emperor*. Kulwant Sahay, J., *contra*.

Note 13.

1. (1926) 1926 Bom 582 (583, 584) : 50 Bom 814, *Collector and District Magistrate* v. *Mahadu*.
2. (1929) 1929 Lah 667 (669) : 1929 Cri Cas 212 : 30 Cri L Jour 1006, *Emperor* v. *Mileka Singh*.
3. (1929) 1929 Mad 383 (384), *Kuppuswamy Iyer* v. *Secretary of State*.

Note 14.

1. (1896) 23 Cal 421 (423), *Empress* v. *Ashwini Kumar Ghose*.
   [See also (1933) 1933 All 135 (135) : 1933 Cri Cas 278 : 34 Cri L Jour 847, *Harimal* v. *Emperor*.]
2. (1926) 1926 Sind 57 (57) : 20 Sind L R 63 : 26 Cri L Jour 1263, *Yusif Ali Lookmanji* v. *Emperor*.
   [See also (1926) 1926 Bom 103 (106) : 49 Bom 906 : 27 Cri L Jour 652 *Shivalingappa Nijappa* v. *Gurlingava*.]

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such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

authorize the *attachment* and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

Synopsis.

Scope of the Section. Note No. 1

Other Topics.

Property out of British India. See Note 1, Pt. 1.

1. Scope of the Section.

As to "jurisdiction of criminal Courts," *see* Section 177, *ante*.

The Court has no power to levy a fine against property situate outside British India.[1]

Sec. 388

Suspension of execution of sentence of imprisonment.

388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the Court issues a warrant under Section 386, it may suspend the execution of the sentence of imprisonment and

388.* (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, *and the fine is not paid forthwith, the Court may*—

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(b) suspend the execution of the sentence of imprisonment

* (Code of 1882—S. 388—Same as sub-section 1; Sub-section 2 was added in 1898.)

(Codes of 1872 and 1861—Nil.)

Section 387—Note 1.

1. (1879) 2 Weir 444 (445), *High Court Proceedings*, 28*th July* 1879.

may release the offender on his executing a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before such Court on the day appointed for the return to such warrant, such day not being more than fifteen days from the time of executing the bond; and in the event of the fine not having been realized the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) In any case in which an order for the payment of money has been made, on non-recovery of which imprisonment may be awarded, and the money is not paid forthwith, the Court may require the person ordered to make such payment to enter into a bond as prescribed in sub-section (1), and in default of his so doing may at once pass sentence of imprisonment as if the money had not been recovered.

and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before *the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and, if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order*, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made, on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; *and if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.*

Sec. 388 Note 1

Synopsis.

Other Topics.

Form of bond. See Schedule 5, Form 37-A. **Warrant for levy of fine—Not needed before imprisonment.** See Note 3, Pt. 2.

1. Legislative changes.

1. Under the Section as it stood before the amendment of 1923, the Court could not suspend a sentence of fine unless a *warrant for the recovery thereof had* been issued under Section 386.[1]

Section 388—Note 1.

1. (1908) 7 Cri L Jour 452 (452): 4 Low Bur Rul 151, *Emperor* v. *Tha Mya.*

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This is not necessary now.

2. Under the old Section a suspension of the sentence could not exceed a period of 15 days from the date of executing a bond under the Section. Under the present Section there can be now order for payment in two or three *monthly* instalments and suspension of the sentence during that period.

2. Scope of the Section.

In order that the Section may apply, two conditions are necessary, namely that the offender must have been sentenced

(1) to *fine only and,*

(2) to imprisonment in *default* of payment of such fine.

The Section has therefore, no application to cases where an offender has been sentenced to fine in *addition* to a sentence of imprisonment[1] or where he is not sentenced to imprisonment *in default* of the payment of the fine.[2]

3. "Order for payment of money on non-recovery of which, imprisonment may be awarded"—Sub-section 2.

Under Section 64 of the Penal Code, whenever a sentence of *fine* is passed the Court can order that in default of payment of such fine, the defaulter shall suffer imprisonment for a certain period. There is no such general provision as to orders for payment of money *other than* fine. The Court has no power to order imprisonment in default of payment of any such amount unless it is specifically provided for by statute.[1] The Code contains the following provisions for payment of money on the non-recovery of which imprisonment may be awarded:—

i. Payment of compensation under Section 250, sub-section 2-A.

ii. Payment of maintenance under Section 488, sub-section 3.

iii. Payment of process-fees etc., under Section 546-A, sub-section 1.

In such cases if the money is not paid forthwith the Court may require the person to enter into a bond as provided by sub-section 1 and on his failure to do so, may at once pass a sentence of imprisonment.

See Sections 250, 488 *and* 546-*A*.

It is not necessary that a warrant for the levy of such amount should be issued, and the following cases decided before the amendment to sub-section 1 are no longer of any practical importance.[2]

Note. 2

1. (1933) 1933 Cal 308 (310) : 1933 Cri Cas 408 : 34 Cri L Jour 530, *Ali Hussain* v. *Emperor.*

(1934) 1934 Rang 11 (12) : 1934 Cri Cas 77 : 11 Rang 451 : 35 Cri L Jour 608, *Emperor* v. *Mohamed.* Even if sentence of imprisonment is a nominal one, Section does not apply and execution of sentence of imprisonment in default of fine cannot be suspended.

(1905) 2 Weir 445 (445), *In re Venkatrapragada Venkatrayadu.*

Note 3.

(1893) 18 Bom 440 (441), *Empress* v. *Kutrappa.*

(1897) 20 Mad 385 (386), *Empress* v. *Subramania Iyer.*

(1896) 19 Mad 238 (239), *Empress* v. *Laxshmi Narayan.*

(1897) 11 C P L R Cr 10 (11), *Karim Khan* v. *Nathoosa.*

(1879) 1 Weir 711 (711), *High Court Proceedings, 27th November* 1879.

(1890) 1 Weir 712 (712), *Re Chetti.*

2. (1897-1901) 1 Upp Bur Rul 71 (71), *Empress* v. *Nga Myit.*

(1901) 28 Cal 164 (166), *Lal Mahmud* v. *Satcowri.*

(1902) 26 Mad 127 (129), *In the matter of Byravalu Naidu.* Issue of a warrant for levy of the attachment, a condition precedent to an order for imprisoment under this Section.

(1894) 21 Cal 979 (985), *Ramjeevan Koormi* v. *Durga Charan Shahu Khan.*

Who may issue warrant.

389.* Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.

Execution of sentence of whipping only.

390.† When the accused is sentenced to whipping only, the sentence shall *subject to the provisions of Section 391* be executed at such place and time as the Court may direct.

Synopsis.

Other Topics.

Amendment of Section 391. See Note 3, Pts. 2 and 3.
Fixing a future date. See Note 3, Pt. 1.
Whipping Act (IV of 1909). See Note 2.

1. Legislative changes.

The words "subject to the provisions of Section 391" were added by the Amending Act 12 of 1923.

See Note 3, *infra*.

2. When the accused is sentenced to whipping only.

This Section applies when the accused is sentenced to *whipping only*. Sentences of whipping are passed under the provisions of the Whipping Act No. IV of 1909. Sections 3 and 5 of that Act, deal with offences for which whipping can be given in *lieu* of other punishments prescribed under the Indian Penal Code, while Section 4 deals with offences for which whipping can be given in *addition* to the other punishments prescribed therefor.

Section 3 of the Whipping Act IV of 1909 enacts that (a) in the cases of theft under Section 378, Penal Code, and aggravated forms of it under Sections 380 and 382, and (b) in the cases of lurking house-trespass or house-breaking under Sections 443 and 445, Penal Code, and aggravated forms of them under Sections 444 and 446, I. P. C. respectively, whipping may be awarded in lieu of the other punishments.

Section 5 of the said Whipping Act provides for the punishment of whipping being given in lieu of other punishments, in the following cases:—

i All offences punishable under the Indian Penal Code, except those specified in Chapter VI and in Sections 153-A and 505 and offences punishable with death.

ii Offences punishable under any other law with imprisonment, which the Governor-General-in-Council may specify in this behalf.

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* **(Code of 1882—S. 389 ; Code of 1872—S. 307, Para. 4 ; Code of 1861**—Nil.)

† **(Code of 1882—S. 390**—Same as that of 1898 Code.)

(Code of 1872—S. 302, Para. 2—*See* under S. 383, *ante*.)

(Code of 1861—Nil.)

Sec. 390 Notes 2—4

Thus this Section applies only in those cases where sentences of whipping are passed under Sections 3 and 5 of the Whipping Act.

3. "At such place and time as the Court may direct."

According to the High Court of Bombay the sentence of whipping need not necessarily be executed on the same day as the sentence was passed, but the Court can fix a day *in the future* for that purpose.[1]

Before the amendment of Section 391, *infra*, in 1923, it was held by the High Court of Madras that a Magistrate had no power to suspend or postpone the execution of a sentence of whipping only, even in cases where such sentence was appealable (as where a second class Magistrate passed a sentence of whipping only).[2] This practically rendered the right of appeal nugatory. The Chief Court of Lower Burma, on the other hand held that whenever a sentence of whipping was passed by a Magistrate, against whose sentence an appeal lay, the Magistrate was bound to ask the prisoner whether he intended to appeal and if the prisoner said that he intended to do so, to suspend the execution of the sentence on the analogy of Section 391.[3] The addition of Clause (a) to sub-section 1 of Section 391 now makes it clear that if the accused furnishes bail for his appearance the sentence may be suspended for 15 days or, if an appeal is made within that time, until after the sentence is confirmed.

4. Postponement of whipping sentence when accused is under sentence of imprisonment in another trial.

The direction in this Section, that the sentence shall be executed at such place and time as the Court may direct, is intended for the case where the accused is *not* already under another sentence and is not also at the same time sentenced to imprisonment. It, therefore, does not apply where he is already under another sentence of imprisonment. The Court cannot therefore postpone a sentence of whipping only till after the accused has undergone a sentence of imprisonment in another case.[1]

Sec. 391

391. (1) When the ac-

391.* (1) When the ac-

*(Code of 1882—S. 391—Same as sub-sections 1 and 2.)

(Code of 1872—S. 310 and S. 311, Para. 3.)

310. When the punishment of whipping is awarded in addition to imprisonment, by a Court whose sentence is open to revision by a superior Court, the whipping shall not be inflicted until fifteen days from the date of such sentence, or, if an appeal be made within that time, until the sentence is confirmed by the superior Court: but the whipping shall be inflicted immediately on the expiry of the fifteen days, or, in case of an appeal, immediately on the receipt of the order of the appellate Court confirming the sentence.

Whipping if awarded in addition to imprisonment, when to be inflicted.

311. * * * *

The punishment shall be inflicted in the presence of a Magistrate, and also, unless the Court which passed the sentence otherwise orders, in the presence of a Medical Officer.

(Code of 1861—Nil.)

Section 390—Note 3.

1. (1928) 1928 Bom 138 (138, 139): 29 Cri L Jour 573, *Emperor* v. *Gopal Murgis*
1897 Ratanlal 906, *held* obsolete.
2. (1902) 26 Mad 465 (466, 467), *Meyyan* v. *Emperor*.
3. (1893-1900) 1893-1900 Low Bur Rul 310, *Empress* v. *Chan Tha Aung*.

Note 4.

1. (1900-1902) 1 Low Bur Rul 53 (53), *Empress* v. *Nga Po Kye*.

Execution of sentence of whipping, in addition to imprisonment.

cused is sentenced to whipping in addition to imprisonment in a case which is subject to appeal, the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

Execution of sentence of whipping, in addition to imprisonment.

cused—

(a) is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or

(b) is sentenced to whipping in addition to imprisonment,

the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment, when the term of imprisonment to which he is sentenced is less than three months.

Synopsis.

Other Topics.

No provision for calling back accused for whipping. See Note 5, Pts. 3, to 6.
Sections 3 and 4 of Act 6 of 1864. See Note 4, Pt. 1a.
Section 4 of Whipping Act IV of 1909. See Note 4.
Whipping before statutory period. See Note 5, Pt. 10.
Whipping for separate offences. See Note 5, Pts. 11 and 12.
Whipping not executed within statutory time—Effect. See Note 5, Pts. 8 and 9.
Whipping to be executed immediately after statutory period. See Note 5, Pt. 1.

Sec. 391 Notes 1—5

1. Legislative changes.

Changes introduced in 1898:—

Sub-section 3 was newly added.

Changes introduced in 1923:—

1. Clause (a) of sub-section 1 was newly added.
2. The words "in a case which is subject to appeal" which occurred in the first paragraph were omitted.

2. When accused is sentenced to whipping only.

See Section 390, Note 2; *also* Section 32.

3. Execution of sentence of whipping only.

See Section 390, Note 3.

4. When accused is sentenced to whipping in addition to imprisonment.

Whipping in addition to imprisonment can be inflicted under Section 4 of the Whipping Act IV of 1909 in regard to the offences specified therein.

Sections 3 and 4 of Act VI of 1864, which provided for the punishment of whipping being inflicted in addition to imprisonment on a second conviction for certain specified offences have been repealed and the cases decided under them are now only of academic interest.[1a]

Under Section 4 of the Act of 1909, whipping should be inflicted in cases, where there is a certain amount of aggravation, in the commission of the offence. Where an accused was convicted under Section 292, Penal Code, for an offence of robbery and sentenced to fine and whipping and in default of fine to imprisonment, the High Court set aside the sentence of whipping on the ground that the hurt caused in the course of the robbery was very slight.[1] Where a sentence of whipping only was legal, but the combined sentence of whipping and imprisonment was passed and the former sentence was executed, the sentence of imprisonment must be set aside in revision.[2]

5. Postponement of the execution of sentence of whipping in addition to imprisonment.

Whipping shall not be inflicted within fifteen days from the date of the sentence or until such time as the sentence is confirmed in appeal, if an appeal is preferred within that time. There is no power vesting in Magistrates or Sessions Judges to postpone the execution of the sentence *beyond the time.*

Section 391—Note 4.

1a. *The following are all cases under the said Act* (6 *of* 1864):—
(1869) 5 Mad H C R App 1 (1), *High Court Proceedings, 25th October* 1869.
(1872-92) 1 Low Bur Rul 336, *Empress* v. *Nga Po Sin.*
(1865) 4 Suth W R Cr 20 (20), *Empress* v. *Amarut Sheikh.*
[See also (1880) 1880 Pun Re Cri No. 39 (p. 93), *Kouri* v. *Empress.*]
(1869) 12 Suth W R Cr 68 (68), *Empress* v. *Udoy Putnaick.*
(1880) 1880 Pun Re Cri No. 42 (p. 99), *Empress* v. *Mansukh.*
(1905) 2 Cri L Jour 105 (106) (All), *Gajju* v. *Emperor.*
(1905-06) 3 Low Bur Rul 161 (162) (F B), *Emperor* v. *Nga To.*
(1872-92) 1 Low Bur Rul 338 *Empress* v. *Abdul Majid.*
(1900) 13 C P L R 171 (172), *Empress* v. *Sheoram.*
(1880) 1880 Pun Re Cri No. 41 (p. 94), *Empress* v. *Radha.*
(1885) 1885 Pun Re Cri No. 9 (p. 20), *Empress* v. *Jhandu.*
(1885) 1885 Pun Re Cri No. 8 (p. 19), *Empress* v. *Sewak.*
(1871) 15 Suth W R Cri 7 (7), *Empress* v. *Bunda Ali.*
(1892) 6 C P L R 36 (37), *Empress* v. *Padam Singh.*
(1893-1900) 1893 1900 Low Bur Rul 310, *Empress* v. *Nga Lu Gyi.*
(1871) 15 Suth W R Cr 52 (52), *Empress* v. *Nuzee Nushyo.*

1. (1922) 1922 All 245 (246) : 44 All 538 : 23 Cri L Jour 274, *Badri Prasad* v. *Emperor.*
2. (1900-1902) 1 Low Bur Rul 362 (363), *Crown* v. *Po Maung.*

Sec. 391 Note 5

It has been held that it is imperative that a sentence of whipping in addition to imprisonment should be carried out immediately on the expiry of the fifteen days from the date on which it was passed unless an appeal be made within that time.[1] It cannot be postponed till after the term of imprisonment in addition to which whipping was given, has expired.[2] Indeed it is illegal to order a sentence of whipping to be inflicted on the prisoner at the time of his release from the jail.[3] There is no provision of law under which an accused who has been released after having undergone his sentence of imprisonment, could be called back to undergo the sentence of whipping.[4] Thus where a Magistrate ordered that a prisoner should be brought before him at the expiration of the term of imprisonment and the sentence of whipping should then be carried out, the High Court set aside the sentence of whipping.[5] In such cases the sentence of whipping should be cancelled as having become inoperative.[6]

Where again an accused is sentenced on three separate convictions, first to a term of imprisonment, second to a certain number of lashes to be inflicted at the expiry of the period of imprisonment, and third to a term of imprisonment after whipping, the postponement of whipping to the expiry of the term of imprisonment under the first conviction is illegal and hence the second term of conviction will begin on the expiry of the first.[7]

There seems to be some conflict of opinion on the question whether a sentence of whipping not inflicted within the statutory period or within the period prescribed therefor, becomes inoperative. The majority of cases hold that the sentence becomes inoperative and cannot be inflicted,[8] while a few hold the contrary opinion.[9]

While Magistrates have no power to postpone the execution of sentence of whipping they are also not entitled to inflict it before the expiry of the period specified in the Section. Thus where a Magistrate of the First Class convicted an accused of theft and sentenced him to one month's rigorous im-

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Note 5.

1. (1878) 1878 Pun Re Cri No. 31 (p. 74), *Crown* v. *Ranja.*
   (1880) 1880 Pun Re Cri No. 34 (page 82), *Empress* v. *Man.*
   (1866) 1866 Pun Re Cri No. 54 (page 62), *Crown* v. *Goolab.*
2. (1872) Ratanlal 68 *Reg.* v. *Sheikh Husen.*
   (1880) 1880 Pun Re Cri No. 34 (page 82), *Empress* v. *Man.*
   (1893-1900) 1893-1900 Low Bur Rul 78, *Empress* v. *Nga Tun Tha.*
   (1902) 4 Bom L R 929 (930), *Emperor* v. *Jagannath Sagar.*
   (1934) 1934 Pat 551 (551) : 1934 Cri Cas 1195 : 36 Cri L Jour 100, *Emperor* v. *Rashbehari Singh.*
3. (1866) 1866 Pun Re Cri No. 54 (page 62), *Crown* v. *Goolab.*
   (1878) 1878 Pun Re Cri No. 31 (page 74), *Crown* v. *Ranja.*
   (1880) 1880 Pun Re Cri No. 34 (page 82), *Empress* v. *Man.*
4. (1879) 2 Weir 449 (449), *High Court Proceedings, 9th January* 1879.
   (1881) 1881 All W N 138 (138), *Empress* v. *Jiwa Ram.*
5. (1866) 1866 Pun Re Cri No. 54 (page 62), *Crown* v *Goolab.*
6. (1873) 20 Suth W R Cr 72 (73), *Hurchandra Kulal* v. *Jafer Ali.*
7. (1871-74) 7 Mad H C R App 29*n* (29*n*), *High Court Proceedings, 7th November* 1873.
   (1886) Ratanlal 300, *Empress* v. *Sagram.* [See also (1895) Ratanlal 803, *Empress* v. *Habla Sola.*]
8. (1881) 1 Weir 931 (932), *High Court Proceedings, 11th August* 1881.
   (1871) 6 Mad H C R App 38*n* (38*n*), *High Court Proceedings, 13th November* 1871.
   (1880) 1880 Pun Re Cri No. 34 (page 82), *Empress* v. *Man.*
   (1878) 1878 Pun Re Cri No. 31 (page 78), *Crown* v *Ranja.*
   (1866) 1866 Pun Re Cri No. 54 (page 61), *Crown* v. *Goolab.*
9. (1878) Ratanlal 136 (136), *Empress* v. *Mohadhu.*

Sec. 391 Notes 5—7

prisonment and 20 lashes, the District Magistrate took the case in revision and holding that whipping cannot be added to imprisonment, directed the accused to be whipped and submitted the case for the orders of the Chief Court. The Chief Court held that the sentence being an appealable one to the Court of Session, the District Magistrate acted illegally in taking up the case in revision and directing the accused to be whipped, before the expiry of the period allowed for appeal.[10]

Where, however, an accused is convicted of two offences for one of which he is sentenced to imprisonment and for the other to whipping, it is not open to the Magistrate to postpone the sentence of whipping on the ground that the accused has preferred an appeal against the sentence of imprisonment.[11] Before Section 390 was amended, it was not illegal to execute the sentence immediately when it was given as a separate sentence for a separate offence and not in addition to imprisonment.[12]

6. Double sentence of whipping.

Under the Whipping Act of 1864 it was held that "when a person who has been previously convicted within the meaning of the Section 4 of that Act, is convicted at one time of two or more offences, he may be punished with one but only one whipping in addition to any other punishment to which under Section 46 of the Code of Criminal Procedure he may be liable."[1] The said Section 4 has been repealed, but it is submitted that under this Section also it would not be legal to pass a double sentence of whipping. Thus where an accused was convicted under Sections 454 and 380, I. P. C., and was sentenced to two years' rigorous imprisonment and fifteen stripes for each of the offences, the High Court doubted if this double sentence of whipping was legal and altered the sentence to fifteen stripes for both the offences.[2]

7. Whipping in addition to imprisonment for less than three months—Sub-section 3.

When the term of imprisonment to which the accused is sentenced is less than three months, it is illegal to award the sentence of whipping in addition to the imprisonment.[1]

Sec. 392

392.* (1) In the case of a person of or over sixteen years

* (Code of 1882—S. 392.)

392. In the case of a person of or over sixteen years of age, whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs ; and, in the case of a person under sixteen years of age, it shall be inflicted in the way of school-discipline, with a light rattan.

Mode of inflicting punishment.

Limit of number of stripes.

In no case shall such punishment exceed thirty stripes.

10. (1902) 1902 Pun L R Cri No. 45, (page 172), *Crown* v. *Rura.*
11. (1902) 4 Bom L R 436, *Emperor* v. *Jaiwant.*
12. (1878) 2 Weir 446 (447), *High Court Proceedings, 28th November* 1878.

Note 6.

1. (1868) 9 Suth W R Cr Cir 3 (4).
   (1870) 14 Suth W R Cri 7 (7), *Ruttan Bewa* v. *Buhur.*
   (1893-1900) 1893-1900 Low Bur Rul 582, *Empress* v. *Nga Paw Dun.*
   [See also (1891) 5 C P L R Cri 23 (23), *Empress* v. *Ratiram.*]
2. (1898) Ratanlal 955, *Empress* v. *Dagdu Janaji.*

Note 7.

1. (1902) 2 Weir 448 (448), *In re Subbian Chetty.*
   (1902) 4 Bom L R 436, *Emperor* v. *Jaiwant.*
   (1900) 2 Bom L R 54 (55), *Empress* v. *Bhica Trimbak.*

Mode of inflicting punishment.

of age, whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs; and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instruments, as the Local Government directs.

Limit of number of stripes.

(2) In no case shall such punishment exceed thirty stripes[1] and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.

1. [These words were added by Section 7 of the Whipping Act, 1909 (Act IV of 1909).]

Synopsis.

Other Topics.

Directions by various Local Governments. See Notes 2 and 3.

Double whipping. See Note 4, Pt. 1.

Stripes on hand—Illegal. See Note 2, Pt. 1.

1. Legislative changes.

Section 311 of the Code of 1872 corresponds to this Section. Under that Section, punishment of whipping was to be inflicted in the case of a person over 16 years of age, "with such instrument, in such mode and on such part of the person as the Local Government directs" and in the case of a person under 16 years of age, it was to be inflicted "in the way of school discipline with a light rattan." It also limited the number of lashes to one hundred and fifty, if whipping was inflicted with the cat-of-nine-tails and to thirty if it was inflicted with a rattan.

Section 392 of the Code of 1882 substituted the words "with a light rattan not less than half an inch in diameter," for the words "with such instrument" and further enacted that in no case shall the punishment of whipping exceed thirty stripes. Section 392 of the present Code has amended the portion relating to persons under 16 years of age from "in the way of school discipline with a light rattan" into "in such mode and on such part of the person and

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(Code of 1872—S. 311, Paras. 1 and 2.)

Mode of inflicting the punishment.

311. In the case of a person of or over sixteen years of age the punishment of whipping shall be inflicted with such instrument, in such mode, and on such part of the person, as the Local Government directs; and, in the case of a person under sixteen years of age, it shall be inflicted in the way of school-discipline with a light rattan.

In no case, if the cat-of-nine-tails be the instrument employed, shall the punishment of whipping exceed one hundred and fifty lashes, or, if the rattan be employed, shall the punishment exceed thirty stripes.

* * * * *

(Code of 1861—Nil.)

Sec. 392 Notes 1—2

with such instrument as the Local Government directs" and Section 7 of Act IV of 1909 has added "and in the case of a person under 16 years of age, it shall not exceed fifteen stripes" to sub-section 2.

2. Mode of inflicting punishment on persons of or over 16 years of age.

The mode of inflicting the said punishment and the part of the body on which it is to be inflicted, have been left to be determined by the Local Government. The various Local Governments have provided as follows in this behalf:—

Bengal:—The punishment of whipping should, in the case of an adult, be inflicted on the breech, with a rattan not exceeding half an inch in diameter; and on all occasions, precautions should be taken to prevent the blows from falling on any other part of the person. (Wilkins, 148.)

Bombay:—In the case of a person of sixteen years of age, whipping shall, when inflicted in private, that is, within the precincts of prison, be inflicted on the bare buttocks, and when inflicted in public, that is without the precincts of prison, across the bare-shoulders. (Bom. G. R. No. 608 of 1897.)

Madras:—In the case of a person of, or over sixteen years of age, the whipping is to be inflicted on the posterior and care is to be taken that the person undergoing the punishment is tied up to a triangle, or his immobility under punishment is otherwise secured—in order to preclude the possibility of the rattan falling on any other part of the body (Gaz. Not. No. 4, 1st Jan. 1883).

A thin cloth soaked in antiseptic should be spread over prisoner's buttocks.

Punjab:— (1) It is to be inflicted on the buttocks with a rattan not more than four feet in length, and one and a half inches in circumference, not in public or in front of Court-houses, but always within some walled enclosure and in the presence of a Magistrate or the Superintendent of the jail, and when practicable, of a Medical Officer. (Punjab Bk. Cir. Vol. 2, S. LV, p. 269.) (2). The triangle should be boarded on the side next to the offender, so as to prevent the possibility of the rattan curling round and touching the front or any other part of his person. (3). The punishment is never to be inflicted in public, or in front of cutchery, but always within some walled enclosure, either the jail, lockup, treasury or any other convenient place, and in presence of a Magistrate, and, when practicable, of a Medical officer. Superintendents of jails have been invested by the Local Government with powers of a Magistrate of third class, with a view to sentences of whipping being executed in their presence. (Smyth 115. Gov. Beng., Feb. 29, 1864.)

United Provinces of Agra and Oudh:—The whipping shall be inflicted on the buttocks with a light rattan half an inch in diameter. (G. O. No. 1290, dated 12th May 1898.)

Central Provinces:—In the case of a person of, or over sixteen years of age, the rattan shall be applied to the bare posterior,

the offender being tied to a triangle and a leather apron fastened round his waist. (C. P. Gaz. Not. No. 20, 4th January 1899. *See also Emperor* v. *Gulab Mussalman*, 14 C. P. L. R. 64.)

Burma:—The punishment of whipping shall be inflicted with a light rattan on the breech in the way of school discipline. (Burma Gaz. Not. No. 193, dated 1st July 1898, Part I. p. 307.)

It has been held illegal to inflict stripes on the hand.[1]

3. Mode of inflicting punishment on persons under 16 years of age.

Under the Codes of 1872 and 1882, as seen in para. 1 above, the whipping was to be inflicted "in the way of school discipline, in the case of persons under 16 years of age." This phrase "in the way of school discipline" was held to connote the degree of severity with which the punishment was to be inflicted.[1] Now that phrase has been omitted and the Local Government is empowered to prescribe the mode of punishment.[2] The several Local Governments have provided as follows:—

Bombay:—In the case of a person under sixteen years of age, it shall be inflicted in private with a light rattan across the bare buttocks.

Madras:—In the case of juvenile offenders, a lighter cane than that employed for persons of, or above sixteen years of age, shall be employed. (G. O. No. 59, Judicial, dated 10th January 1898.)

Punjab:—In the case of a person under sixteen years of age, it shall be inflicted on the buttocks in the way of school discipline with a rattan not more than half an inch in diameter. (Not. No. 677, dated 16th May 1899) (Punjab Gazette, 1899, Part 1, p 314.)

Central Provinces:—The whipping shall be inflicted on the bare-buttocks or in the case of a boy under twelve, on the hands, at the discretion of the Magistrate. The instrument used shall be a rattan lighter than that used for adults; and while the whipping is being administered, the prisoner shall be held, but not tied to a triangle or in any other convenient way, as the Magistrate or officer present may think fit.

4. Maximum sentence of whipping.

All the Codes have limited the maximum number of stripes to be inflicted with a rattan, to thirty. It is enacted that "in no case" shall this be exceeded. The question arises, if, at the same time an accused is convicted of more than one offence, he can be sentenced to more than one sentence of whipping. Referring to Section 46 of the Criminal Procedure Code (in force at that time) Peacock, C. J., said:

"The Code of Criminal Procedure did not intend to allow two punishments of whipping to be inflicted at the same time, for two offences of which an offender might be convicted, at the same time."

His Lordship said in reference to the Whipping Act VI of 1864:

Section 392—Note 2.

1. (1892) 5 C P L R 31 (31), *Empress* v. *Sada Gauda.*

Note 3.

1. (1892) 5 C P L R 31 (31), *Empress* v. *Sada Gauda.*
2. (1901) 14 C P L R 64 (64), *Emperor* v.

Sec. 392 Note 4

"I do not believe that it was intended to sanction such a cruelty as to allow a double flogging to be inflicted upon a prisoner convicted of two offences, at the same time."[1]

The words "in no case" in the Codes of 1872, 1882 and 1898 clearly show that at one time not more than thirty stripes should be inflicted and it has been so held[2] under these Codes.

Sec. 393

Not to be executed by instalments. Exemptions.

393.* No sentence of whipping shall be executed by instalments: and none of the following persons shall be punishable with whipping, namely—

(a) females;

(b) males sentenced to death or to transportation or to penal servitude, or to imprisonment for more than five years;

(c) males whom the Court considers to be more than forty-five years of age.

Synopsis.

Other Topics.

Burma Whipping Act 8 of 1927. See Note 2.
Convictions in several cases—Aggregate sentence See Note 2 Pt. 7.
No enhancement of whipping after execution. See Note 1, Pts. 1 and 2.
Punishable if distinguishable from "sentenced." See Note 2, Pts. 4 and 5.
Section 7 of Act 6 of 1864. See Note 2.
"Sentenced" and not "already sentenced." See Note 2, Pts. 6 and 7.

1. Execution of whipping by instalments.

The sentence of whipping is not to be executed by instalments.[1] Therefore, no enhancement of the sentence of whipping can be made in appeal after it has been executed, as it would amount to executing the sentence by instalments. Thus, where, an accused person convicted under Section 382, Penal Code, and sentenced to whipping was whipped and an application was subsequently made to the High Court for enhancement of the sentence, this Section

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* **(Code of 1882—S. 393—Same.)**

(Code of 1872—S. 312, Para. 3.)

312.
Not to be executed by instalments.

No sentence of whipping shall be executed by instalments.

(Code of 1861—Nil.)

Gulab Mussalman.

Note 4.

1. (1868) 9 Suth W R Cri 41 (49, 50), *Nassir* v *Chunder.*
[See also (1870) 14 Suth W R Cri 7 (7), *Ruttun Bewa* v. *Buhur.*]
2. (1906) 4 Cri L Jour 281 (281): (1906) Upp Bur Rul 47, *Emperor* v. *Nga Po Kyan.*
(1892-96) 1 Upp Bur Rul 1, *Empress* v. *Nga Po Tin.*
(1892-96) 1 Upp Bur Rul 44, *Empress* v. *Nga Kan Sa.*
(1897-1901) 1 Upp Bur Rul 1, *Empress* v. *Nga Myat Aung.*
(1897-1901) 1 Upp Bur Rul 247, *Empress* v. *Nga Kaing.*
(1866) 1866 Pun Re Cri No. 82 Page 86 (87), *Bamjus* v. *Sookhram.*
(1898) Ratanlal 955, *Empress* v. *Dagdu Janaji.*

Section 393—Note 1.

1. (1866) 1866 Pun Re Cri No. 82, page 86 (87), *Bamjus* v. *Sookhram.*

was held to bar the awarding of any additional sentence of whipping.[2]

2. Persons exempted from being punished with whipping.

Section 7 of the Whipping Act, VI of 1864, provided as follows:

"No female shall be punished with whipping nor shall any person who may be sentenced to death, or to transportation or to penal servitude, or to imprisonment for more than five years, be punished with whipping."

This Section, has, in addition to these persons, exempted such males as the Court considers to be more than 45 years of age. Burma Whipping Act VIII of 1927 has extended the period of imprisonment from 5 to 7 years for purposes of this exemption. Thus, persons sentenced to transportation[1] or imprisonment[2] for 7 years cannot be sentenced to whipping. Nor can women or persons under sentence of death be so sentenced.[3] It is to be noted that the wording of this Section "none of the following persons shall be punishable," as compared with the words in Section 391, sub-section 3, "shall be sentenced" refers to the execution of the sentence of whipping and not to its being passed.[4] However, a sentence, the execution of which is prohibited by law, is illegal and cannot be passed.[5] The word "sentenced," it was argued, means "already sentenced" and does not refer to the sentence passed in combination with the sentence of whipping. This contention was rightly rejected[6] and it was held that the word must be understood in a general sense and if a person is sentenced for any period exceeding that fixed by the Act, whether in conviction in one case, or more than one, he cannot be punished with whipping.[7]

But in computing the maximum period of imprisonment under this Section, the period of imprisonment to which a man has already been sentenced before the commission of the offence for which the sentence of whipping is passed cannot be taken into account.[8]

394.* (1) The punishment of whipping shall not be inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

Whipping not to be inflicted if offender not in fit state of health.

* (1882—S. 394; 1872—S. 312, Paras 1 and 2; 1861—Nil.)

2. (1891) Ratanlal 537, *Empress* v. *Balu Nasir.*
(1892) 6 C P L R 36 (37): *Empress* v. *Padam Singh.*
[See also (1864) 3 Mad H C R App 1 (1) (Note), *High Court Proceedings, 25th July* 1864.]

Note 2.

1. (1876) 1 Mad 56 (56, 57), *High Court Proceedings, 19th April* 1876.
(1892-1896) 1 Upp Bur Rul 44, *Empress* v. *Nga Kan Sa.*
2. (1875) 23 Suth W R Cri 49 (49), *Queen* v. *Poranmal.*
(1874) 21 Suth W R Cri 40 (40), *Queen* v. *Esan Chunder Dey.*
(1920) 1920 Lah 364 (367): 1919 Pun Re Cri No. 30: 21 Cri L Jour 306, *Akbar* v. *Emperor.*
3. (1876) 1 Mad 56 (56), *High Court Proceedings, 19th April* 1876.
4. (1920) 1920 Lah 364 (367): 1919 Pun Re Cri No. 30: 21 Cri L Jour 306, *Akbar* v. *Emperor.*
5. (1920) 1920 Lah 364 (367): 1919 Pun Re Cri No. 30: 21 Cri L Jour 306, *Akbar* v. *Emperor.*
6. (1930) 1930 Rang 138 (139): 7 Rang 769: 1930 Cri Cas 305: 31 Cri L Jour 176, *Nga Nyi Gyi* v. *Emperor.*
7. (1930) 1930 Rang 138 (139): 7 Rang 769: 1930 Cri Cas 305: 31 Cri L Jour 176, *Nga Nyi Gyi* v. *Emperor.*
8. (1934) 1934 Rang 58 (59): 12 Rang 404: 1934 Cri Cas 375: 35 Cri L Jour 1027, *Emperor* v. *Nga Nyi Nge.*

Sec. 394 Notes 1—2

(2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

Stay of execution.

Synopsis.

Other Topics.

Custody pending revision of whipping sentence. See Note 2.
Imprisonment for default of part of whipping sentence—Illegal. See Note 2, Pt. 1.
Medical opinion of non-fitness for portion of whipping before commencement—Illegal. See Note 2, Pt. 1.
Record of whipping—Rule 287, Madras Criminal Rules of Practice. See Note 1.
Whipping stopped after a few stripes—No more stripes. See Note 1, Pt. 1.

1. Scope.

This Section enacts that the sentence of whipping shall not be inflicted on an accused person unless a medical officer certifies, or in his absence the Magistrate considers that the accused is in a fit state of health to undergo the punishment and it should be finally stopped, if, during the course of its execution, it is found that the accused is not in a fit state of health to undergo the rest of the punishment. "A man though sentenced to whipping is not to be whipped unless in a fit state to suffer that punishment. The whipping is not to be commenced if he is unfit to bear it at all, and then he is to be kept in custody till Court can revise the sentence. But, if it be commenced, it is not to be continued longer than the man is fit to bear it, and when the man has had all he can bear, (in the opinion of the medical officer), the executioner is to stay his hand, and the sentence has been fully satisfied, for, it cannot be executed by instalments."[1] It may be noted that when a sentence of whipping has been executed in the presence of the Magistrate, Rule 287 of the Madras Criminal Rules of Practice, 1931, requires the Magistrate to record the fact of such execution.

2. Certificate of the medical Officer.

The medical officer can, under sub-clause 1, certify before the sentence is inflicted, that the accused is, or is not, in a fit state of health to undergo the punishment, and, under sub-clause 2, he can certify during the execution of the sentence, that the accused cannot bear the rest of it. But, it has been held, that he is not empowered to certify before the whipping is commenced, that the accused is fit to receive only a part of the sentence. Thus, where, before the whipping was inflicted, the Medical officer certified that the accused could bear only 6 out of 20 lashes ordered to be inflicted on him, it was held that (a) the medical officer not being authorised to grant such a certificate before the execution of the sentence, it was not a valid certificate under sub-section 1, and (b) the certificate, not having been granted during execution, was not a proper certificate under sub-section 2. Hence, the Magistrate's

Section 394—Note 1.

1. (1864) 3 Mad H C R App 1 (1), *High Court Proceedings, 25th July* 1864. [See also (1877) Weir 3rd Edn. 991, *High Court Proceedings, 31st Jan.* 1877, *No.* 237.]

action in inflicting 6 out of the 20 lashes and awarding 3 months' R. I. in lieu of the 14 lashes that were not inflicted, was illegal and the imprisonment was set aside.[1] In such a case, as this, the accused should have been kept in custody with a view to revising the sentence of whipping under Section 395 below. **Sec. 395 Note 2**

395.* (1) In any case in which, under Section 394, a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months *or to a fine not exceeding five hundred rupees* which may be in addition to any other punishment to which he may have been sentenced for the same offence. **Sec. 395**

Procedure if punishment cannot be inflicted under Section 394.

(2) Nothing in this Section shall be deemed to authorize any Court to inflict imprisonment for a term *or a fine of an amount* exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

Synopsis.

Other Topics.

Absence of Magistrate—District Magistrate can act. See Note 3, Pt. 3.
Commutation of thirty stripes for twelve months' imprisonment under Section 423 —No enhancement. See Note 2, Pt. 3.
Conclusion "thirty stripes—Twelve months' imprisonment" — Wrong. See Note 2, Pt. 2.

* **(Code of 1882—S. 395**—Same as that of 1898 Code.)

(Code of 1872—S. 313.)

313. In any case in which, under Section three hundred and twelve, a sentence of whipping is, wholly or partially, prevented from being carried into execution, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either order the discharge of such offender, or sentence him, in lieu of whipping, or in lieu of so much of the sentence of whipping as was not carried out, to imprisonment for any period, which may be in addition to any other punishment to which he may have been sentenced for the same offence.

Procedure if punishment cannot be inflicted under the last Section.

Provided that the whole period of imprisonment to which such offender is sentenced shall not exceed that to which he is liable by law, or that which the said Court is competent to award.

(Code of 1861—Nil.)

Note 2.

1. (1908) 7 Cri L Jour 5 (5) : 31 Mad 84, *In re The Public Prosecutor.*

Sec. 395 Notes 1—2

Fine instead of whipping. See Note 4, Pt. 1.
No revision of illegal sentence. See Note 4, Pt. 6.
Revision of original Court after confirmation in appeal. See Note 3, Pt. 2.
Revision of whipping if maximum sentence already given. See Note 4, Pt. 5.
Whipping and imprisonment in default — Illegal. See Note 4, Pt. 7.
Whipping stopped under illegal certificate— Imprisonment illegal. See Note 2, Pt. 4.

1. Legislative changes.

Changes introduced in 1882:—

1. The words "order the discharge of the offender" in Section 313 of the Code of 1872 were substituted by the words "remit such sentence."
2. The words "to imprisonment for any period" in Section 313, were substituted by the words "to imprisonment for any period not exceeding 12 months."
3. The words "Provided that the whole period of imprisonment to which such offender is sentenced shall not exceed that to which he is liable by law, etc.," were altered into "Nothing in this Section shall be deemed to authorise any Court to inflict imprisonment for a term exceeding that to which the accused is liable by law etc."

Amendments in 1923:—

1. The words "or to a fine not exceeding five hundred rupees," were added in sub-section 1 between the words "twelve months" and "which may be, etc."
2. The words "or a fine of an amount" were added in sub-section 2 between the words "for a term" and "exceeding that..... etc."

2. Scope and object of the Section.

In cases where a sentence of whipping cannot be carried out at all, under sub-section 1 of Section 394, because, the accused is not in a fit state of health to undergo the punishment, or where it is carried out only in part, the accused not being in a state of health to undergo the rest of it[1] this Section requires the Court to keep the accused in custody with a view to revise the sentence of whipping. The sentence of whipping can be revised (a) either by remitting it or (b) by sentencing the accused to imprisonment for a term not exceeding twelve months, in lieu of whipping, or, (c) by imposing a fine not exceeding five hundred rupees. It cannot be said that by reading Section 392, sub-section 2, which fixes the maximum sentence of whipping at 30 stripes, with this Section which fixes the maximum sentence of imprisonment that can be given in lieu of whipping at 12 months, that sentences of 30 stripes and 12 months' rigorous imprisonment are of equal degree of severity.[2] But it may be taken that the legislature regarded a sentence of 12 months' imprisonment as the maximum sentence of imprisonment which could be substituted for whipping. Thus it has been held by a Full Bench of the Rangoon High Court[3]

Section 395—Note 2.

1. (1908) 7 Cri L Jour 5 (5, 6) : 31 Mad 84 (85), *In re Emperor.*
   [See also (1869) 5 Mad H C R App 1 (1), *High Court Proceedings, 25th Oct.* 1869.]
2. (1928) 1928 Rang 265 (265) : 30 Cri L Jour 328, *Kyaing Nga Hmwe, In re.* Thirty stripes not equivalent to one year's R. I.
   [See also (1871) 15 Suth W R Cri 7 (9), *Queen* v. *Bunda Ali.* 20 stripes are not equivalent to rigorous imprisonment for 3 months.]
3. (1929) 1929 Rang 177 (179) : 7 Rang 319 : 30 Cri L Jour 986 : 1929 Cri Cas 169 (FB), *Emperor* v. *Chit Pon.*
   [But see (1928) 1928 Rang 265 (265) : 30 Cri L Jour 328, *Kyaing Nga Hmwe, In re.*

that a substitute of 30 stripes for a sentence of one year's rigorous imprisonment is not an "enhancement" within the meaning of Section 423, sub-section 1 (b). It has been seen in Section 394 that a Medical Officer cannot certify before the sentence of whipping is executed that the prisoner is in a fit state of health to undergo only a portion of the sentence. If such an illegal certificate is given and in pursuance of it the sentence is partially executed, the Magistrate is not entitled under this Section to sentence the prisoner to imprisonment in lieu of the unexecuted portion of the sentence of whipping.[4]

3. Court which passed the sentence.

It is the Court that *passed the sentence of whipping* that can revise it.[1] This power to revise the sentence is not taken away by the sentence being confirmed in appeal.[2]

The words "Court which passed the sentence" do not mean the *same officer*, who passed the original sentence of whipping. The word "Court" is impersonal, and its use instead of the words "Magistrate or officer" lends support to this view. Indeed, to confine the power of revision to the particular officer who passed the sentence, would in many cases, make the Section unworkable. It certainly cannot be the intention of the Legislature, that, if at the time the sentence of whipping is to be revised under this Section, the particular officer who passed the sentence of whipping is not available, he being either dead or transferred, the accused should escape the commuted sentence under this Section. It has consequently been held that when the Magistrate who passed the sentence of whipping is absent, the District Magistrate can be held to be "the Court which passed the sentence."[3]

4. Power of revision of sentence.

As seen already the sentence may either be remitted or imprisonment or fine inflicted in lieu of it. Before the amendment of this Section in 1923, it has been held that a sentence of fine cannot be passed in lieu of whipping.[1] Since the amendment, those cases are not good law and now fine not exceeding Rs. 500 can be levied.

The Court can remit the sentence altogether even though it is competent to inflict a term of imprisonment in lieu of whipping.[2] The word "imprisonment" means, a substantive sentence of imprisonment and not imprisonment in default of payment of fine.[3] Sub-section 2 enacts that where an accused is sentenced to whipping and imprisonment and where in lieu of such whipping, imprisonment is inflicted, the total term of imprisonment should not exceed that which the Court is competent to inflict.[4] Therefore, where imprisonment for the maximum period is inflicted in addition to whipping, the

4. (1908) 7 Cri L Jour 5 (6) : 31 Mad 84, *Emperor, In re.*

Note 3.

1. (1889) 1889 Pun Re Cri No. 10, page 50 (53) *Empress* v. *Chetu.*
2. (1889) 1889 Pun Re Cri No. 10 page 50 (53), *Empress* v. *Chetu.*
3. (1901) 1901 Pun Re Cri No. 33 page 96 (98), *Chhajju* v. *Emperor.*

Note 4.

1. (1889) 11 All 308 (309, 310), *Empress* v. *Sheodin.*
   (1892-1896) 1 Upp Bur Rul 45, *Empress* v. *Nga E Aung.*
   (1900-02) 1 Low Bur Rul 202 (202), *Crown* v. *Nga Po Thit.*
   (1909) 10 Cri L Jour 120 (121) : 5 Low Bur Rul 22, *Emperor* v. *Tha Kin.*
2. (1900-02) 1 Low Bur Rul 202 (202), *Crown* v. *Nga Po Thit.*
3. (1889) 11 All 308 (310). *Queen* v. *Sheodin.*
4. (1899) 21 All 25 (26), *Queen* v. *Ram Baran Singh.*
   (1901) 1901 Pun Re Cri No. 11 page 32 (33), *Crown* v. *Barkat Ali.*

Sec. 395 Notes 4—5

entire sentence of whipping should be remitted; it cannot be inflicted, for any further sentence of imprisonment will be beyond the competency of the Court.[5]

Where the sentence of whipping that has been passed is illegal as for example, on a person above forty-five years of age, the Magistrate is not competent to revise such illegal sentence.[6] The illegal sentence should be reported to the High Court for orders. But, where at the time the sentence of whipping is passed, it is ordered that if the sentence cannot be executed, the accused shall undergo imprisonment, it has been held, that the conditional sentence of imprisonment is illegal and the Magistrate should act under this Section.[7]

5. Solitary confinement.

When imprisonment in lieu of whipping is awarded, solitary confinement may be ordered, though it is not specifically mentioned in the Section.[1]

Sec. 396

Execution of sentences on escaped convicts.

396.* (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

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* **(Code of 1882—S. 396**—The word "kind" was substituted for the word "quality;" otherwise the Section was the same.)

(Code of 1872—S. 316.)

Currency of sentence on escaped convicts.

316. When sentence is passed on an escaped convict, for such escape or for any other offence, the Court may direct the sentence to take effect immediately, or after such convict has suffered imprisonment or transportation, as the case may be, for a further period, equal to that which remained unexpired of his former sentence at the time of his escape.

(Code of 1861—S. 47—Same as that of 1872 Code.)

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5. (1879) 2 Weir 449 (449), *High Court Proceedings, 9th January* 1879, *No.* 14.
(1901) 1901 Pun Re Cri No. 11, page 32 (33), *Crown* v. *Barkat Ali.*

6. (1893-1900) 1893-1900 Low Bur Rul 241, *Queen* v. *Nga Pan Bon.*

7. (1893-1900) 1893-1900 Low Bur Rul 631, *Queen* v. *Nga Cheen.*

Note 5.

1. (1899) 1899 Pun Re Cri No. 14. page 38 (39), *Empress* v. *Gaman.*

Explanation.—For the purposes of this Section—

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment;

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

Synopsis.

Other Topics.

Custody during trial—Not a convict. See Note 2.

Criminal Circular Order No. 9 of Calcutta High Court. See Note 4.

Detention for security — Not imprisonment—Conviction under Section 224, I. P. C., Illegal. See Note 2, Pt. 1.

Imprisonment under Section 123 in default of security is sentence. See Note 2, Pt. 2.

Place of trial for escaped convict. See Note 2, Pt. 3.

Sentence overlooked — Execution after discovery. See Note 4, Pt. 4.

Sentence under Section 224, I. P. C., is additional and Section applies. See Note 3, Pt. 1.

Sections 397 and 123, Criminal P. C. See Note 2, F-N (2).

1. Legislative changes.

Section 316 of Act X of 1872 left it to the discretion of the Court to direct the sentence passed on an escaped convict to take effect immediately or after the expiration of the period of the imprisonment or transportation, which the convict was undergoing at the time of his escape. But Section 396 of the Code of 1882 and the present Section enact, (a) that the sentence of death, fine or whipping passed on an escaped convict shall be executed immediately and (b) the sentence of imprisonment, penal servitude, or transportation shall be deferred or executed immediately, according as the new sentence is lighter or severer in quality than the sentence which the convict was undergoing at the time of his escape.

2. Escaped convict.

The word "convict" shows that the case of a person who escapes from custody *while under trial* is excluded from the operation of the Section. There is a difference of opinion on the question if a person detained in custody for the purpose of giving security for good behaviour is not in custody for an offence though his detention may be lawful. Some cases have held that it is not a "sentence" of imprisonment though the detention is lawful, and that his conviction under Section 224, Penal Code, is illegal.[1] Other cases have held that the word "sentence" applies also to an order of imprisonment passed under Section 123, in default of furnishing security.[2] It is submitted that the former

Section 396—Note 2.

1. (1867) 3 Mad H C R App 23 (23), *High Court Proceedings, 19th January* 1867.
(1874) 7 Mad H C R App 41 (41), *High Court Proceedings, 28th October* 1874.
(1903-04) 2 Low Bur Rul 72 (75), *Emperor* v. *Nga Po Thin.*

2. (1895) Ratanlal 774, *Queen* v. *Pandu Khandu.*
(1904) 1 Cri L Jour 1114 (1114) (Bom), *Emperor* v. *Durga Bahirav.*
(1912) 13 Cr L Jour 849 (849): 37 Bom 178,

Sec. 396 Notes 2—4

view is correct having regard to the use of the word *convict*. The place of trial under Section 224 for an escaped convict is the place from where he escaped. Trial and conviction by a Magistrate of another District will be quashed.[3]

3. Sentence.

The punishment under Section 224, Penal Code, for escaping from lawful custody is to be in addition to the original sentence and the Court in passing such sentence must comply with the provisions of this Section.[1]

4. Execution of sentence.

As far as the sentence of imprisonment, transportation or penal servitude is concerned, the principle of this Section is, that the severer in kind of the two sentences shall take effect immediately and the lighter deferred. Thus when a life-convict under sentence of transportation was convicted under Section 224 of the Penal Code, and sentenced to four months' rigorous imprisonment, it was held that it was illegal to give priority to the sentence of rigorous imprisonment as the transportation is a severer punishment than imprisonment.[1] Similarly where an accused under sentence of transportation for 7 years escaped from where he was confined before transportation and was convicted and sentenced to two years' rigorous imprisonment, the latter punishment was directed to take effect after the period of transportation.[2]

In the case of a sentence of death, fine, or whipping, this enacts that it shall be executed immediately. When a person who escaped from custody while under sentence of death was convicted under Section 224, Penal Code, the High Court directed the original sentence of death to be executed immediately.[3]

Criminal Circular Order No. 9 dated the 15th July 1873 of the Calcutta High Court, required the Sessions Judges and the Magistrates in Bengal to carefully comply with the provisions of Section 316 of the Code of 1872 and to specify in the warrant, the date from which the sentence is to take effect, whether at once or after the lapse of a period equivalent to the portion of the prisoner's original sentence which remained unexpired at the time of his escape, the date on which the original sentence, of which the currency was interrupted by the escape, being clearly shown. This circular has now become obsolete as the present Section makes statutory provision as to the execution of the two sentences.

Where an accused was sentenced to 3 months' rigorous imprisonment, and a certain fine or in default to 20 days' rigorous imprisonment, the substantive term of imprisonment was overlooked through a mistake in the warrant of commitment to the jail, and he served only the 20 days' imprisonment and was released. The error was then discovered and five days after his release

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Emporor v. *Vishnu Balkrishna Ram.* Case under Section 397.
[See also (1908) 8 Cr L Jour 402 (402): 31 Mad 515 (517), *In re Joghi Kannigan.* Case under S. 397.]

3. (1862-1865) 1 Bom H C R Crown Cas 139 (139), *Reg* v. *Dossa Sera.*

Note 3.

1. (1882) 1 Weir 203 (204), *In re Chinna Madakudamban.*
(1867) 8 Suth W R Cr 85 (86), *Queen* v. *Dhoonda Bhooya.*

Note 4.

1. (1898) Ratanlal 965, *Queen* v. *Mahadu Nagu.*
2. (1912) 13 Cri L Jour 54 (55): 13 Ind Cas 390 (391), (Rang) *Nga Po Chein* v. *Emperor.*
3. (1882) 1882 All W N 164 (164), *Empress* v. *Aman.*
(1873) 20 Suth W R Cri Cir No. 9, (p. 6).

he was re-arrested and sent back to the jail to undergo the substantive term of imprisonment, it being directed that the imprisonment should begin on the day of re-arrest. It was held that the order was a legal one.[4] Sec. 396 Note 4

397.* When a person already undergoing a sentence of imprisonment, penal servitude or transportation, is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced, *unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence :* Sec. 397

Sentence on offender already sentenced for another offence.

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced :

Provided, further, that where a person who has been sentenced to imprisonment by an order under Section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

Synopsis.

	Note No.		Note No.
Legislative changes.	1	Detention in civil prison, if "sentence of imprisonment."	6
Several sentences—Execution of.	2	Effect of reversal of one of two sentences in appeal.	7
"Unless the Court directs . . . . . concurrently with the previous sentence."	3	Transportation—First proviso.	8
"Already undergoing a sentence of imprisonment," etc.	4	Sentence cannot be ante-dated.	9
Order for imprisonment under Section 123—Subsequent sentence for offence—Second proviso.	5	Order as to commencement of sentence is not a judgment.	10
		Power of High Court to pass concurrent sentences.	11
		Appeal.	12

* (Code of 1882—S. 397—Same as that of 1898 Code.)

(Code of 1872—S. 317, Paras. 1 and 2.)

Sentence on offender already sentenced for another offence.

317. When sentence is passed on a person already under sentence of imprisonment or transportation, and the sentence is for imprisonment or transportation, the Court shall direct that such imprisonment or transportation shall commence at the expiration of the imprisonment or transportation to which such person has been previously sentenced, or, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction be for transportation, the Court may direct that the sentence shall commence immediately or at the expiration of the imprisonment to which such person has been previously sentenced.

(Code of 1861—S. 48—See Note 2, *supra*.)

4. (1897-1901) 1 Upp Bur Rul 89, *Emperor* v. *Ngwe Gaing*.

Sec. 397 Notes 1—2

Other Topics.

Compared with Section 35. See Note 2, Pt. 3.
Ignorance of imprisonment and subsequent discovery. See Note 8, Pt. 3.
Imprisonment in foreign territory. See Note 4, Pt. 4.
No order as to transportation during imprisonment—Effect. See Note 8, Pt. 2.
No transportation in default of fine. See Note 8, Pt. 5.
Order as to commencement of sentences — Subsequent to delivery of judgment — Legal. See Note 10, Pt. 1.
Order under Section 123 subsequent to sentence for another offence. See Note 5, Pts. 5a and 6.
Section 48 of Code of 1861. See Note 2, F-N (3); Note 3, F-N (1).
Section 234. See Note 4, F-N (1a).
Section 64, I. P. C. See Note 4, Pt. 7.
Security given under Section 108—Withdrawn after conviction for another offence — Effect. See Note 4, Pt. 3.
Sentence of transportation for a second time. See Note 8, Pt. 4.
Sentences to be executed immediately. See Note 2, Pt. 1.
Several sentences same day. See Note 4, Pts. 1, 2 and 1a.
Subsequent sentence for offence committed after order under Section 123. See Note 5, Pt. 5.

1. Legislative changes.

Changes introduced in 1872:—

There was no provision in the Code of 1861 as to how a sentence of transportation on an offender already undergoing a sentence of *transportation*, was to take effect. This was provided for in the Code of 1872, but in other respects there was no difference between the two codes.

Changes introduced in 1882:—

1. The Code of 1872 referred only to sentences of *imprisonment* and *transportation*. The sentence of *penal servitude* was also added in 1882.

2. The proviso to Section 317 of the Code of 1872 was enacted as a separate Section in 1882, namely Section 398.

Changes introduced in 1898:—

There were no changes introduced in 1898.

Changes introduced in 1923:—

1. The words "unless .....previous sentence" were newly added. *See* Note 3.

2. The second proviso was newly added—*See* Note 5.

2. Several sentences—Execution of.

The general principle is that sentences should take effect immediately on conviction and cannot be postponed.[1] In cases, however, where *several sentences* are passed against the same person, the Code has enacted a different rule, namely, that such sentences should run consecutively, the one *after the expiration* of the other, unless the Court *directs* that they should run concurrently.[2] Section 35, *ante*, enacts this rule, where a person is convicted at *one trial* of several offences and several sentences are given. This Section enacts the rule, where a person *already undergoing a sentence* is sentenced to imprisonment etc.[3]

Section 397—Note 2.

1. (1869) 12 Suth W R Cr 47 (48), *Kishen Soonder Bhuttacharjee, In the matter of.*
2. (1864) 1 Suth W R Cr Cir 2 (2), *Criminal Circular No.* 16 *of* 20*th August* 1864.
(1878) Ratanlal 132, *Dharwar District Magistrate's Letter No.* 682.
(1920) 1920 All 211 (211), 21 Cri L Jour 398, *Emperor* v. *Bhikhi.*
(1928) 1928 Oudh 507 (508): 30 Cri L Jour 473, *Hazari Beria* v. *Emperor.*
[See also (1925) 1925 Oudh 374 (376): 27 Oudh Cas 385: 26 Cri L Jour 1412, *Murli Brahman* v. *King-Emperor.*]
3. (1910) 11 Cri L Jour 679 (680): 8 Ind Cas 550 (Lah), *Sheo Narain* v. *Emperor.*
[See also (1870) 3 Beng L R App 50 (51), *Kishen Soonder Bhuttacharjee, In the matter of.* S. 48 of the Code of 1861 was held to be an exception to the rule that sentences begin to run from the moment they are passed.]

3. "Unless the Court directs . . . . . concurrently with the previous sentence."

Before the amendment of the Code in 1923, Section 35 enabled a Magistrate, in a case where several sentences were passed at *one trial*, to order that the punishments shall run concurrently.[1a] But there was no such provision (except in one particular specified) in this Section, and it was consequently held in cases not falling within Section 35 that the Court had no power to order that the sentences should run concurrently.[1] The addition of the words "unless the Court directs that the subsequent sentences shall run concurrently with the previous sentence" by the Amendment of 1923, now makes it clear that such orders are competent.[2]

4. "Already undergoing a sentence of imprisonment," etc.

A is sentenced *on the same day* to two separate terms of imprisonment on two separate convictions. Can *A* be said at the moment the second sentence is passed, to be *undergoing a sentence of imprisonment* in respect of the first sentence? It was held by the High Court of Allahabad, in a case arising before the Amendment of 1923, that he cannot, the reason being that a person cannot be said to undergo a sentence of imprisonment until he is *actually put in jail.*[1] It was, however, held in the same case following the undermentioned case[1a] of the Bombay High Court that where several sentences were passed on the same day, they might be considered to have been passed at *one trial* within the meaning of Section 35 and that therefore, the Court could order the sentences to run concurrently. The High Courts of Madras and Rangoon and the Judicial Commissioner's Court of Nagpur have held on the other hand that a person

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Note 3.

1a (1869) Ratanlal 19, *Reg.* v. *Ramachandra.* Court may direct that they should run concurrently.

1. (1869) Ratanlal 18, *Khandesh Sessions Judge's Letter No.* 815 *of* 1869. Case under S. 48 of the Code of 1861.
(1921) 1921 All 126 (127): 22 Cri L Jour 520, *Harakh Narain* v. *Emperor.*
(1888) Ratanlal 391, *Empress* v. *Hari.*
(1873) 20 Suth W R Cr 70 (70), *Queen* v. *Sobrai Gowallah.*
[See also (1894) 1894 Pun Re Cr No. 12, page 38 (39), *Muzaffar* v. *Empress.*
(1902) 4 Bom L R 876, *Emperor* v. *Tukaram Hari.*
(1897) 20 All 1 (1, 2), *Empress* v. *Ishri.*
(1920) 1920 All 211 (211): 21 Cri L Jour 398, *Emperor* v. *Bhikhi.*
(1900) 2 Bom L R 111 (112), *Queen-Empress* v. *Bhagwandas Baldas.*
(1902) 15 C P L R 57 (57), *Emperor* v. *Buddhu.*
(1912) 13 Cri L Jour 3 (3): 13 Ind Cas 109 (Lah), *Emperor* v. *Ganda Singh.*
(1908) 7 Cri L Jour 445 (445): 4 Low Bur Rul 147, *Emperor* v. *San E.*
(1903) 1903 Upp Bur Rul 19, *Nga Tok Gyi* v. *Emperor.*
(1909) 10 Cri L Jour 236 (237): 2 Sind L R 23, *Imperator* v. *Khuda Bux.*
(1886) Ratanlal 289, *Sagram Nath, In re.*]
[See also (1891) Ratanlal 552, *Queen-Empress* v. *Mahomed.*
(1912) 13 Cri L Jour 466 (467): 15 Ind Cas 306 (Mad), *Advocate-General* v. *Govindaswamy.*
(1917) 1917 Cal 416 (417): 18 Cri L Jour 410, *Kamal Mandal* v. *King-Emperor.*
(1913) 14 Cri L Jour 240 (240): 19 Ind Cas 336 (All), *Makbul Hussain* v. *Emperor.*
(1913) 14 Cri L Jour 388 (388): 20 Ind Cas 212 (Rang), *Nga Pya* v. *Emperor.*
(1923) 1923 Rang 197 (198): 1 Rang 306: 25 Cri L Jour 85, *Emperor* v. *Nga Sein Po.*]

2. (1924) 1924 Rang 307 (308): 25 Cri L Jour 1310, *Emperor* v. *Nga Po Thaung.*
(1926) 1926 Nag 426 (429): 27 Cri L Jour 807, *Mahadeo* v. *King-Emperor.*
[But see (1925) 1925 Lah 334 (335): 26 Cri L Jour 731, *Batan Singh* v. *Emperor.* The decision, it is submitted, is not correct. The Amendment of 1923 was apparently not brought to the notice of the Court.]

Note 4.

1. (1918) 1918 All 303 (303): 19 Cri L Jour 207, *Makhan* v. *Emperor.*

1a (1911) 12 Cri L Jour 241 (2) (241): 10 Ind Cas 769 (769) (Bom), *Emperor* v. *Mahomed Isaf Habib.* In this case the

Sec. 397 Notes 4—5

sentenced to imprisonment must be deemed to be undergoing that imprisonment within the meaning of this Section *from the moment the sentence is passed* and that therefore this Section will apply.[2]

A person who has *furnished security* under Section 108 of the Code and is subsequently convicted under Section 500 of the Penal Code, cannot be said to be undergoing any sentence of imprisonment at the time the sentence under Section 500, is passed though, after such conviction the accused withdraws his security and is consequently committed to prison.[3]

A person undergoing a sentence of imprisonment in a *foreign territory* will, for the purposes of this Section, be considered to be "undergoing the sentence" and consequently, a Magistrate is competent to direct that a sentence passed by him should commence after the expiration of the sentence which the accused is undergoing in the foreign territory.[4]

5. Order for imprisonment under Section 123—Subsequent sentence for offence—Second proviso.

Before the addition of the second proviso to this Section in 1923, there was a difference of opinion as to whether an order for commitment to prison under Section 123 in default of furnishing security was a *sentence of imprisonment* within the meaning of this Section. On the one hand, it was held that it was not[1] and that the subsequent sentence could not, therefore, under this Section be postponed till after the expiry of the imprisonment ordered under Section 123.[2] The High Court of Allahabad held, on the

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offences could have been joined together under S. 234 of the Code.

2. (1891) 2 Weir 451 (451), *Muthusami Goundan, In re.* Case before 1923—Sentences held only to run *consecutively.*
   (1924) 1924 Rang 307 (308): 25 Cri L Jour 1310, *Emperor* v. *Nga Po Thaung.* Case under the amended Section—Sentences could be directed to run concurrently.
   (1926) 1926 Nag 426 (429): 27 Cri L Jour 807, *Mahadeo* v. *King-Emperor.* (Do.)
   [See (1935) 1935 Rang 456 (458): 1935 Cri Cas 1213, *N. N. Burjorjee* v. *Emperor.* But sentences should not be ordered to run concurrently, where the offences are totally unconnected with each other.]
3. (1923) 1923 Oudh 56 (57): 25 Oudh Cas 249: 24 Cri L Jour 577, *Ganesh Shankar Vidyarathi* v. *King-Emperor.*
4. (1897) 20 Mad 444 (444), *Queen-Empress* v. *Venkatarama Jetti.*

Note 5.

1. (1916) 1916 Pat 182 (182): 17 Cri L Jour 528: 1 Pat L Jour 212, *Marakandar Kanda* v. *Emperor.*
   (1914) 1914 Sind 22 (22): 7 Sind L R 203: 15 Cri L Jour 592, *Emperor* v. *Ghulam Ali.*
   (1912) 13 Cri L Jour 189 (190): 8 Nag L R 20, *Emperor* v. *Lekria.*
   (1904) 1 Cri L Jour 1090 (1090): 27 Mad 525, *Emperor* v. *Muthukomaran.*
   (1900-02) 1 Low Bur Rul 14 (15), *Emperor* v. *Nga Kyon.*
   (1895) Ratanlal 774, *Queen - Empress* v. *Pandu.*
2. (1903-04) 2 Low Bur Rul 72 (75, 76), *King-Emperor* v. *Nga Po Thin.*
   (1892-96) 1 Upp Bur Rul 46, *Queen-Empress* v. *Nga So.*
   (1909) 10 Cri L Jour 122 (123): 2 Ind Cas 651 (Cal), *Emperor* v. *Nepal Shikary.*
   (1904) 1 Cri L Jour 1114 (1114) (Bom), *Emperor* v. *Durga Bahirav.*
   (1903) 2 Weir 452 (452), *Venkatigadu, In re.*
   (1921) 1921 Sind 96 (96): 15 Sind L R 205: 23 Cri L Jour 255, *Sukhal Singh* v. *Emperor.*
   (1919) 1919 Lah 136 (136): 20 Cri L Jour 316, *Emperor* v. *Chet Singh.*
   (1917) 1917 Low Bur 159 (159): 17 Cri L Jour 480, *Shin Taung* v. *Emperor.*
   (1916) 1916 Mad 1144 (1144): 16 Cri L Jour 622, *Pichari Authu, In re.*
   (1915) 1915 Mad 587 (587): 16 Cri L Jour 137, *Gandella Ramudu, In re.*
   (1912) 13 Cri L Jour 849 (849): 37 Bom 178, *Emperor* v. *Vishnu Balakrishna.*
   (1910) 11 Cri L Jour 15 (15): 3 Sind L R 114, *Emperor* v. *Pandhi.*
   (1908) 8 Cri L Jour 402 (402): 31 Mad 515, *Joghi Kannigan, In re.*
   (1910) 11 Cri L Jour 271 (271): 34 Bom 326, *Emperor* v. *Arjun Ambo Kathodi.*
   (1904) 1 Cri L Jour 1114 (1114) (Bom) *Emperor* v. *Durga Bahirav.*
   (1903) 5 Bom L R 26 (27), *Emperor* v. *Kanji Jay Singh.*
   (1903) 1903 All W N 28 (28), *Emperor* v. *Ja-*

other hand, that a commitment under Section 123 is a *sentence of imprisonment* within the meaning of this Section and that, consequently, the subsequent sentence for an offence, would, under this Section, commence after the expiry of the imprisonment under Section 123.[3] By the addition, in 1923, of the second proviso to this Section and the use therein of the words "sentenced to imprisonment by an order under Section 123" the Legislature has adopted the view of the Allahabad High Court that the words "sentence of imprisonment" include an order for commitment to prison under Section 123[4] but has enacted, in conformity with the other view that where the subsequent sentence is for an offence committed *prior* to the order under Section 123, such sentence should commence immediately.[4a]

Where the subsequent sentence is for an offence *committed after* the order under Section 123, this proviso has no application. In such cases the first paragraph of this Section will come into operation and the subsequent sentence will run after the expiry of the sentence under Section 123 unless the Court directs that they shall run concurrently.[5] The proviso will not also apply where the *order under Section* 123 is passed *subsequent* to a sentence of imprisonment for an offence and, in such cases also, it is submitted, that the 1st para. of this Section applies and the sentences will run only *consecutively*. A contrary view has, however, been taken by a Full Bench of the Judicial Commissioner's Court of Sind.[5a] In that case *X* was sentenced to imprisonment for an offence, after the date of an order for security and before the date fixed for furnishing security. On failure to furnish security on the latter date an order under Section 123 was not passed but was suspended until the expiry of the sentence for the offence. It was held by their Lordships *firstly*, that the order under Section 123 could not be suspended and *secondly*, the imprisonment under Section 123 would run concurrently with the previous imprisonment. As has been seen before, this latter view is not correct. Where after an order for security was passed *X* was convicted of an offence and sentenced to imprisonment and thereafter an order under Section 123 for imprisonment was passed for default of security, it was held by the High Court of Bombay that the order under Section 123 should not have been passed on a later date at all and that on the assumption that the order under Section 123 was on the date of the order for security as it should have been, the subsequent sentence for the offence ran concurrently with the former.[6]

When the sentence for the offence is *fine*, Section 64, of the Penal

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(1898) Ratanlal 970, *Queen-Empress* v. *Tulshya Bahiru.*

(1895) 1895 Pun Re Cr No. 14, p. 45 (46), *Queen-Empress* v. *Divanchand.*

(1872-1892) 1872-1892 Low Bur Rul 364 (365), *Queen Empress* v. *Nga Shwe Byo.*

(1912) 13 Cri L Jour 536 (536): 5 Sind L R 263, *Imperator* v. *Akidullah.*
[See also (1923) 1923 Oudh 56 (57): 25 Oudh Cas 249: 24 Cri L Jour 577: *Ganesh Shankar Vidyarthi* v. *King-Emperor.*
(1875) 24 Suth W R Cri 13 (14), *Queen* v. *Shona Dagee.*]

3. (1908) 7 Cri L Jour 427 (432): 30 All 334 (340, 342), *Emperor* v. *Tula Khan.*

4. (1931) 1931 Rang 127 (129): 9 Rang 110: 32 Cri L Jour 714: 1931 Cri Cas 522, *Nga Pye, In re.*

4a (1933) 1933 Oudh 381 (381): 34 Cri L Jour 1152: 1933 Cri Cas 1098, *Emperor* v. *Jagmohan.*

5. (1931) 1931 Rang 127 (129): 1931 Cri Cas 522: 9 Rang 110: 32 Cri L Jour 714, *Nga Pye, In re.*

5a (1926) 1926 Sind 273 (275): 20 Sind L R 163: 27 Cri L Jour 865, *Emperor* v. *Ahmed.*

6. (1927) 1927 Bom 657 (1) (657): 28 Cri L Jour 652, *Emperor* v. *Aba Farid Bargir.*

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Code, requires that any imprisonment in default of the payment of fine should be *in excess of any other imprisonment to which the accused may be sentenced.* Hence, in such cases, even though the offence in question may have been committed prior to the passing of the order under Section 123, the effect of Section 64 of the Penal Code, would be to postpone the imprisonment in default of fine till the expiration of the imprisonment in default of security.[7]

6. Detention in civil prison, if "sentence of imprisonment."

The detention in *civil* prison is not a sentence of imprisonment within the meaning of this Section. Where therefore a person undergoing detention in a civil jail is convicted of an offence and sentenced to a term of imprisonment, this Section has no application and the sentence will commence, under the general principle of law, from the date of the order.[1]

7. Effect of reversal of one of two sentences in appeal.

Where *X* is convicted and sentenced to imprisonment first in one case and subsequently in another, and the former conviction is reversed in appeal, it has been held by the High Court of Bombay, that the second sentence will commence from the date of such *reversal.*[1] According to the High Court of Madras, the sentence already undergone in respect of the conviction which was set aside should be reckoned as imprisonment in the second conviction.[2] The Judicial Commissioner's Court of Sind has held that the second sentence will commence only on the date of the acquittal in appeal in respect of the first conviction, but that the High Court has power under Section 439 of the Code, to reduce, on equitable considerations, the second sentence by the period of imprisonment already undergone by the accused.[3]

8. Transportation—First proviso.

Where an accused, who is already undergoing a sentence of imprisonment is sentenced to transportation, the Court has got a discretion under the first proviso to direct the sentence of transportation to commence immediately or after the expiration of the sentence of imprisonment.[1] If no order is made directing it to commence immediately, the sentence of transportation will commence only after the expiry of the sentence of imprisonment.[2] Where, however, at the time the sentence of transportation is passed, the Magistrate is ignorant of the previous sentence of imprisonment, an order directing the sentence of transportation to commence immediately can be made later on.[3] By the amendment of sub-section 1 this discretion has been given, even in the case of a subsequent sentence of imprisonment or penal servitude. The

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7. (1932) 1932 Rang 50 (51): 9 Rang 612: 33 Cri L Jour 174 : 1932 Cri Cas 210, *Emperor* v. *Nan E.*

Note 6.

1. (1917) 1917 Low Bur 159 (159): 17 Cri L Jour 480, *Shin Taung* v. *Emperor.*
   (1925) 1925 Rang 202 (203): 3 Rang 93: 26 Cri L Jour 821, *Emperor* v. *Ma Kha.*

Note 7.

1. (1879) Ratanlal 139 (140), *Khandesh Sessions Judge's Letter No.* 420.
   [See also (1890) Ratanlal 523, *Queen Empress* v. *Khandu.*]
2. [See (1879) 2 Weir 450 (450), *High Court Proceedings, 15th February 1879, No.* 201.]
3. (1932) 1932 Sind 159 (160): 34 Cri L Jour 24: 1932 Cri Cas 695, *Emperor* v. *Koural Shah.*

Note 8.

1. (1902) 2 Weir 453 (453), *Pattayil Kooru, In re.*
   (1909) 10 Cri L Jour 236 (237): 2 Sind L R 23, *Imperator* v. *Khuda Bux.*
   (1914) 1914 Lah 75 (76): 15 Cri L Jour 68 (69): 1913 Pun Re Cr No. 21, *Bogi* v. *Emperor.*
2. (1888) Ratanlal 391, *Queen-Empress* v. *Bhika.*
3. (1888) Ratanlal 391, *Queen-Empress* v. *Bhika.*

first proviso appears to be redundant and unnecessary. Where a person already sentenced to transportation for *life* is for the second time sentenced to transportation, this Section has been held not to apply though for purposes of calculation, a sentence of transportation for life is reckoned as 20 years.[4] It may be noted in passing that transportation cannot be ordered in default of payment of fine.[5]

9. Sentence cannot be ante-dated.

A sentence cannot be made to operate from a date prior to the date on which the sentence was passed. Thus where a prisoner was arrested on 27-1-1931 and was convicted and sentenced on 8-4-1931 it was held that the sentence could not be made to run from 27-1-1931.[1]

10. Order as to commencement of sentence is not a judgment.

An order made by a Court under this Section as to the commencement of sentences is not a part of its judgment and may therefore be made after the judgment is signed.[1]

11. Power of High Court to pass concurrent sentences.

The High Court has power, under this Section, to pass concurrent sentences in the same manner as the Court which originally passes the sentences.[1]

12. Appeal.

Where an accused is sentenced to concurrent terms of imprisonment no one of which alone is appealable, he is not entitled to appeal against them collectively.[1] Likewise when an Assistant Sessions Judge sentences an accused to imprisonment for a period not exceeding 4 years, under each of two Sections of the Penal Code, the sentences to run concurrently, an appeal lies to the Sessions Court and not to the High Court.[2]

398.* (1) Nothing in Section 396 or Section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

Saving as to Sections 396 and 397.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing

*(1898—S. 398, sub-section 1=1882—S. 398; 1872—S. 317, Proviso; 1861—S. 48, Proviso.)

4. (1893-1900) 1893-1900 Low Bur Rul 13, *Nga Tha Byit* v *Queen-Empress.*
5. (1880) 1880 Pun Re Cr No. 17, page 29 (30), *Empress* v. *Nuran.*

Note 9.

1. (1933) 1933 Rang 28 (28): 34 Cri L Jour 447: 1933 Cri Cas 275, *Emperor* v. *Nga Po Min.*

Note 10.

1. (1888) Ratanlal 391, *Queen-Empress* v. *Bhika.*

Note 11.

1. (1929) 1929 All 585 (585): 1929 Cri Cas 175: 51 All 888: 30 Cri L Jour 904, *Sis Ram* v. *Emperor.*
   (1931) 1931 Bom 529 (529): 1931 Cri Cas 917: 33 Cri L Jour 77, *Emperor* v. *Nagappa.*

Note 12.

1. (1913) 14 Cri L Jour 254 (254, 255): 40 Cal 631, *Aziz Sheikh* v. *Emperor.*
2. (1916) 1916 Cal 464 (464): 17 Cri L Jour 266, *Lakhimi Ram Gagoi* v. *Emperor.*

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the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

Synopsis.

Other Topics.

Substantive sentence overlooked—Executed after imprisonment in default of fine. See Note 1, Pt. 2.

1. Scope of the Section.

This Section provides that no person will be excused from undergoing any part of the punishment, to which he is liable under former or subsequent convictions.[1] Thus where an accused was convicted under Section 447, I. P. C., and sentenced to undergo rigorous imprisonment for three months and a fine in default of payment of which, he was sentenced to imprisonment for twenty days, the substantive sentence was by some mistake overlooked and the accused served only the sentence of imprisonment in default of payment of fine, and was released, it was held that the accused could be re-arrested and sent to jail to serve the substantive sentence, and the substantive sentence could be directed to begin from the date of his re-arrest.[2]

2. Sub-section 2.

This Clause was first introduced in this Code. It supercedes the view held in the undermentioned case[1] that where a convict is imprisoned under two warrants which order consecutive punishments, the first warrant should be completely executed both in respect of the substantive sentence of imprisonment and the imprisonment in default of fine before any effect is given to the second warrant.

Sec. 399

Confinement of youthful offenders in reformatories.

399.* (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in

* **(1882—S. 399; 1872—S. 318; 1861—S. 433.)**

See Note 2, *supra*; otherwise these Sections were the same as that of 1898 Code; sub-section was newly added in 1898.

Section 398—Note 1.

1. (1903) 2 Weir 453 (453), *Venkatigadu, In re.*
(1894) 1894 Pun Re Cr No. 12, page 38 (39), *Muzaffar* v. *Empress.*
[See also (1911) 12 Cri L Jour 286 (318) : 38 Cal 559, *Emperor* v. *Noni Gopal Gupta.*]
2. (1897-1901) 1 Upp Bur Rul 89 (89, 90), *King-Emperor* v. *Ngwe Gaing.*

Note 2.

1. (1878) Ratanlal 132, *Dharwar District Magistrate's letter No.* 682.

some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein. Sec. 399 Note 1

(2) All persons confined under this Section shall be subject to the rules so prescribed.

(3) This Section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

Synopsis.

Other Topics.

Act VIII of 1897—Reformatory Schools Act. See Note 8, Pt. 1; Note 1 ; Note 3, Pt. 1 ; Note 5, Pt. 4 ; Note 6, F-N (1a) and (3).
Borstal Schools Act. See Note 3, F-N (1) ; Note 4, F-N (1).
Comparison with Section 562. See Note 1.
Detention is not sentence — Suspension of sentence does not prevent detention. See Note 4, Pt. 2.
Inquiry as to age. See Note 2, Pt. 2.
Grounds for sending to Reformatory School. See Note 4, Pt. 1.
Legislative changes. See Note 2.
Notification and rules. See Note 5, F-N (4).
Period of detention. See Note 5, Pts. 1 to 3.
Points not to be considered. See Note 3, Pts. 3 and 4.
Procedure. See Note 3, Pt. 2.
Revision against illegal order of sending to reformatory without imprisonment. See Note 3, F-N (1)
Revision under Act V of 1876. See Note 8, F-N (1).
Section applies to appeal and revision. See Note 6, F-N (3).
Section 31 of Act VIII of 1897—Powers under. See Note 4.
Sentences not coming under this Section. See Note 3, Pts. 5 to 7.

1. Scope of the Section.

This Section may be compared with Section 562, *infra*. The points of difference are as follows:—

1. This Section applies to offenders below the age of 15 years, while Section 562 applies to *all* offenders.
2. Under this Section the offender need not be a first offender, whereas under Section 562 the offender must be a *first* offender.
3. In order that this Section may apply, the offender must be *sentenced* to imprisonment.[1] Under Section 562 the Court may *instead of sentencing him* release him on probation.

This Section is analogous to Section 8 of the Reformatory Schools Act, 1897 under which *male* youthful offenders can be sent to a Reformatory. Where the latter Act applies, this Section has no application.

See also Notes to Section 522, *infra*.

Section 399—Note 1.

1. (1882) Ratanlal 180 (180), *Queen-Empress* v. *Ravaji*.

Sec. 399 Notes 2—3

2. "Under the age of fifteen years."

Under the previous Codes the age limit was *sixteen* years.

Where the accused is not under the age of fifteen years he cannot be ordered to be detained in a reformatory.[1] The Magistrate should determine precisely the age of the accused by enquiry before action is taken under this Section.[2]

3. "Is sentenced to imprisonment."

The same words "is sentenced" occur also in Section 8 of the Reformatory Schools Act, 1897. It has been held in cases arising under that Section that where the accused is not *sentenced* to imprisonment for any offence the Magistrate has no jurisdiction to make an order for detention in a Reformatory School.[1] The same view must prevail in cases arising under this Section. Where it is deemed necessary to have a convicted person sent to a Reformatory, the proper procedure is to impose a substantive sentence and then direct that, in lieu thereof, the accused be detained in a Reformatory.[2] The liability to be sent to a Reformatory School[3] or a non-existence of a Reformatory[4] is not a matter to be considered in estimating the sentence to be passed on a juvenile offender. A person who is ordered to execute a bond to keep the peace and in default to undergo imprisonment for that period is not "sentenced to imprisonment" and so cannot be sent to a Reformatory.[5] Similarly a person sentenced to pay fine or in default to undergo imprisonment

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Note 2.

1. (1898) 25 Cal 333 (337), *Deputy Legal Remembrancer* v. *Ahmed Ali.*
   (1897) Ratanlal 905 (906), *Queen-Empress* v. *Bhausing.*
   (1924) 1924 Rang 16 (16) : 24 Cri L Jour 918, *Hamid* v. *Emperor.*
   (1897-1901) 1 Upp Bur Rul 375 (375), *Queen-Empress* v. *Nga Po Su.*
   (1898) 1 Weir 879 (880), *Nachi, In re.*
   (1931) 1931 Mad W N 401 (401), *Guduva Ramalinga Iyer* v. *Emperor.*
   (1893-1900) 1893-1900 Low Bur Rul 79 (79), *Queen-Empress* v. *Nga Me.*
2. (1893) 15 All 208 (209), *Queen-Empress* v. *Narain.*
   (1898) Ratanlal 494 (496), *Queen-Empress* v. *Manaji.*
   (1894) Ratanlal 726 (726), *Queen-Empress* v. *Gopala.*
   (1899) 3 Cal W N 576 (579), *Empress* v. *Harisdas Mukherjee.*
   (1900) 4 Cal W N 225 (226), *The Deputy Legal Remembrancer* v. *Kopil Kahar.*
   (1898) 1 Weir 879 (880), *Nachi, In re.*
   (1900-1902) 1 Low Bur Rul 126 (127), *Crown* v. *Po Sein.*
   (1901) 24 Mad 13 (15), *Queen-Empress* v. *Rama.*
   (1925) 1925 Rang 302 (303) : 3 Rang 218 : 26 Cri L Jour 852, *Emperor* v. *Seion Choung.*

Note 3.

1. (1898) 20 All 160 (161), *Queen-Empress* v. *Billar.* The High Court can revise this illegal order and S. 16 is no bar to such revision.
   (1890) Ratanlal 518 (519), *Queen-Empress* v. *Purushotham.* Mere conviction not enough — There should be a legal sentence.
   (1901) 5 Cal W N 210 (211), *Radha Kristo* v. *Gokula Nut.*
   (1898) 1 Weir 879 (880), *Nachi, In re.*
   (1894) Ratanlal 726 (726), *Queen-Empress* v. *Gopala.*
   (1911) 12 Cri L Jour 56 (57): 8 Ind Cas 1166 (Lah), *Emperor* v. *Batkhtwari.* The High Court cannot pass a sentence to legalise the order of detention.
   (1932) 1932 Sind 175 (176): 1932 Cri Cas 732 : 26 Sind L R 295 : 34 Cri L Jour 11, *Issa Angaria* v. *Emperor.* Under Borstal Schools Act, mere conviction is enough. Actual sentence is not necessary.
2. (1896) 1896 All W N 27 (27), *Queen-Empress* v. *Babu Ram.*
   (1899) 1 Bom L R 162 (163), *Queen-Empress Kidya Hussain.*
3. (1922) 1922 Bom 169 (170) : 46 Bom 429 : 23 Cri L Jour 93, *Abdul Rahman Ismail* v. *Emperor.*
4. (1884) 2 Weir 453 (454), *Burri Subbadu, In re.*
5. (1900-1902) 1 Low Bur Rul 42 (42), *Mahomed Kasim* v. *Queen-Empress.*
   (1897-1901) 1 Upp Bur Rul 375 (376), *Queen-Empress* v. *Nga Po Su.*
   [But see under Borstal Schools Act (1934) 1934 Mad 457 (457): 57 Mad 928 : 35 Cri L Jour 1153 : 1934 Cri Cas 802, *Chengadu, In re.*]

is not "sentenced to imprisonment."[6] Nor is a sentence to be whipped a "sentence of imprisonment" for the purpose of sending the accused to a Reformatory.[7]

4. "May direct."

It is not every boy that is convicted of an offence that can be sent to a Reformatory School; only such boys as are found to be proper persons to be the inmates of such a school could be ordered to be so sent. As a rule, no boy should be sent to a Reformatory on a first conviction unless there is a reasonable cause for supposing that he is being trained up to or is likely again to lapse into crime, being without parental or other control.[1] The order for detention in a Reformatory School is not a sentence and the suspension of the sentence by the Sessions Judge will not prevent the carrying out of the detention.[2] As to power to act under Section 31 of the Reformatory Schools Act, 1897, *see* the cases cited below.[3]

5. "Instead of being imprisoned."

Since the detention is only *instead* of imprisonment in jail, the Court which sentences an accused person for any particular period of imprisonment cannot direct detention in a Reformatory for a longer period.[1] Thus where a confinement in a Reformatory for one year was ordered on a conviction of imprisonment for one month the sentence was held illegal.[2] The period of detention should be defined and words like "or until he attains majority should not be used."[3] *See also* Section 8 of the Reformatory Schools Act, 1897 and the undermentioned cases.[4]

6. (1893-1900) 1893-1900 Low Bur Rul 491 (492), *Queen-Empress* v. *Nga Po Sin.*
   (1911) 12 Cri L Jour 244 (244) : 10 Ind Cas 773 (Rang), *Nga Po Tok* v. *Emperor.*
7. (1893-1900) 1893-1900 Low Bur Rul 493 (493), *Puttu* v. *Queen-Empress.*

Note 4.

1. (1895) 1 Weir 878 (879), *Abdul Gaffar, In re.*
   (1921) 1921 Oudh 190 (191) : 24 Oudh Cas 305 : 23 Cri L Jour 145, *Mt. Parbati* v. *Emperor.*
   (1925) 1925 Rang 302 (303) : 3 Rang 218 : 26 Cri L Jour 852, *Emperor* v. *Sein Choung.*
   (1931) 1931 Mad 771 (771) : 1931 Cri Cas 1027 : 54 Mad 764 : 32 Cri L Jour 1044, *Sellappa Goundan* v. *Emperor.* Detention in Borstal School.
   (1934) 1934 Rang 125 (127) : 1934 Cri Cas 718 : 12 Rang 344 : 35 Cri L Jour 959, *Emperor* v. *Nga Ohn Shwe.* Detention in Borstal School is not proper where accused merely fails to keep under control his passion or gives way to violence.
   (1934) 1934 Rang 123 (124) : 1934 Cri Cas 716 : 12 Rang 349 : 35 Cri L Jour 903, *Emperor* v. *Shwe Bein.* Detention in Borstal School.
2. (1915) 1915 Mad 1067 (1068) : 16 Cri L Jour 134, *Emperor* v. *Krishna Pandharama.*
3. (1921) 1921 Oudh 190 (191) : 24 Oudh Cas 305 : 23 Cri L Jour 145, *Mt. Parbati* v. *Emperor.*
   (1905) 2 Cri L Jour 720 (721) : 3 Low Bur Rul 30 (30), *King-Emperor* v. *Ha Taw.*
   (1923) 1923 Pat 297 (297) : 25 Cri L Jour 1312, *Jagarnath Chauley* v. *King-Emperor.*

Note 5.

1. (1876) Ratanlal 109 (109), *Reg* v. *Ganpaya.*
2. (1889) 1889 All W N 131 (131), *Queen-Empress* v. *Hira.*
3. (1913) 14 Cri L Jour 256 (256) : 19 Ind Cas 512 (Bom), *Emperor* v. *Rama Sudama.*
   (1901) 24 Mad 13 (16), *Queen-Empress* v. *Rama.*
4. (1897-1900) 1 Upp Bur Rul 375 (375), *Queen-Empress* v. *Nga Po Su.*
   (1905) 2 Cri L Jour 738 (738) : 3 Low Bur Rul 46 (47), *San Hlaing* v. *King-Emperor.* Notification No. 237, dated 12th June 1897, provides that youthful offender should be detained till majority.
   (1898) 21 Mad 430 (432), *Queen-Empress* v. *Ramalingam.* Rules passed by Government require detention until the age of eighteen.
   (1900) 1 Weir 884 (884), *The Public Prosecutor* v. *Bantoo.* Notification dated 30th June 1887 does not require detention till eighteen years in every case.

Sec. 399 Notes 6—8

6. Sub-section 3.

This Section does not apply where the Reformatory Schools Act, 1897 is in force.[1a] In such cases the authority to send a youthful offender to a Reformatory School must be found in that Act. Section 8 of that Act provides that only the Magistrates *specified* therein can make an order under this Section.[1] A second class Magistrate who is not so specified cannot order a youthful offender to be sent to a Reformatory School where the Reformatory Schools Act, 1897 is in force.[2] *See also* the undermentioned cases.[3]

7. "Imprisonment."

Transportation is only a particular form of imprisonment and consequently, this Section will apply also to cases when an offender under the age of 15 is sentenced to transportation.[1]

8. Revision.

As to the power of the High Court in revision in cases arising under Reformatory Schools Act (VIII of 1897), *see* the following cases.[1]

(1934) 1934 All 976 (977): 1934 Cri Cas 1300: 36 Cri L Jour 368, *Lurkhur* v. *Emperor*. Rules framed—United Provinces require a minimum of sentence of four years for detaining in Reformatory.

(1891) Ratanlal 564 (571), *Empress* v. *Bali*.

Note 6.

1a (1896) Ratanlal 864 (864), *Queen-Empress* v. *Tukaram Keshav Sonar*.

(1897) Ratanlal 915 (916), *Queen-Empress* v *Fakira Dharmappa*.

(1897) Ratanlal 929 (930). *Queen-Empress* v. *Har Parshad Lalta*. Reformatory Schools Act does not provide for whipping as a punishment.

(1897) Ratanlal 936 (936), *Queen-Empress* v. *Bhuja Gujia*.

(1918) 1918 Lah 27 (28): 1918 Pun Re Cr No. 17: 19 Cr L Jour 917, *Emperor* v. *Nur Muhammad*.

(1889) 12 Mad 94 (95, 97), *Queen-Empress* v. *Madasami*.

(1882) 1882 Pun Re Cr No 6, (page 6), *The Empress* v. *Muhamdu*.

(1897) 20 All 158 (159), *Queen-Empress* v. *Himai*.

(1897) 20 All 159 (160), *Queen-Empress* v. *Gobinda*.

1. (1897) Ratanlal 936 (936), *Queen-Empress* v. *Bhuja Gujia*.

(1897) Ratanlal 947 (948), *Queen-Empress* v. *Bhagia Bhaoo*.

(1872-1892) 1872-1892 Low Bur Rul 330 (331), *Queen-Empress* v. *Nga Hasing*.

(1897-1900) 1 Upp Bur Rul 375 (376), *Queen-Empress* v. *Nga Po Su*.

2. (1889) 12 Mad 94 (95, 97), *Queen-Empress* v. *Madasami*.

3. (1915) 1915 Mad 841 (841): 16 Cri L Jour 32, *Kanukayya* v. *Emperor*. A second class Magistrate not empowered to act under S. 8 of the Act must refer the case to the District Magistrate under S. 9.

(1928) 1928 Bom 348 (349): 29 Cri L Jour 1016, *Emperor* v. *Lakshman*. High Court can order detention of a boy in Reformatory School not only on appeal but in revision also.

(1891) Ratanlal 536 (536), *Queen-Empress* v. *Lallubhai*. Case under Act 5 of 1876.

Note 7.

1. (1909) 9 Cri L Jour 99 (102): 4 Nag L R 280, *Rama* v. *Emperor*.

Note 8.

1. *The order of a Magistrate under S. 8 of the Reformatory Schools Act, 1876, is not an executive but a judicial proceeding and the High Court has power to revise:—*

(1889) 14 Bom 381 (383), *Queen-Empress* v. *Manaji*..

(1889) Ratanlal 494 (495), *Queen-Empress* v. *Manji Lal*.

High Court has no power to interfere with the order of detention under S. 7 of Act V of 1876:—

(1896) 1896 All W N 43 (43), *Queen-Empress* v. *Anrudh Singh*.

Where the order is not made in substitution of an order for transportation or imprisonment, or where it is made without jurisdiction High Court can interfere:—

(1897) 20 All 160 (161), *Queen-Empress* v. *Billar*.

(1899) 21 All 391 (395) (FB), *Queen-Empress* v. *Hari*.

(1893-1900) 1893-1900 Low Bur Rul 493 (493), *Puttu* v. *Queen-Empress*.

Revisional jurisdiction excluded only as to the age of offender and order for detention:—

(1904) 1 Cri L Jour 609 (610) (Bom.) *Emperor* v. *Amir Bhikan*.

(1899) 27 Cal 133 (136), *Queen-Empress* v. *Makimuddin*.

(1899) 3 Cal W N 576 (579), *Queen-Empress* v. *Haridas Mukerjee*.

400.* When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed. **Sec. 400**

Return of warrant on execution of sentence.

Synopsis.

"Has been fully executed." Note No. 1

Other Topics.

Full sentence to be executed though Ordinance ceases. See Note 1, Pt. 1.

1. "Has been fully executed."

Where a person has been convicted under an Ordinance issued by the Governor-General, his sentence does not become fully executed till the expiry of the period of the sentence, though the term of the Ordinance has expired; the detention after the period of Ordinance is not illegal.[1]

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.

401.† (1) When any person has been sentenced to punish- **Sec. 401**

*** (1882—S. 400 ; 1872—S. 305 ; 1861—S. 385.)**

† (Code of 1882—S. 401.)

(Same as that of first five sub-sections of 1898 Code. Sub-section 6 was added in 1898.)

(1893-1900) 1893-1900 Low Bur Rul 255 (255), *Queen Empress* v. *Nga Tun Zan.*

(1893-1900) 1893-1900 Low Bur Rul 441 (442), *Queen-Empress* v. *Nga Nyan Wun.*

(1900) 1 Low Bur Rul 42 (43), *Muhammad Kasim* v. *Queen-Empress.*

(1901) 1 Low Bur Rul 63 (64), *Crown* v. *Valu.*

(1901) 1 Low Bur Rul 68 (68, 69), *Crown* v. *Dawood Sahib.*

(1911) 13 Cri L Jour 44 (44) : 5 Sind L R 173, *Imperator* v *Rajabali.*

(1932) 1932 Sind 175 (176) : 1932 Cri Cas 732: 26 Sind L R 295: 34 Cri L Jour 11, *Issa Angario* v. *Emperor.*

High Court can alter the sentence passed :—

(1901) 28 Cal 423 (424), *Reaset* v. *Courtney.*

(1900) 5 Cal W N 210 (211), *Radha Kristo Barat* v. *Gokula Nut.*

(1907) 6 Cri L Jour 129 (130): 1907 Pun Re Cri No. 18, (page 59), *Ram Singh* v. *King-Emperor*

(1931) 1931 Nag 179 (179): 1931 Cri Cas 920: 27 Nag L R 242: 32 Cri L Jour 1268. *Muhammad Azimuddin* v. *Emperor.*

(1902) 15 C P L R 151 (152), *Emperor* v. *Jagan.*

Section 400—Note 1.

1. (1933) 1933 Cal 280 (282) : 1933 Cri Cas 361 : 60 Cal 742 : 34 Cri L Jour 291, *Jagendra Chandra Roy* v. *Superintendent of the Dum Dum Special Jail.*

(1933) 1933 Cal 516 (519) : 1933 Cri Cas 860 : 60 Cal 545 : 34 Cri L Jour 879, *Jogendramohan Guha* v. *Emperor.*

Sec. 401

Power to suspend or remit sentences.

ment for an offence, the Governor-General in Council or the Local Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the Governor-General in Council or the Local Government for the suspension or remission of a sentence, the Governor-General in Council or the Local Government, as the case may be, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion, *and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.*

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Governor-General in Council or of the Local Government, as the case may be, not fulfilled, the Governor-General in Council or the Local Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this Section, may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4-A) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any Section

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(Code of 1872—S. 322, Paras. 1 and 2.)

322. When any person has been sentenced to punishment for an offence, the Governor-General of India in Council, or the Local Government, may at any time, without conditions, or upon any conditions which the person sentenced accepts, remit the whole or any part of the punishment to which he has been sentenced.

Power to remit punishment.

If the person to whom a pardon has been given fails to fulfil the conditions prescribed by the Governor-General of India in Council, or the Local Government, the Governor-General of India in Council or the Local Government, as the case may be, may withdraw such pardon, whereupon such person shall be remanded to undergo the unexpired portion of his sentence.

* * * * *

(Code of 1861—S. 54—Same as that of first paragraph of 1872 Code.)

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of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.

Sec. 401 Note 1

(5) Nothing herein contained shall be deemed to interfere with the right of *His Majesty or of the Governor-General when such right is delegated to him* to grant pardons, reprieves, respites or remissions of punishment.

(5-A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to him by the Governor-General, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.

(6) The Governor-General in Council and the Local Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

Synopsis.

Other Topics.

1. Scope and applicability of the Section.

This Section does not disturb the *conviction* of an accused. It deals only with the power to suspend the execution of a *sentence* or remit the whole or any part of the *punishment*. The Governor-General in Council or the Local Government may act of his or their *own* accord (sub-section 1),[1] or may be moved by an application (sub-section 2). The Local Government has power under this Section to *suspend* the execution of a death sentence to enable the accused to appeal to the Privy Council.[1a]

The special authority conferred by this Section relates to persons

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Section 401—Note 1.

1. [See (1932) 1932 All 232 (232): 1932 Cri Cas 230 : 33 Cri L Jour 830, *In re Ram Dawan Singh, a Mukhtiar of Gorakhpur.*]

1a (1931) 1931 Lah 359 (360) : 1931 Cri Cas 631 : 33 Cri L Jour 126, *Chint Ram Thapar v. Emperor.*
[See also (1915) 1915 P C 29 (30) : 42 Cal 739 : 42 I A 133 : 16 Cri L Jour

Sec. 401 Notes 1—2

sentenced to punishment and does not touch cases under Section 337 in which a person charged along with others with a crime has, under a conditionally tendered pardon, given evidence against such persons.[2]

2. Statement of opinion of the presiding Judge—Sub-section 2.

On the receipt of an *application*, the Governor-General in Council or the Local Government may require, from the presiding Judge of the Court before or by which the conviction was had or confirmed, a statement of his opinion with reasons and a certified copy of the available record. The object of calling for such a statement is to avoid a possible misapprehension about the legality of the sentence passed or a mistake as to the propriety of a particular punishment inflicted.[1a] The Judge may also *suo motu* send his opinion whenever he considers that the prerogative of mercy should be exercised in favour of an accused. The following are instances where the Courts have thus recommended the accused to the mercy of the Government:—

1. Discovery of facts *after* the final judgment is pronounced and signed, showing that the accused has committed no offence.[1]
2. An oversight on the part of a counsel or omission on the part of the Court to notice a *relevant* fact in the proceedings resulting in an error of fact or law.[2]
3. Unsoundness of mind not *strictly* covered by Section 84 of the Penal Code.[3] *See also* Notes under Section 376.
4. The punishment prescribed by the law being more rigorous than

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494 (P C), *Balmukund* v. *Emperor*.]

2. (1888) 11 All 79 (89), *Empress* v. *Ganga Charan*.

Note 2.

1a [See (1934) 1934 Rang 125 (126, 127) : 1934 Cri Cas 718 : 12 Rang 344 : 35 Cri L Jour 959, *Emperor* v. *Nga Ohn Shwe*.]

1. (1923) 1923 All 473 (474) : 45 All 143 : 24 Cri L Jour 766, *Kale* v. *Emperor*.

(1866) 6 Suth W R Cri 42 (42), *Nussur Ali* v. *Mr. G. Hart*.

(1926) 27 Cri L Jour 1254 (1256) : 98 Ind Cas 102 (104) (Cal), *Arajali* v. *Emperor*.

(1919) 1919 Cal 409 (410) : 46 Cal 60 : 20 Cri L Jour 265, *Rajab Ali* v. *Emperor*.

[See (1885) 7 All 672 (673), *Empress* v. *Durga Charan*.]

2. (1885) 10 Bom 176 (180, 181), *Empress* v. *C. P. Fox*.

(1895) Ratanlal 791 (791), *Empress* v. *Mohun Abhesing*.

(1909) 9 Cri L Jour 226 (245) : 33 Bom 221, *In re Bal Gangadhar Tilak*.

(1866) 5 Suth W R Cri 61 (64) (F B), *Queen* v. *Godai Raout*.

3. (1896) 23 Cal 604 (609), *Queen* v. *Kader Nasyer Shah*.

(1932) 1932 All 233 (236) : 1932 Cri Cas 231 : 33 Cri L Jour 714, *Pancha* v. *Emperor*.

(1924) 1924 All 413 (413, 414) : 46 All 243 : 25 Cri L Jour 683, *Lachhman* v. *Emperor*.

(1886) 10 Bom 512 (518, 519), *Empress* v. *Lakshman Dagdu*.

(1901) 28 Cal 613 (619), *Ghatu Pramanik* v. *Emperor*.

(1923) 1923 Cal 460 (463), *Emperor* v. *Tincouri Dhopi*.

(1931) 1931 Lah 276 (278) : 32 Cri L Jour 1230 : 1931 Cri Cas 532, *Bagga* v. *Emperor*.

(1927) 1927 Lah 674 (677) : 8 Lah 684 : 28 Cri L Jour 598, *Tala Ram* v. *Emperor*.

(1919) 1919 Lah 470 (470) : 1918 Pun Re Cri No. 30 : 20 Cri L Jour 1, *Ramzan* v. *Emperor*.

(1931) 1931 Mad W N 719 (723), *Narayanaswami Goundan* v. *Emperor*.

(1919) 1919 Mad 128 (129) : 20 Cri L Jour 828, *Muthusami Asari, In re*.

(1910) 11 Cri L Jour 105 (110) : 4 Ind Cas 985 (Lah), *Chajju Mal* v. *Emperor*.

(1913) 14 Cri L Jour 81 (91) : 15 Oudh Cas 321, *Muhammad Husain* v. *Emperor*.

the circumstances of the case deserve.[4]

5. Other mitigating circumstances.[5]

Such an opinion has to be given only when the Court, on weighing the evidence on record, comes to the conclusion that the accused person deserves a recommendation for clemency; but if it holds that such evidence is not *per se* incredible or even improbable, the Court need not refer the case to the Government.[6] Nor ought the Court to express an opinion in a case where stay of execution of sentence is prayed for until a petition to His Majesty in Council is disposed of; it is a matter which lies entirely with the Government.[7]

(1920) 1920 Cal 39 (40): 21 Cri L Jour 317, *Mantajali* v. *Emperor*.

4. (1923) 1923 All 355 (356): 24 Cri L Jour 753, *Emperor* v. *Umrao*.

(1920) 1920 All 199 (200): 21 Cri L Jour 607, *Goshain* v. *Emperor*.

(1895) Ratanlal 792 (792), *Empress* v. *Salu*.

(1864) (1864) Suth W R Cri Gap 27 (27), *Queen* v. *Dabee*.

(1864) 1 Suth W R Cri Letters 9 (9).

(1865) 3 Suth W R Cri Letters 16 (16).

(1866) 5 Suth W R Cri 73 (75), *Queen* v. *Durwan Geer*.

(1867) 7 Suth W R Cri 6 (7), *Queen* v. *Thakoordas Chootur*.

5. (1867) 7 Suth W R Cri 64 (64), *Queen* v. *Sajowpa*. Offence under S. 125 Penal Code.

(1872) 18 Suth W R Cri 45 (46), *Queen* v. *Nidheeram Bagdee*. Unsatisfactory verdict of jury.

(1916) 1916 Lah 408 (410): 17 Cri L Jour 267 (269): 1916 Pun Re Cri No. 12, *Kaimi* v. *Emperor*. Capital sentence against two for murder of one.

(1926) 1926 Lah 144 (144): 26 Cri L Jour 1373, *Mt. Daulan* v. *Emperor*. Age of the accused.

(1926) 1926 Lah 271 (272): 7 Lah 70: 27 Cri L Jour 627, *Ghulam Jannat* v. *Emperor*. Young age of accused—Anxiety of shame—Mitigating circumstances.

(1929) 1929 Lah 601 (603): 1929 Cri Cas 165, *Jogah Singh* v. *Emperor*. Young age—Minor part played—Influence of bad company.

(1932) 1932 Lah 259 (260): 33 Cri L Jour 484: 1932 Cri Cas 324, *Kartar Singh* v. *Emperor*. Youth of accused—Participation in *crime under other influence*.

(1932) 1932 Lah 297 (297): 33 Cri L Jour 448: 1932 Cri Cas 377, *Alam Bibi* v. *Emperor*. Causing death of child—Reduction of sentence — Mitigating circumstances.

(1932) 1932 Lah 308 (310): 33 Cri L Jour 580: 1932 Cri Cas 422, *Nawab* v. *Emperor*. Offence of murder—Accused of tender age—Offence committed under provocation —Recommendation to Local Government.

(1933) 1933 Lah 718 (720): 34 Cri L Jour 1251: 1933 Cri Cas 904, *Mt. Sardaran* v. *Emperor*. Illiterate and superstitious young woman causing the death of a child.

(1933) 1933 Lah 1021 (1022): 35 Cri L Jour 430: 1933 Cri Cas 1558, *Ghulam Mohamad* v. *Emperor*. Young age—Influence of relations.

(1934) 1934 Lah 31 (32): 35 Cri L Jour 652: 1934 Cri Cas 44, *Mt. Dhaulan* v. *Emperor*. Woman committing murder of child on account of weak intellect, treatment of relation and extreme poverty—Sentence of transportation—Recommendation for reduction of sentence.

(1868) 4 Mad H C Rul App 19*n* (19*n*), *High Court Proceedings, 13th November* 1868.

(1926) 1926 Mad 1165 (1166): 50 Mad 474: 27 Cri L Jour 1357, *Mayandi Thevan* v. *Emperor*.

(1931) 1931 Rang 235 (244): 1931 Cri Cas 875: 9 Rang 404: 33 Cri L Jour 205 (S B), *Aung Hla* v. *Emperor*. Political offence.

(1916) 1916 Sind 65 (66): 9 Sind L R 205: 17 Cri L Jour 231, *Jiwanji & Co.* v. *Emperor*. Right of appeal and revision barred — Erroneous conviction—Recommendation to Government.

[See (1890) 14 Mad 36 (37, 38), *Empress* v. *Chinna Tevan*.

(1900-02) 1 Low Bur Rul 359 (361), *Nya Pyan* v. *Crown*.]

6. (1865) 3 Suth W R Cri 1 (2), *Queen* v. *Gobindo Bagdee*.

7. (1924) 1924 Cal 64 (66, 67): 50 Cal 585: 24 Cri L Jour 362, *Tulsi Telini* v. *Em-*

Sec. 401 Notes 3—7

3. Procedure to be followed by the Court.

A Sessions Judge, required to state his opinion under this Section, must forward his reply through the High Court whether the requisition for the opinion has been received through the High Court or not—*Madras H. C. Cir. dated 15th November* 1895.

When any Court shall be of opinion that there are grounds for recommending to the Local Government to exercise the powers vested in it by Section 401 and Section 402, of suspending, remitting or commuting the punishment to which any accused person has been sentenced, the recommendation shall be submitted with the proceedings in the case through the Court of the Judicial Commissioner—*C. P. Criminal Circulars, Part II, No.* 40.

All recommendations for remission or suspension of a sentence made under Section 401 by an officer of any Subordinate Court to the Local Government, in regard to a convict whose case has been before the High Court on appeal, shall be made through the High Court—*Cal. G. R. and C. O. P.* 40.

4. Violation of condition of remission of punishment—Sub-section 3.

Section 227 of the Penal Code runs thus : "Whoever having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of his punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered." Under this Section it is for the Court to decide whether a conditionally released prisoner has violated the conditions on which the remission was granted.[1]

5. "If at large."

Under Section 21 of the Prisoners Act, 1900, the Local Government may grant to any person under sentence of penal servitude a license to be at large within such part of the province and during such portion of his term of penal servitude as may be specified in the license and upon such conditions as the Governor-General in Council may, by general or special order, prescribe.

6. His Majesty's prerogative of pardon—Sub-section 5.

Primarily the power of *pardon* rests in the Sovereign; and the provisions contained in this Section in no way interfere with the prerogative of the Crown in that respect.[1] The tendering of advice to His Majesty as to exercise of his prerogative of pardon is a matter for the Executive Government and is outside the province of the Judicial Committee.[2]

7. Release on medical grounds.

See Madras Police Manual, Vol. I, pp. 319-320.

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peror.

(1915) 1915 P C 29 (30) : 42 Cal 739 : 42 I A 133 : 16 Cri L Jour 494 (P C), *Balmukund* v. *Emperor.*

Note 4.

1. (1933) 1933 Rang 28 (28): 34 Cri L Jour 447 : 1933 Cri Cas 275, *Emperor* v. *Nga Po Min.*

Note 6.

1. (1888) 11 All 79 (89), *Empress* v. *Ganga Charan.*
2. (1915) 1915 P C 29 (30) : 42 Cal 739 : 42 I A 133 : 16 Cri L Jour 494 (P C), *Balmukund* v. *Emperor.*

402.* (1) **Power to commute punishment.** The Governor-General in Council or the Local Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it :—

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this Section shall affect the provisions of Section 54 or Section 55 of the Indian Penal Code.

Synopsis.

Other Topics.

Commutation of death Sentence into transportation, special tribunal ceasing to exist. See Note 1, Pt. 1.

1. Scope of the Section.

Certain accused persons were sentenced to death by a special Tribunal under Ordinance 3 of 1930. The execution of the sentence was stayed by the Local Government pending the decision of the Privy Council in the appeal against the sentence. Before the appeal was disposed of, the special Tribunal ceased to exist, and on the dismissal of the appeal it was contended that as the Tribunal ceased to exist and the time for execution had expired the custody of the prisoners was illegal. It was held that even if there was difficulty in carrying out the death sentence, still the Local Government could commute the sentence under this Section.[1] *See also* the undermentioned cases.[2]

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*(Code of 1882—S. 402—Same as that of first sub-section.)

(Code of 1872—S. 322, Para 3.)

322. * * * * * The Governor-General of India in Council, or the Local Government, may also, without the consent of the person sentenced, in substitution for the sentence passed according to law, commute any one of the following sentences for any other mentioned after it :—

Power to commute punishment.

death, transportation. penal servitude, imprisonment.

(Code of 1861—Nil.)

Section 402—Note 1.

1. (1931) 1931 Lah 359 (360) : 33 Cri L Jour 126 : 1931 Cri Cas 631, *Chint Ram Thapur* v. *Emperor.*
2. (1919) 1919 All 445 (447) : 20 Cri L Jour 767, *Garib* v. *Emperor.* Co-offenders tried separately, received a lesser sentence on the same facts—*Held* that case might be brought to notice of Government so that the inequalities in sentences might be removed.
(1868) Ratanlal 10 (11), *Reg.* v. *Jeewa Amtha.* In view of the long delay in execution of the sentence of death, High Court recommended to Government that sentence should be commuted to transportation for life.

CHAPTER XXX.

OF PREVIOUS ACQUITTALS OR CONVICTIONS.

Sec. 403

Person once convicted or acquitted not to be tried for same offence.

403.* (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237.

*** (Code of 1882—S. 403.)**

(Sub-section 5 was added in 1898; otherwise the Section was the same.)

(Code of 1872—Ss. 460; 147, Para. 2; 195, Expln. 2 and 215, Expln. 2.)

PREVIOUS ACQUITTALS OR CONVICTIONS.

460. A person who has once been tried for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again on the same facts for the same offence, nor for any other offence, for which a different charge from the one made against him might have been made under S. 455, or for which he might have been convicted under S. 456.

Person once convicted or acquitted not to be tried for same offence.

A person convicted or acquitted of any offence may be afterwards tried for any offence for which a separate charge might have been made against him in the former trial under S. 454, Para. 1.

A person acquitted or convicted of any offence in respect of any act causing consequences which, together with such act, constituted a different offence from that for which such person was acquitted or convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was acquitted or convicted.

A person acquitted or convicted of any offence in respect of any facts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence which he may have committed in respect of the same facts, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

Illustrations.

(*a*) *A* is tried upon a charge of theft as a servant and acquitted. He cannot afterwards be charged upon the same facts, either with theft as a servant, with theft simply, or with criminal breach of trust.

(*b*) *A* is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that *A* committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery.

(*c*) *A* is tried for an assault and convicted. The person afterwards dies. *A* may be tried again for culpable homicide.

(*d*) *A* is tried under S. 270, I. P. C., for malignantly doing an act likely to spread the infection of a disease dangerous to life and is acquitted. The act so done afterwards causes a person permanently to lose his eyesight. *A* may be charged, under S. 325, with voluntarily causing grievous hurt to that person.

(*e*) *A* is charged before the Court of Session and convicted of the culpable homicide of *B*. *A* may not afterwards be tried for the murder of *B* on the same facts.

(*f*) *A* is charged by a Magistrate of the First Class with, and convicted by him of, voluntarily causing hurt to *B*. *A* may not afterwards be tried for voluntarily causing grievous hurt to *B*, on the same facts, unless the case comes within paragraph 3.

(*g*) *A* is charged by a Magistrate of the second class with, and convicted by him of,

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 235, sub-section (1). Sec. 403

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this Section shall affect the provisions of Section 26 of the General Clauses Act, 1897, or Section 188 of this Code.

Explanation.—The dismissal of a complaint, the stopping

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theft of property from the person of *B*. *A* may be subsequently charged with, and tried for, robbery on the same facts.

(*h*) *A*, *B* and *C* are charged by a Magistrate of the First Class with, and convicted by him of, robbing *D*. *A*, *B* and *C* may afterwards be charged with, and tried for, dacoity on the same facts.

147. * * * *

The dismissal of a complaint shall not prevent subsequent proceedings.

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195. * * * *

Explanation II.—A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

* * * *

215. * * * *

Explanation II.—A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

(Code of 1861—Ss. 55 and 60.)

Party tried upon formal charge not liable to renewed prosecution.

55. A person who has once been tried for an offence and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence. Provided that any person may be tried for the offence of culpable homicide and punished for that offence, notwithstanding he may have been tried and punished for the act which caused the death, if at the time of his conviction for the said act death shall not have resulted, or shall not have been known by the Court which passed sentence to have resulted.

Proviso.

No person charged under the last four Sections, and found guilty liable to be charged again.

60. No person charged and tried for an offence under any Section of the Indian Penal Code in the last four Sections of this Act mentioned, and found guilty of another offence under the provisions of any other of the said Sections of the Indian Penal Code, shall be liable to be afterwards prosecuted upon the same facts under the Section under which he was charged, or under the Section under which he was found guilty.

Sec. 403 of proceedings under Section 249, the discharge of the accused or any entry made upon a charge under Section 273, is not an acquittal for the purposes of this Section.

Illustrations.

(a) *A* is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or upon the same facts with theft simply, or with criminal breach of trust.

(b) *A* is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that *A* committed robbery at the time when the murder was committed he may afterwards be charged with, and tried for, robbery.

(c) *A* is tried for causing grievous hurt and convicted. The person injured afterwards dies. *A* may be tried again for culpable homicide.

(d) *A* is charged before the Court of Session and convicted of the culpable homicide of *B*. *A* may not afterwards be tried on the same facts for the murder of *B*.

(e) *A* is charged by a Magistrate of the First Class with, and convicted by him of, voluntarily causing hurt to *B*. *A* may not afterwards be tried for voluntarily causing grievous hurt to *B* on the same facts, unless the case comes within Para. 3 of the Section.

(f) *A* is charged by a Magistrate of the Second Class with, and convicted by him of, theft of property from the person of *B*. *A* may be subsequently charged with, and tried for, robbery on the same facts.

(g) *A*, *B* and *C* are charged by a Magistrate of the First Class with, and convicted by him of, robbing *D*. *A*, *B* and *C* may afterwards be charged with, and tried for, dacoity on the same facts.

Synopsis.

Other Topics.

Abetment of forgery—Previous trial—No bar to trial under S. 82, Registration Act. See Note 5, F-N (14).

Absence of sanction or complaint for trial—Court trying—Whether one of competent jurisdiction. See Note 11, Pts. 3 to 4a.

Acquittal—Implies trial. See Note 7, Pt. 13.

Acquittal—Establishes innocence of accused—Such innocence cannot be disputed in subsequent proceedings. See Note 1, Pts. 5, 6.

Acquittal or discharge. See Note 8 and F-Ns.

Appeal—Not fresh trial. See Note 7, Pt. 12.

Bar of extradition proceedings—Not affected. See Note 15a.

Breach of trust or criminal mis-appropriation of different items at various times—Charge omitting some items—No bar to fresh trial on omitted items. See Note 5, F-N (14).

Complaint dismissed by one Magistrate—Another Magistrate—Whether can start fresh prosecution. See Note 13, Pts. 3 to 9.

Compromise—Not lawful—No bar to fresh trial. See Note 8, F-N (3).

Conspiracy to commit offence is distinct from offence. See Note 5, F-N (14).

Conviction in Native State—Can be pleaded as bar. See Note 11, Pt. 8.

Conviction or acquittal—By Court established under local or special law is by competent Court. See Note 11, Pt. 7, F-N (3).

Court having no jurisdiction to try—No jurisdiction to acquit. See Note 7, F-N (13).

Departmental punishment — Not conviction. See Note 9, Pt. 3.

Dismissal of complaint or discharge—Fresh prosecution not barred. See Note 13, Pt. 1.

Distinct offences—Test. See Note 5, Pts. 1 and 15 to 17.

Enticing married woman—Acquittal on such charge—Fresh trial for kidnapping—Finding of fact in prior trial—Not to be ignored. See Note 1, F-N (4).

1. Scope of the Section.

(This Section embodies the ancient maxim *Nemo debet bis vexari pro eadem causa* (No person should be twice disturbed for the same cause),[1] and provides that where a person has once been tried and convicted or acquitted of an offence he cannot again be tried for the same offence or for any other offence which is not distinct from the one previously tried.) (See Note 2). It incorporates the common law principle of the well known pleas of *autre fois acquit* (formerly acquitted) and *autre fois convict* (formerly convicted),[2] namely, that no one shall be punished or put in peril twice for the same matter.[3] The principle does not rest on any doctrine of estoppel, but on grounds of public

Section 403—Note 1.

1. (1935) 1935 Mad 56 (57) : 1935 Cri Cas 55 : 58 Mad 513 : 36 Cri L Jour 311, *A. M. Rangachariar* v. *Venkataswami Chetty.*
2. (1913) 14 Cri L Jour 135 (137, 138) : 9 Nag L R 26, *Mahadeogir* v. *Emperor.*
   (1928) 1928 Rang 252 (253) : 6 Rang 386 : 29 Cri L Jour 930, *Yeok Kuk* v. *Emperor.*
   (1930) 1930 Pat 26 (27) : 9 Pat 585 : 30 Cri L Jour 806 : 1930 Cri Cas 2, *Babu Lal Mahton* v. *Ram Saran Singh.*
   (1918) 1918 Nag 126 (128) : 19 Cri L Jour 796, *Nanakram* v. *Emperor.*
   (1932) 1932 Cal 871 (874) : 1932 Cri Cas 893 : 60 Cal 149 : 34 Cri L Jour 181, *Nafui Sardar* v. *Emperor.*
3. (1934) 1934 Mad 311 (313) : 1934 Cri Cas 604 : 57 Mad 554 : 35 Cri L Jour 783, *Janakiramaraju* v. *Emperor.*
   (1928) 1928 Rang 252 (253) : 6 Rang 386 :

Sec. 403 Notes 1—2

policy.[3a]

Even in cases in which a trial is not barred under this Section it has been held in a series of decisions,[4] following *R. v. Plummer*,[5] that a judgment of acquittal fully establishes the innocence of the accused and that the fact of such innocence cannot be disputed in any subsequent proceedings. Thus, where *A* is acquitted of an offence and later on, *B* is prosecuted under Sections 213 and 214, I. P. C., (concealing offence and screening offender) with reference to the same offence, the fact, established by the acquittal of *A*, *viz.*, that no offence was committed by him, cannot be disputed in the prosecution of *B*.[6]

2. In what cases fresh trial is barred.

The question in what cases a fresh trial is barred under this Section and in what cases it is not, can best be discussed by reference to the following illustrative cases:—

1. *A* is tried for offence *X* and is convicted or acquitted. He is again sought to be tried for same offence *X*.
2. *A* is tried for offence *X* and is convicted or acquitted. He is again sought to be tried for the same offence *Y*, for which a charge might have been framed against him in the former trial under Section 236 of the Code or of which he might have been convicted under Section 237 of the Code.
3. *A* is tried for offence *X* and is convicted or acquitted. He is again sought to be tried for offence *Y*. *X* and *Y* are *distinct* offences forming part of the same transaction but not falling within Section 236 or Section 237 of the Code.
4. *A* is tried for offence *X* and is convicted or acquitted. He is again sought to be tried for offence *Y*. *X* and *Y* are "distinct" offences

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29 Cri L Jour 930, *Yeok Kuk* v. *Emperor*.

3a (1928) 1928 Rang 252 (253) : 6 Rang 386 : 29 Cri L Jour 930, *Yeok Kuk* v. *Emperor*.

4. (1911) 12 Cri L Jour 396 (397) : 11 Ind Cas 580 (Cal), *Emperor* v. *Noni Gopal*.

(1911) 12 Cri L Jour 286 (288) : 38 Cal 559, *Emperor* v. *Noni Gopal*.

(1934) 1934 All 61 (65): 35 Cri L Jour 1349: 1934 Cri Cas 130, *Ram Das* v. *Emperor*. Evidence of particular offences which are objects of alleged conspiracy and of which accused has been acquitted cannot be used in subsequent trial for conspiracy.

(1913) 14 Cri L Jour 5 (26) : 18 Ind Cas 149 (Cal), *Rajendra Narain* v. *Emperor*.

(1911) 12 Cri L Jour 94 (96) : 9 Ind Cas 511 (Lah), *Genesh Das* v. *Emperor*. Acquittal on charge of enticing away married woman, Magistrate holding that accused was not present when the woman ran away with her children — Fresh trial for kidnapping children — Finding of fact in previous trial cannot be ignored.

(1933) 1933 Oudh 470 (472) : 35 Cri L Jour 36 : 1933 Cri Cas 1393, *Emperor* v. *Munno*. Charge of burglary—Evidence of possession of certain rifle cartridges sought to be let in as proof of complicity of accused — Prior acquittal under Arms Act, S. 19 (f), of offence of possession of same cartridges — Question cannot be re-opened.

(1935) 1935 Mad W N 1342 (1343), *Veerayya Vandayar* v. *Emperor*. Acquittal of murder on ground that acccused acted in private defence — Finding that he did so is binding in subsequent prosecution against him under Arms Act, S. 19 (f).

(1902) 7 Cal W N 493 (494), *Bishnu Das Ghosh* v. *Emperor*.

[But see (1867) 7 Suth W R Cri 15 (21), *The Queen* v. *Dwarka Nath*. Court before which a second trial is held has nothing to do with the evidence given in the former trial except for the purpose of ascertaining whether the offence in the two trials is the same.

(1874) 22 Suth W R Cri 14 (15, 16), *The Queen* v. *Mt. Itwarya*. (Do).]

5. (1902) (1902) 2 K B 339 : 71 L J K B 805 : 86 L T 836 : 51 W R 137, *Rex* v. *Plummer*.

6. (1913) 14 Cri L Jour 453 (455) : 37 Bom 658, *Emperor* v. *Sanalal Lalu Bhai*.

forming *separate* transactions.

5. *A* is tried for offence *X*. *A* is again sought to be tried for offence *Y*. *X* and Y are *not* distinct offences and do not fall within Sections 236 and 237 of the Code, but *form part of the same transaction.*

In cases 1 and 2 the subsequent trial is barred under sub-section 1 of the Section.[1] Sub-section 2 provides that in case 3 the subsequent trial is not barred. Case 4 does not fall either under sub-section 1 or sub-section 2. The subsequent trial is, however, obviously not barred. The reason is that if a subsequent trial for a distinct offence *forming part of the same transaction*, is not barred, a subsequent trial for a distinct offence *not* forming part of the same transaction cannot in any view be barred.

Case 5 is not within sub-section 1 of the Section. Sub-section 2 also does not in terms apply to it; but it *implies*, that a subsequent trial is barred, and decisions which have held that a subsequent trial in such cases is barred can only be supported in this view.[2] Thus where *A* gives *Z* 50 strokes with a stick, each stroke is a different offence, but all the strokes form part of the same transaction. The offences are, however, not *distinct* and a conviction or acquittal in respect of one such stroke would operate as a bar to a subsequent trial for other strokes.

As to the meaning of the words "same offence" and "distinct offences," *see* Notes 3 and 5 below.

Even in cases in which a fresh trial may not be barred under this Section the Court may refuse to proceed against a person on the ground that it is not desirable or proper in the circumstances of a particular case to prosecute a person for a second time on the same facts.[3]

Note 2.

1. *Same offence* :—
(1906) 3 Cri L Jour 115 (116) (Cal), *Suresh Chandra Sinha* v. *Banku Sadhu Khan.*
(1907) 5 Cri L Jour 412 (412): 3 Low Bur Rul 253, *San Mya* v. *Emperor.*
(1934) 1934 Oudh 259 (259): 1934 Cri Cas 765 : 35 Cri L Jour 570, *Gaya Din Lal* v. *Emperor.*
(1917) 1917 Lah 143 (143): 18 Cri L Jour 324, *Saifuddin* v. *Emperor.*
(1906) 4 Cri L Jour 179 (181) (Lah), *Dina Ram* v. *Emperor.*
(1904) 1 Cri L Jour 504 (506) (Lah), *Emperor* v. *Dina Nath.*
(1930) 1930 Mad 785 (785) : 32 Cri L Jour 27 : 1930 Cri Cas 896, *Kolandaswami Pillai* v. *Rajaratna Mudaliar.* Fresh trial barred, though complainant different.
(1927) 1927 Sind 10 (15) : 21 Sind L R 1 : 27 Cri L Jour 1105, *Fakir Mahomed* v. *Emperor.* (Do.)
(1919) 1919 All 90 (90) : 21 Cri L Jour 164, *Ram Chander* v. *Emperor.* (Do.)
Offences falling under Ss. 236 *and* 237. *See Note* 4 *below.*
2. (1929) 1929 All 899 (900): 51 All 977 : 1929 Cri Cas 491: 30 Cri L Jour 1089, *Gamandi Nath* v. *Babu Lal.* Express limitation of sub-s. 2 to S. 235, sub-s. 1 necessarily implies the exclusion from its operation cases falling under the other sub-sections of S. 235.
(1928) 1928 Bom 177 (178): 29 Cri L Jour 522, *Dagdi Dagdya Bhil* v. *Emperor.* (Do.)
(1913) 14 Cri L Jour 135 (137) : 9 Nag L R 26, *Mahadeogir* v. *Emperor.* (Do.)
[See also (1928) 1928 Rang 252 (254): 6 Rang 386 : 29 Cri L Jour 930, *Yeok Kuk* v. *Emperor.* The key to sub-s. 2 lies in words "*distinct* offence."
(1924) 1924 Oudh 64 (64) : 26 Oudh Cas 282 : 25 Cri L Jour 794, *Ram Nidh* v. *Ram Saran.* Acquittal of an offence arising out of certain facts under a wrong Section will prevent a further enquiry into any offence based on the *same facts* until that acquittal is set aside.]
3. (1932) 1932 Cal 291 (292) : 1932 Cri Cas 260 : 33 Cri L Jour 439, *Ajodhyanath* v. *Kshitish Chandra.*
(1930) 1930 Cal 60 (60) : 1930 Cri Cas 12 : 31 Cri L Jour 613, *Kailaspati Upadhya* v. *Gopi Koiri.* Prosecution for offence under Railways Act — Assault committed by accused taken into account in awarding sentence

Sec. 403 Notes 3—5

3. "Same offence."

The word "offence" has been defined in Section 4, Clause (*o*) as any act or omission made punishable by any law for the time being in force. That definition applies, however, where a different intention does not appear from the subject to the context. Sub-section 4 of this Section shows that the *same act* may constitute different offences. The words "same offence" in this Section therefore must be taken to mean the *same act or omission* made punishable under the *same provision of law*. Where an act or omission is punishable under different provisions of law the person committing it cannot be said to "commit the same offence" within the meaning of this sub-section.[1] Hence the expressions "same offence" and "same act or omission" cannot be treated as interchangeable. The judgment in the undermentioned case[2] is, it is submitted, not correct in this respect.

The view has sometimes been expressed[3] that the words "same offence" in sub-section 1 refer to the same *transaction*. It is submitted that such an interpretation is too broad. Sub-section 2 to 4 show that though the transaction may be the same the offences involved may be different.

4. Any other offence for which a different charge might have been made under Section 236.

The expression "might have been made" means "might have been lawfully made."[1] As to when a charge may be framed under Section 236, *see* Notes to Section 236. *See also* the cases cited below.[2]

5. "Any distinct offence."

Before the Amending Act of 1923, Section 35 of the Code provided that where at one trial, a person was convicted of two or more *distinct* offences the Court may sentence him to the several punishments prescribed therefor. An explanation to the Section provided that separable offences within the meaning of Section 71 of the Penal Code were not *distinct* offences within the meaning of that Section. Separate offences not falling within Section 71 of the Code, were, therefore, distinct offences. The word "distinct" which had been used in this Section also even before 1923 continues to exist even now in this Section, though by the Amendment of 1923, it has been deleted in Section 35. But the test to determine whether the offences charged at two trials are distinct for purposes of this Section would be the same, namely, whether, if the offences were charged at the same trial, separate sentences could be passed

— Subsequent prosecution for assault—*Held*, it was not just to prosecute accused again for assault.

(1905) 2 Cri L Jour 790 (793) (All), *The Emperor* v. *Inam-ullah.*

(1900) 5 Cal W N 72 (73), *Jaliram Alom Gamburah* v. *Raj Kumar Umar Singh.*

Note 3.

1. (1930) 1930 Pat 26 (27) : 9 Pat 585 : 1930 Cri Cas 2 : 30 Cri L Jour 806, *Babu Lal* v. *Ramsaran Singh.*
2. (1934) 1934 Mad 311 (313) : 1934 Cri Cas 604 : 57 Mad 554 : 35 Cri L Jour 783, *Janakiramaraju* v. *Emperor.*
3. (1903) 6 Oudh Cas 153 (157, 158), *Raghubar* v. *King Emperor.*

[See also (1913) 14 Cri L Jour 135 (133) : 9 Nag L R 26, *Mahadeogir* v. *Emperor.*]

Note 4.

1. (1930) 1930 Pat 26 (27) : 1930 Cri Cas 2 : 9 Pat 585: 30 Cri L Jour 806, *Babu Lal* v. *Ramsaran Singh.*
2. (1934) 1934 Cal 240 (241) : 35 Cri L Jour 1270 : 1934 Cri Cas 352, *Hira Lal Ahir* v. *Emperor.* Trial under certain Sections expressly reserved—Charges cannot have been framed for such offences.

(1924) 1924 Mad 478 (478) : 25 Cri L Jour 244, *Chinnappa Naidu, In re.*

(1915) 1915 Low Bur 60 (61) : 16 Cri L Jour 267, *Nga Shawe Yi* v. *Emperor.*

in respect thereof under Section 71 of the Code.[1] Hence, the following considerations based on Section 71 of the Penal Code may be applied in determining whether two offences are distinct:— **Sec. 403. Note 5**

1. Where the offences are constituted by the same acts or omissions they are not distinct.[2] *See also* Note 6.

Illustrations.

(a) A person who has been tried for an offence under Section 202 of the Penal Code, cannot be tried again on the same facts for an offence under Section 176 of the Penal Code because the offences under the two Sections would be constituted by the same acts.[3]

(b). A person who is acquitted of disorderly behaviour on a public thoroughfare under a Police Act—the Rangoon Police Act, Section 41, Clause (16)—cannot again be tried under the Penal Code for rioting where the same acts constitute both the offences.[4]

(c). An acquittal of a person under Section 211, of the Penal Code, would bar his trial again on the same facts for an offence under Section 182 of the Penal Code.[5]

(d). A person tried under Section 353, of the Penal Code cannot again be tried in respect of the same act under Section 186 of the Penal Code.[6]

See also the undermentioned cases.[7]

Note 5.

1. (1934) 1934 Mad 311 (313): 1934 Cri Cas 604: 57 Mad 554: 35 Cri L Jour 783, *Janakiramaraju* v. *Emperor*.
2. (1889) 2 C P L R 66 (68, 69), *Empress* v. *Ganesh Prasad*.
   (1934) 1934 Mad 311 (313): 1934 Cri Cas 604: 57 Mad 554: 35 Cri L Jour 783, *Janakiramaraju* v. *Emperor*. *Autre fois convict* forbids a man to be punished twice for the same offence, *i. e.*, the same acts and omissions.
   See also cases in Foot-notes 3 to 7.
3. (1906) 3 Cri L Jour 388 (389) (Cal), *Shabekhan Gohain* v. *Emperor*.
4. (1935) 1935 Rang 436 (438): 1935 Cri Cas 1217, *Nga Myat Thaung* v. *Emperor*.
5. (1913) 14 Cri L Jour 214 (216): 36 Mad 308, *Ganapathi Bhatta* v. *Emperor*.
   [See also (1913) 14 Cri L Jour 135 (138): 9 Nag L R 26, *Mahadeogir* v. *Emperor*. Acquittal under S. 203 precludes trial under S. 177, Penal Code.]
6. (1929) 1929 All 940 (940): 1929 Cri Cas 668: 30 Cri L Jour 1153, *Abdul Rashid* v. *Harish Chandra*.
7. (1930) 1930 Pat 26 (27): 1930 Cri Cas 2: 30 Cri L Jour 806: 9 Pat 585, *Babu Lal Mahton* v. *Ram Saran Singh*. Accused suddenly rising in Court and shouting out, assaulting another with shoe — He commits offences under Ss. 228 and 355, I. P. C., but sub-s. 2 of S. 403 does not apply because the entire series of acts constitute both the acts.
   (1923) 1923 Cal 407 (408): 25 Cri L Jour 149, *Fazzar Pramanic* v. *King-Emperor*. First trial under S. 426, (Mischief) I. P. C. — Second trial under S. 379, I. P. C., for same Act barred.
   (1871) 16 Suth W R Cri 3 (3), *Kaptan* v. *G. M. Smith*. Trial for assualt (S. 352, I. P. C.) bars trial for causing hurt where act constituting offences is same.
   (1890) Ratanlal 519 (520), *Queen-Empress* v. *Vali Ashmal*. Trial under S. 324, I. P. C., bars trial under S. 323, I. P. C., for same act.
   (1927) 1927 Cal 224 (225): 28 Cri L Jour 233, *Alfred Laird* v. *Emperor*. Conviction of officer of ship under S. 68 of Calcutta Police Act for drunken and disorderly behaviour by assaulting captain of ship, bars trial for assault under S. 103 (4) of the Merchants Shipping Act.
   (1926) 1926 Lah 639 (639): 8 Lah 52: 27 Cri L Jour 1019, *Fatteh Muhammad* v. *Emperor*. Cutting tree in Muhammadan graveyard—First trial under S. 297, I. P. C., and acquittal —Second trial under S 379, barred, the reason being that the *act* is the same though it may have two distinct *results*.
   (1928) 1928 All 191 (191): 29 Cri L Jour 271,

Sec. 403 Note 5

The undermentioned decisions[8] in so far as they are inconsistent with the above view are, it is submitted, not correct.

2. Where anything which is an offence consists of parts any of which parts is itself an offence, the offences are not distinct. Thus, where a person receives or retains different items of stolen property at the

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Gur Narain v. *Emperor*. Trial under S. 5, Motor Venicles Act, for reckless driving precludes trial under S. 279, I. P. C., for rash driving on public road so as to endanger human life or to be likely to cause injury or hurt to any other person.

(1928) 1928 Cal 240 (241), *Chatto Kalwar* v. *Emperor*. Where the goods which formed the subject of a charge under Ch. 17, Penal Code and of a charge under S. 54-A Calcutta Police Act, were identical, *held*, second trial barred.

(1925) 1925 Lah 157 (158): 25 Cri L Jour 1241, *Hussain* v. *Emperor*. Trial under S. 121-A (Conspiracy to wage war against the King) precludes trial on same facts for offence under S. 120-B, Criminal Conspiracy.

(1928) 1928 Rang 252 (254): 6 Rang 386: 29 Cri L Jour 930, *Yeok Kuk* v. *Emperor*. Trial under Burma Forest Act for extracting teak timber without license and for counterfeiting akauk mark on teak timber stolen by him—Fresh trial on same facts under Ss. 379 and 411 of the I. P. C. is barred.

(1923) 1923 Cal 179 (179): 24 Cri L Jour 509: 49 Cal 924, *Emperor* v. *Jhabbar Mull*. Trial for offence under S. 408, (Criminal Breach of Trust) in respect of certain sums—Misappropriation alleged by prosecution to have been carried out by means of certain false entries in accounts—Fresh trial under S. 477-A is barred.

(1921) 1921 Pat 22 (22, 23): 22 Cri L Jour 63, *Maksuddan Mistry* v. *Emperor*. Acquittal under S. 338, I. P. C., for rash and negligent driving motor car bars fresh trial under Motor Vehicles Act, S. 16, for driving without license.

(1918) 1918 Lah 49 (50): 19 Cri L Jour 931, *Raj Bahadur* v. *Emperor*. Selling married girl by misrepresenting that she is virgin, conviction under S. 372, I. P. C., precludes trial for cheating.

(1919) 1919 Pat 70 (71): 20 Cri L Jour 526, *Muhamad Saleh* v. *Emperor*. Acquittal under S. 363, I. P. C., (kidnapping) bars trial under Ss. 365, 366, and 368, I. P. C.

(1934) 1934 Mad 311 (313): 57 Mad 554: 1934 Cri Cas 604: 35 Cri L Jour 783, *Janakiramayya* v. *Emperor*. Acquittal under S. 397, I. P. C., bars trial under S. 307.

[See (1901) 24 Mad 284 (292), *Jagannadha Rao* v. *Kamaraju*. A charge of kidnapping from lawful guardianship under S. 366, I. P. C., in general terms and not stating from whose guardianship kidnapping took place —Acquittal on such a charge may be pleaded in bar of a trial of a charge of kidnapping from the guardianship of particular person.]

S. (1932) 1932 Mad 362 (363): 1932 Cri Cas 295: 55 Mad 788: 33 Cri L Jour 522, *Subbiah Kone* v. *Kandaswami Kone*. Offences under S. 323, I. P. C., and S. 3 (12), Town Nuisances Act—Though same act may constitute both offences, separate trials not barred.

(1910) 11 Cri L Jour 325 (325, 326): 37 Cal 604, *Ram Sawak Lal* v. *Maneswar Singh*. False information to public servant—Ss. 182 and 500, I. P. C. —Acquittal on charge under S. 182, I. P. C.—No bar to trial under S. 500.

(1910) 11 Cri L Jour 420 (421): 1910 Pun Re Cr No. 20. *Thakar Singh* v. *Chattar Pal*. Acquittal under S. 182 no bar to trial under S. 211, I. P. C.

[See also (1932) 1932 Cal 723 (725): 1932 Cri Cas 728: 60 Cal 179: 34 Cri L Jour 177, *Hanuman Sarma* v. *Emperor*. Accused not found guilty under S. 376, (Rape), I.P.C., does not amount to acquittal under Ss. 376 and 511.

(1928) 1928 All 191 (191): 29 Cri L Jour 271, *Gur Narain* v. *Emperor*. Accused driving car recklessly — Accident resulting— Person injured —Prior conviction for reckless driving under S. 5, Motor Vehicles Act, no bar to trial for causing hurt.

(1928) 1928 Bom 231 (232): 29 Cri L Jour 981, *Emperor* v. *Ram Deoji*. Conviction for driving car while drunk no bar to trial for rash and negligent driving.

(1929) 1929 All 940 (940): 1929 Cri Cas 668: 30 Cri L Jour 1153, *Abdul Rashid* v. *Harish Chandra*. First prosecution under S. 155, U. P. Municipalities Act, for evasion of octroi duty does not bar prosecution for obstructing the Municipal peons —The first offence was against the

same time, he does not commit so many distinct offences.[9] *See also* the case cited below.[10] In this view, the undermentioned decision[11] must be deemed incorrect. Sec. 403 Note 5

3. Where several acts, of which one or more than one, would, by itself, or by themselves, constitute an offence, constitute when combined a different offence, the offences are not distinct.[12] Thus, *A* is a member of an unlawful assembly, the common object of which is to cause hurt to *B*. In pursuance of the common object, *A* causes hurt to *B*. In such a case, the act of being a member of an unlawful assembly, and that of causing hurt constitute offences in themselves under Sections 143 and 323 of the Penal Code respectively, and constitute when combined a different offence, *viz.*, rioting under Section 147 of the Penal Code. But the offences under Sections 143, 323 and 147 are not *distinct* and cannot be made the subject of separate trials.[13]

Municipality and the second against the peons.
(1926) 1926 All 405 (406) : 48 All 496: 27 Cri L Jour 767, *Deoki Koeri* v. *Emperor*. Where the accused was convicted for theft as he was found removing gunny bags with opium inside. *Held* his conviction for theft does not bar the trial for being in possession of opium under S. 9, Opium Act.
(1929) 1929 Bom 283 (285, 286) : 1929 Cri Cas 38 : 53 Bom 604 : 30 Cri L Jour 1059, *Manjubhai Gokdhandas* v. *Emperor*. Offence under S. 19 (e), Arms Act is distinct from offence under S 324, I. P. C.
(1929) 1929 Bom 451 (452) : 1929 Cri Cas 510 : 30 Cri L Jour 965, *Dodhu Kalu Mahar, In re*. Conviction for affray does not bar trial for hurt caused in course of affray.
(1925) 1925 All 299 (300) : 47 All 284: 26 Cri L Jour 688, *Ram Sukh* v. *Emperor*. (Do.)
(1920) 1920 Pat 419 (450) : 22 Cri L Jour 222, *Tanuk Lal Mandan* v. *Emperor*. Conviction for rioting—Common object of unlawful assembly to obstruct public servant in discharge of duty—Subsequent trial under S. 186, I. P. C., for causing obstruction to public servant in discharge of duty not barred.
(1933) 1933 Oudh 470 (472) : 35 Cri L Jour 36 : 1933 Cri Cas 1393, *Emperor* v. *Munno*. Conviction in respect of possession under Ss. 411 and 414, I. P. C., is no bar to conviction under S. 19 (f) in respect of such possession.]

9. (1925) 1925 Pat 20 (24, 25): 3 Pat 503 : 25 Cri L Jour 738, *Emperor* v. *Bishun Singh*.
(1925) 1925 Oudh 298 (299) : 26 Cri L Jour 1, *Munwa* v. *Emperor*.
(1893) 15 All 317 (318), *Queen-Empress* v. *Makhan*.
(1923) 1923 Cal 557 (558): 50 Cal 594 : 24 Cri L Jour 707, *Ganesh Sahu* v. *Emperor*.
(1906) 1906 All W N 22 (22, 23), *Emperor* v. *Mianjan*.
[See (1927) 1927 Sind 53 (54): 27 Cri L Jour 1256: 21 Sind L R 154, *Dadlo Mal* v. *Emperor*. Properties received on *different* dates—Separate trials not barred—Where it is proved that the properties were stolen on different occasions, it may be presumed that they were received also at different times.]

10. (1927) 1927 Mad 444 (445): 28 Cri L Jour 235, *In re Mooka Pillai*. Accused inducing complainant to buy certain property by misrepresenting that it was unencumbered and that he would make a deposit — Two separate trials for cheating in respect of the two facts misrepresented not maintainable.

11. (1929) 1929 Pat 710 (711) : 1929 Cri Cas 582 : 31 Cri L Jour 472, *Ghana Mahapatra* v. *Emperor*. Unlawful assembly and rioting resulting in damage to several holdings—Charge of separate offences legal.

12. *See the following cases where it was held that offences coming under sub-s. 3, S. 235 of the Code (which deals with offences of the above kind) cannot be separately tried :—*
(1913) 14 Cri L Jour 135 (137) : 9 Nag L R 226, *Mahadeogir* v. *Emperor*.
(1928) 1928 Bom 177 (178) : 29 Cri L Jour 522, *Dagdi Dagdya* v. *Emperor*.
(1929) 1929 All 899 (900) : 1929 Cri Cas 491 : 51 All 977 : 30 Cri L Jour 1089, *Ghamandi Nath* v. *Babu Lal*.

13. See (1900) 5 Cal W N 72 (73), *Jaliram* v. *Rajkumar*. Unlawful assembly with common object of assaulting com-

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Where the offences in question do not fall within any of the above categories, they are distinct.[14]

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plainant—Complainant assaulted by accused in prosecution of common object—Accused tried and acquitted under S. 147, I. P. C. (rioting)—He cannot be tried again on same facts for causing hurt to complainant.

14. (1930) 1930 All 92 (95) : 1930 Cri Cas 81 : 30 Cri L Jour 1149, *Hakum Singh* v. *Emperor*. Separate trials with reference to distinct transactions are legal.
(1935) 1935 Cal 316 (330) : 1935 Cri Cas 467: 36 Cri L Jour 982 : 62 Cal 749, *Abdul Rahman* v. *Emperor*. Prosecution and conviction for one conspiracy is no bar to trial for a *different* conspiracy.
(1921) 1921 Cal 181 (183) : 48 Cal 78 : 21 Cri L Jour 614, *Ram Sahay Ram* v. *Emperor*. Trial for rioting in course of which accused are said to have wrongfully confined certain persons —Previous trial for wrongful confinement is not a bar to subsequent trial for rioting.
(1904) 1 Cri L Jour 714 (716) : 31 Cal 1007, *Prosunno Kumar Das* v. *Emperor*. Previous conviction for being in possession of counterfeit coin under S. 243, I. P. C., does not bar a trial under S. 240 for passing the coins.
(1874) 22 Suth W R Cri 14 (15, 16), *Queen* v. *Mt. Itwarya*. Murder of *A*, and the subsequent attempt to murder *B* are distinct offences.
(1921) 1921 Lah 186 (186) : 24 Cri L Jour 636, *Nadar* v. *Crown*. Trial of detention of married woman under S. 498, I. P. C., at a particular time is no bar to trial for detention at a different period.
(1928) 29 Cri L Jour 3 (3) : 106 Ind Cas 339 (Lah), *Waryam Singh* v. *Emperor*. (Do.)
(1924) 1924 Lah 330 (331): 24 Cri L Jour 780, *Mah Ali Khan* v. *Emperor*. Acquittal of a person on a charge of abduction does not bar a trial for detaining the same person.
(1933) 1933 Pat 670 (671) : 35 Cri L Jour 486 : 1933 Cri Cas 1492, *Balchand Ram* v. *Emperor*. Accused charged and acquitted of suffering prisoner to escape can be again tried for breach of departmental rule in omitting to rouse night officer.
(1906) 3 Cri L Jour 93 (94) (All), *Baldeo Prasad* v. *King-Emperor*. Attacking a certain person in his house and carrying away a woman in the house—Conviction for attacking is not bar to trial for abduction.
(1927) 1927 Rang 303 (304) : 28 Cri L Jour 908, *Me Tok* v. *King-Emperor*. *A*, representing himself to be *B*, executing a mortgage and registering it —Trial of *A* for cheating under S. 419, I. P. C. does not bar his trial under S. 82 (c), Registration Act, for false personation at the registration office as the offences are distinct.
(1931) 1931 Sind 116 (117, 118) : 1931 Cri Cas 734 : 25 Sind L R 9 : 33 Cri L Jour 41, *Muhammad Rafio* v. *Emperor*. *A* sending telegram to Mrs. *B* asking her to send a certain sum of money wording the telegram as though it was despatched by *B*—*A* tried under S. 420, I. P. C., for cheating—Subsequent trial of *A* under S. 468, I. P. C. and S. 29, Telegraph Act, not barred.
(1905) 2 Cri L Jour 790 (792) (All), *Emperor* v. *Inam-ullah*. Forgery of different documents—Separate trials legal.
(1867) 7 Suth W R Cri 15 (21), *Queen* v. *Dwarkanath Dutt*. (Do.)
(1918) 1918 Pat 165 (167) : 19 Cri L Jour 121, *Hayat Khan* v. *Emperor*. Accused assaulting *A*—*B* interfering and accused attacking *B* also and causing hurt to him—Trial for assault on *A* is no bar to trial for causing hurt to *B*.
(1934) 1934 Cal 240 (241) : 35 Cri L Jour 1270 : 1934 Cri Cas 352, *Hira Lal Ahir* v. *Emperor*. Trespass into jail in order to have communication with prisoner and offering bribe to warder—Trespass and offering bribe constitute distinct offences and separate trials not barred.
(1899) 1 Bom L R 15 (18), *Queen-Empress* v. *Subedar Krishnappa*. Acquittal of an accused on a charge under S. 400, Penal Code, cannot operate under S. 403, Criminal P. C. as a bar to his being prosecuted again on a charge under S. 395, Penal Code, for committing one of the dacoities in respect of which evidence was given in the previous trial under S. 400.
(1930) 1930 Mad W N 692 (694), *Venkataswami* v. *Narappa*. *A* trespassing on *B's* land — Trampling upon his crops and hurting *B's* servants who came to resist—*C* complaining of all three offences but trial only for hurt and case compounded—Later trial of offence of criminal trespass and mischief not barred.
(1897) 20 All 107 (108), *Queen-Empress* v. *Yusuf*. Acquittal of murder no bar to trial under S. 404 or 411.
(1896) 23 Cal 174 (178, 179): *Queen-Em-*

press v. *Croft.* Conviction of offence under S. 61, Bengal Excise Act no bar to trial for offence under Ss. 486 and 487, I. P. C. and Ss. 6 and 7, Merchandise Marks Act.

(1919) 1919 Cal 1063 (1064): 20 Cri L Jour 43, *Bejoy Krishna Pal* v. *Belai Chand Bhandari.* Trial for offence under S. 352, I. P. C. (assault) is no bar to trial for offence under S. 504 (insult) committed in course of same transaction.

(1934) 1934 Mad 673 (674): 1934 Cri Cas 1307: 58 Mad 178: 35 Cri L Jour 1503, *Seerangachariar* v. *Emperor.* Person prosecuted and acquitted for theft of blank railway ticket—Subsequent trial for forgery thereon is not barred.

(1915) 1915 Bom 203 (204, 205): 40 Bom 97: 16 Cri L Jour 761, *Jaivram Dankarji* v. *Emperor.* Abetment of forgery of a document and using such document as genuine are distinct offences and separate trials are legal.

(1870) 5 Mad H C Rul App 22 (22), *High Court Proceedings, 16th May* 1870. Adultery with and enticing married woman and theft of husband's property — Acquittal of former two offences no bar to trial for last mentioned offence.

(1928) 1928 Bom 177 (179): 29 Cri L Jour 522, *Dagdi Dagdya* v. *Emperor.* False complaints made to two different Magistrates on two different occasions—Offences are distinct and separate trials are legal.

(1930) 1930 Lah 57 (59): 1930 Cri Cas 25: 30 Cri L Jour 954, *Mangalsen* v. *Emperor.* Conviction of director of company under S. 91-B, of Companies Act (for voting on contract in which he was personally interested) is no bar to his trial for criminal breach of trust.

(1935) 1935 Cal 571 (572): 1935 Cri Cas 979, *Saroda Devi* v *Satyeswar Santra.* Complaint disclosing several offences -- Accused summoned for one offence and acquitted - Fresh complaint in respect of other offences is not barred.

(1902) 4 Bom L R 575 (577), *Municipality of Bombay* v. *Jever.* Trial for building without license from Municipality is no bar to trial for failure to comply with notice for removal of building.

(1915) 1915 Lah 147 (147): 16 Cri L Jour 605, *Crown* v. *Mohan Lal.* (Do.)

(1909) 9 Cri L Jour 578 (580, 581): 5 Low Bur Rul 12, *Oborno Charan Chowdhary* v. *Emperor.* Disobedience of notice under Municipal Act to leave passage while building under construction—Acquittal for such disobedience does not bar trial for disobedience of notice to *alter* building after construction.

(1935) 1935 Mad W N 1342 (1343), *Veerayya Vandayar* v. *Emperor.* Acquittal of murder by firing gun is no bar to trial for possession of gun under Arms Act, S. 19 (f), either *before* or *subsequent* to occurrence.

(1932) 1932 Cal 291 (292): 33 Cri L Jour 439: 1932 Cri Cas 260, *Ajodhya Nath Kundu* v. *Kshitish Chandra Kundu.* Acquittal for offence under S. 453, I. P. C., trespass, is no bar to trial for theft.

(1925) 1925 Lah 537 (538): 26 Cri L Jour 1097, *Chhaju* v. *Emperor.* Being member of gang for the purpose of habitually committing theft, trial for — Acquittal — Receiving stolen property, trial for, not barred.

Criminal breach of trust or criminal misappropriation committed of different items at various times between certain dates—Charge under S. 222 ante *for an aggregate sum omitting some of the items —Trial on such charge no bar to trial in respect of an omitted item* :—

(1930) 1930 Mad 978 (980): 32 Cri L Jour 223: 1930 Cri Cas 1194, *Kanakayya* v. *Emperor.*

(1910) 11 Cri L Jour 337 (337, 338): 5 Ind Cas 970 (Bom), *Emperor* v. *Kasinath Bagaji.*

(1929) 1929 Cal 457 (458, 459): 1929 Cri Cas 91: 57 Cal 17: 31 Cri L Jour 747, *Sidh Nath* v. *Emperor.*

(1923) 1923 Cal 654 (656): 50 Cal 632: 25 Cri L Jour 156, *Nagendra Nath Bose* v. *Emperor.*

(1931) 1931 All 209 (209): 1931 Cri Cas 224: 32 Cri L Jour 376: 53 All 411, *Brijiwan Das* v. *Emperor*
[But see (1917) 1917 Mad 524 (525): 17 Cri L Jour 30, *Appadurai Ayyar, In re.* Submitted not correct.]

Conspiracy to commit an offence is distinct from the offence the comission of which is the object of the conspiracy :—

(1934) 1934 All 61 (65): 1934 Cri Cas 130: 35 Cri L Jour 1349, *Ram Das* v. *Emperor.*

(1933) 1933 Bom 447 (448, 449): 1933 Cri Cas 1406: 58 Bom 23: 35 Cri L Jour 112, *Ochhavlal Bhikhabai, In re.* Conviction for criminal conspiracy—Acts of cheating committed in pursuance of the conspiracy—S. 403 is no bar to subsequent trial for cheating.

(1924) 1924 Cal 809 (811): 25 Cri L Jour 1048, *King-Emperor* v. *Osman Sardar.* Conspiracy to murder is not same as murder and conviction for conspiracy is no bar to trial for

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It has sometimes been said[15] that the test for determining whether an offence is distinct from one previously tried is to see whether the evidence necessary to prove the two offences is the same or different. It is submitted that such a test is not conclusive[16] as it is possible that though the evidence necessary to prove two offences is different, the offences may not be distinct. For instance, the evidence necessary to prove hurt will not be the same as that necessary to prove grievous hurt; yet two offences may be committed by the same act and may not be distinct.

Further, the observation in the undermentioned case[17] that, in order to constitute distinct offences, the offences must be *totally* unconnected, is not correct, as the same transaction may involve distinct offences, in which case they cannot be said to be totally unconnected.

6. Consequences of act happening after previous conviction—Sub-section 3. *A* is tried for causing grievous hurt and convicted. The person injured afterwards dies. *A* may be tried again for culpable homicide (Illus-

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murder.
[But see (1926) 1926 Cal 450 (450) : 26 Cri L Jour 1023, *Behari* v. *Satish Chandra Ghose*. After person is acquitted of offence under S. 193, I. P. C., he cannot be proceeded against on facts wholly inseparable from the facts of the prior prosecution case for an offence under Ss. 467 and 471 read with S. 120-B, I. P. C.]

Previous trial for abetment of forgery is no bar to trial for offence under S. 82 of Registration Act :—

(1915) 1915 All 114 (115): 37 All 107 : 16 Cri L Jour 144, *Emperor* v. *Jiwan*.
[But see (1924) 1924 Rang 213 (213): 1 Rang 299 : 25 Cri L Jour 191, *Maung Saing* v. *Emperor*.]

Non-compliance with notice under S. 159 (1), *Madras Local Boards Act, for removal of encroachment—Prosecution for—Fresh prosecution for disobedience of fresh notice regarding same encroachment is not barred* :—

(1932) 1932 Mad 535 (536) : 33 Cri L Jour 626 : 1932 Cri Cas 552, *Moidi Peary* v. *President, Taluk Board of Mangalore*.

(1932) 1932 Mad 537 (537) : 1932 Cri Cas 525 : 33 Cri L Jour 629, *President, Panchayat Board, Velgode* v. *Venkata Reddy*.

(1927) 1927 Mad W N 645 (646), *Narayan Ayyar* v. *Rakkupayal*.

(1930) 1930 Mad 971 (972) : 1930 Cri Cas 1187: 32 Cri L Jour 228, *Union Board, Ayyampet* v. *Ramchandra Ayyar*.
[But see (1925) 1925 Mad 1067 (1068): 48 Mad 870 : 26 Cri L Jour 1049, *Ramanujachariar* v. *Kailasam Ayyar*.
(1935) 1935 Mad 56 (57, 58) : 1935 Cri Cas 55 : 58 Mad 513 : 36 Cri L Jour 311, *A. M. Rengachariar* v. *Venkataswami Chetty*.]

Section 35, *Madras Planter's Labour Act* (1903), *does not limit the number of directions to fulfil the contract that can be made or to the number of prosecutions following on default* :—

(1916) 1916 Mad 527 (529, 530): 16 Cri L Jour 777 : 39 Mad 889, *N. C. Whitton* v. *Muhammad Maistri*.
[But see (1913) 14 Cri L Jour 79 (79, 80): 36 Mad 427, *Ponga Maistry* v. *Emperor*.]

[See also (1930) 1930 Oudh 455 (459), *Bachchu* v. *Emperor*. Acquittal of receiving property stolen in dacoity no bar to trial for taking part in the dacoity.]

[But see (1930) 1930 Rang 360 (360): 1930 Cri Cas 1238: 32 Cri L Jour 205, *Chit Hlaing Maung* v. *Emperor*. Acquittal for abduction of female precludes trial for rape on female—Submitted, the decision, is not correct.

(1865) 3 Suth W R Cr Letters 9 (9). Acquittal for theft—Fresh trial for abetment of theft barred on same facts—Submitted, decision not correct.]

15. (1928) 1928 Pat 577 (578) : 29 Cri L Jour 760, *Channu Prasad Singh* v. *Emperor*.
(1927) 1927 Bom 629 (630) : 28 Cri L Jour 1032, *Emperor* v. *Kallasani*.
(1930) 1930 All 92 (94) : 1930 Cri Cas 81 : 30 Cri L Jour 1149, *Hukum Singh* v. *Emperor*.
(1930) 1930 Pat 26 (27) : 1930 Cri Cas 2 : 30 Cri L Jour 806 : 9 Pat 585 *Babu Lal Mahton* v. *Ram Saran Singh*.

16. (1932) 1932 Mad 362 (363) : 55 Mad 788 : 1932 Cri Cas 295 : 33 Cri L Jour 522, *Subbiah Kone* v. *Kandaswami Kone*.

17. (1928) 1928 Rang 252 (254) : 6 Rang 396 :

tration c).[1]

In such a case a fresh trial will be competent even while the accused is undergoing the previous sentence.[2]

But a fresh trial will not be competent if the death had occurred, and was known to the Court to have occurred, at the time of the previous conviction.[3] The reason is that the offences charged at the two trials would be constituted by the *same* acts and as such would not be *distinct* offences. (*See* Notes 2 and 5.)

7. "Tried."

This Section does not apply unless the accused has been *tried*[1] and convicted or acquitted. But the previous trial need not be one on the merits;[2] so that an acquittal under Section 247, in a summons case on the ground of the complainant's absence will be a valid bar under this Seciotn[3] although the summons had not been served on the accused.[4]

Security proceedings[5] or proceedings under Section 145[6] do not constitute a *trial* within the meaning of this Section. Similarly a proceeding for maintenance under Section 488 of the Code is not a trial and a prior application for maintenance does not bar a fresh application. But where a Magistrate knows or has reason to believe that a prior application has been made and disposed of, he ought not to act on a later application without taking into consideration the adjudication on the prior application.[7]

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29 Cri L Jour 930, *Yeok Kuk* v. *Emperor.*

Note 6.

1. (1914) 1914 All 191 (192) : 15 Cri L Jour 64: 36 All 4, *Sailani* v. *King-Emperor.*
   (1901) 1901 Pun Re Cri No. 3, page 6 (8), *Crown* v. *Sarbiland.*
2. (1935) 1935 Pesh 18 (19) : 36 Cri L Jour 813 : 1935 Cri Cas 191, *Arsala Khan* v. *Emperor*
3. (1879) 2 All 349 (350), *Emperor* v. *Banni.*
   (1913) 14 Cri L Jour 135 (137, 138) : 9 Nag L R 26, *Mahadeogir* v. *Emperor.*

Note 7.

1. (1918) 1918 Mad 212 (213) : 40 Mad 977 : 19 Cri L Jour 497, *Bezwada Kottayya* v. *Konthalapalli Venkayya.*
2. (1911) 12 Cri L Jour 41 (42) : 34 Mad 253, *Guggilapu Peddaya, In re.*
   (1929) 1929 Cal 189 (189, 190): 30 Cri L Jour 585, *Suku Ram Koch* v. *Krishna Deb Sarma.*
   (1921) 1921 Pat 311 (312): 22 Cri L Jour 331, *Ram Mahto* v. *Emperor.*
   (1927) 1927 Nag 388 (388): 28 Cri L Jour 183, *Yesudha* v. *Mt. Bannu Bai.*
   (1918) 1918 Mad 231 (233) : 40 Mad 976 : 19 Cri L Jour 501, *Dude Kula Lal Sahib, In re.*
   (1935) 1935 Cal 491 (493) : 36 Cri L Jour 1238 : 1935 Cri Cas 883, *Bhubati Bhusan Mukerjee* v. *Amio Bhusan Mukerjee.*
   (1929) 1929 Bom 408 (409, 410) : 53 Bom 693 : 1929 Cri Cas 436 : 31 Cri L Jour 1000, *Shankar Dattatraya* v. *Dattatraya Sadasiva.*
3. (1911) 12 Cri L Jour 41 (41, 42) : 34 Mad 253, *Guggilapu Peddaya, In re.*
   (1924) 1924 Pat 140 (141) : 24 Cri L Jour 815, *Kiram Sarkar* v. *King-Emperor.*
   (1935) 1935 Cal 491 (493) : 1935 Cri Cas 883 : 36 Cri L Jour 1238, *Bhubati Bhusan Mukerjee* v. *Amio Bhusan Mukerjee.*
   (1929) 1929 Bom 408 (409) : 1929 Cri Cas 436 : 53 Bom 693 : 31 Cri L Jour 1000, *Sankar Dattatraya* v. *Dattatraya Sadasiva.*
4. (1918) 1918 Mad 231 (234, 236) : 40 Mad 976 : 19 Cri L Jour 501, *In re Dudikula Lal Sahib.* Trial commences as soon as Court takes cognisance and issues process.
   [But see (1918) 1918 Mad 212 (212, 213) : 40 Mad 977 : 19 Cri L Jour 497, *Bezawada Kottayya* v *Kanthalapalli Venkayya.* Trial of summons case does not begin until particulars of offence are stated to accused under S. 242 of Code.]
5. (1913) 14 Cri L Jour 559 (561) : 36 Mad 315, *Muthia Moopan, In Re.*
   [Compare (1928) 1928 Rang 135 (136) : 30 Cri L Jour 630, *Nya Mya Gyi* v. *Emperor.* Accused sent to jail for failure to furnish security for keeping peace—Subsequent trial for sedition in connexion with the same speeches is against spirit of S. 403.]
6. (1918) 1918 Upp Bur 8 (9) : 3 Upp Bur Rul 33 : 19 Cri L Jour 389, *Nga Chit* v. *Nga Ya.*
7. (1908) 9 Cri L Jour 21 (22) : 4 Low Bur

Sec. 403 Notes 7—8

Disciplinary proceedings under the Legal Practitioners' Act are not trials.[8] But the Rangoon High Court has held that such proceedings are *quasi* criminal and that the principle of this Section will apply to them.[9] Issuing a warrant of commitment and placing a person under restraint under Regulation III of 1818 is not in the nature of a trial and a conviction and does not bar a prosecution for a specific offence.[10]

Where in a Sessions trial in a High Court the jury is discharged on a difference of opinion between the Judge and the jury and the case is re-tried with a new jury there is no fresh trial for the purpose of this Section.[11] Similarly, an appeal is not a fresh trial but only a continuation of the trial in the lower Court.[12]

The *acquittal* of a person on the ground of his trial being barred under this Section, is illegal, the reason being that an acquittal implies a trial.[13]

8. "Acquittal"—Meaning of.

The acquittal of an accused under Section 247 of the Code on the ground of the complainant's absence[1] or under Section 494 on withdrawal of a prosecution by the Public Prosecutor[2] is an acquittal within the meaning of

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Rul 337, *Po So* v. *Ma Kyin Mi*.

(1927) 1927 Rang 328 (328) : 5 Rang 697 : 28 Cri L Jour 912, *Maung Hla Maung* v. *Ma On Kin*.

8. (1931) 1931 Pat 369 (376) : 11 Pat 365 : 32 Cri L Jour 1256 : 1931 Cri Cas 897 (F B), *Ram Gobind Sinha, In Re*.

9. (1925) 1925 Rang 110 (110) : 2 Rang 491 : 26 Cri L Jour 1111, *In the matter of Maung Po Tok*.

10. (1871) 17 Suth W R Cri 15 (18), *Queen* v. *Amir Khan*.

11. (1914) 1914 Cal 901 (904): 41 Cal 1072: 15 Cri L Jour 460, *Emperor* v. *Nirmal Kanta Ray*.

12. (1914) 1914 Mad 258 (259): 37 Mad 119: 15 Cri L Jour 180, *Kunban Bali Reddi* v. *Emperor*.

(1932) 1932 Nag 121 (123): 1932 Cri Cas 672: 28 Nag L R 233: 33 Cri L Jour 849 (F B), *Mohammadi Gul Rohilla* v. *Emperor*.

13. (1908) 8 Cri L Jour 139 (140) (Bom), *In re S. E. Dubash*.

(1909) 9 Cri L Jour 578 (580, 581): 5 Low Bur Rul 12, *Oborno Charan Chowdhury* v. *Emperor*.

[See (1910) 11 Cri L Jour 253 (254): 1910 Pun Re. Cri No. 7, *Gokul Chand* v. *Phul Chand*. Court which has no jurisdiction to try an accused has no jurisdiction to *acquit* him and the proper order is one of discharge.]

Note 8.

1. (1929) 1929 Bom 408 (409, 410): 53 Bom 693: 1929 Cri Cas 436 : 31 Cri L Jour 1000, *Shankar Dattatraya* v. *Dattatraya Sadasiva*. Even though summons had not been served on the accused

(1935) 1935 Cal 491 (493) : 1935 Cri Cas 883 : 36 Cri L Jour 1238, *Bhubati Bhusan Mukerjee* v. *Amio Bhusan Mukerjee*.

(1924) 1924 Cal 96 (96) : 24 Cri L Jour 716, *Nityananda Koer* v. *Rakhahari Missra*.

(1911) 12 Cri L Jour 41 (41, 42): 34 Mad 253, *Guggilapu Peddaya, In re*.

(1929) 1929 Cal 189 (189, 190): 30 Cri L Jour 585, *Suku Ram* v. *Krishna Deb*.

(1934) 1934 Lah 211 (212): 1934 Cri Cas 446 : 36 Cri L Jour 29, *Abdul Aziz* v. *Noor Ellahi*.

(1921) 1921 Pat 311 (312): 22 Cri L Jour 331, *Ram Mahto* v. *Emperor*.

(1927) 1927 Nag 388 (388): 28 Cri L Jour 183, *Mt. Yesodha* v. *Mt. Banu Bai*.

(1914) 1914 Mad 628 (630): 38 Mad 1028 : 15 Cri L Jour 236, *Sinnu Goundan, In re*.

(1924) 1924 Pat 140 (141): 24 Cri L Jour 815, *Kiran Sirkar* v. *Emperor*.

(1923) 1923 Cal 407 (408): 25 Cri L Jour 149, *Fazzaar Pramanick* v. *King-Emperor*.

(1923) 1923 All 360 (360): 45 All 58: 24 Cri L Jour 862, *Dulla* v. *Emperor*.

[See (1908) 8 Cri L Jour 139 (140) (Bom), *In re S. E. Dubash*. Order striking off case not proper— Proper order would be acquittal.

(1915) 1915 Cal 119 (120): 42 Cal 365: 16 Cri L Jour 148, *Achambit Mondal* v. *Mahatab Singh*. Void order under S. 247 does not amount to acquittal.

(1915) 1915 Cal 263 (263): 15 Cri L Jour 726, *Madho Chowdhury* v. *Turab Mian*. (Do.)

(1929) 1929 Cal 657 (658): 1929 Cri Cas 327, *Musa Singh* v. *Gostha Behari*. (Do.)]

2. (1913) 14 Cri L Jour 135 (138): 9 Nag L R 26, *Mahadeogir* v. *Emperor*.

this Section. Similarly the acquittal of an accused on the case being lawfully compounded is an acquittal for the purposes of this Section.[3]

The dismissal of a complaint,[4] the discharge of an accused[5] or an order stopping proceedings under Section 249[6] of the Code is not an acquittal for the purposes of this Section. *See* Note 13, *infra*. Similarly, an order refusing to take cognizance of an offence[7] or an order staying proceedings with reference to an offence does not amount to an acquittal.[8]

Where an appellate Court sets aside a conviction without anything further, the order amounts to an acquittal.[9] But where the appellate Court sets aside a conviction and orders a re-trial its order does not amount to an acquittal.[10] In some decisions[11] it has been held that an order setting aside a

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(1918) 1918 Mad 231 (233, 235): 40 Mad 976: 19 Cri L Jour 501, *Dude Kula Lal Sahib, In re.*

(1888) 12 Mad 35 (36), *Queen-Empress* v. *Sivarama.*

3. (1913) 14 Cri L Jour 458 (459): 20 Ind Cas 618 (Cal), *Bausiruddin* v. *Khairat Ali.*
[See (1893-1900) 1893-1900 Low Bur Rul 240 (241), *Queen-Empress* v. *Po Ba.* No lawful compromise—No bar to fresh trial.]

4. (1934) 1934 All 877 (879): 1934 Cri Cas 1084: 35 Cri L Jour 1177, *Ali Bux* v. *Emperor.* Dismissal of the complaint after recording of the prosecution evidence and framing of a charge, on discovery that the complainant had not been examined under S. 200, Criminal P. C., does not amount to an acquittal.

5. (1866) 5 Suth W R Cri 58 (58), *Shoodun Mundle, In re.*

(1907) 5 Cri L Jour 309 (318) : 31 Bom 335, *Emperor* v. *Bhagwan Das.*

(1932) 1932 Mad 505 (506): 1932 Cri Cas 509: 55 Mad 795 : 33 Cri L Jour 653, *Nannier* v. *Dasalier.* Discharge under S. 259

(1867) 6 Suth W R Cri 13 (14), *Queen* v. *Robert Sheriff.* Before the charge is drawn up and the accused called upon to plead to it, he can only be discharged, and not acquitted.

(1934) 1934 All 340 (341) : 1934 Cri Cas 418: 56 All 750 : 36 Cri L Jour 65, *Suraj Bali* v. *Emperor.* Dismissal of complaint for default in warrant case operates as discharge under S. 259 and not acquittal.

6. (1912) 13 Cri L Jour 860 (861) : 1913 Pun Re Cri No. 9, *Achhu* v. *Emperor.*

7. (1926) 1926 Sind 198 (199) : 22 Sind L R 427 : 27 Cri L Jour 302, *Morrison* v. *Crowder.*

(1914) 1914 Oudh 406 (407) : 17 Oudh Cas 273 : 15 Cri L Jour 638, *Alaudin Khan* v. *Emperor.*

(1932) 1932 Cal 871 (874, 875) : 1932 Cri Cas 893 : 60 Cal 149 : 34 Cri L Jour 181, *Nafar Sardar* v. *Emperor.*

(1900) 24 Mad 337 (339), *Queen-Empress* v. *Kuniyil Raru.*

(1933) 1933 Pat 242 (244) : 1933 Cri Cas 714: 12 Pat 234 : 34 Cri L Jour 1198, *Uma Singh* v. *Emperor.*

(1907) 6 Cri L Jour 34 (36) (Cal), *Mokamiji Das* v. *Emperor.* But proceedings should not be revived without sufficient grounds.
[See also (1881) 5 Bom 405 (407, 408), *The Government of Bombay* v. *Shidapa.* Information to police about offence—Police not investigating—Case dropped—No bar under Section.]
[But see (1903) 7 Cal W N 711 (713), *Kedar Nath Biswas* v. *Adhin Manji.* Order refusing to issue process against certain accused—*Held* that until the order was set aside those accused could not be prosecuted.]

8. (1889) 1889 All W N 8 (9), *Queen Empress* v. *Rajhunandan Lal.*

9. (1933) 1933 Mad W N 224 (224), *Similan* v. *Similan.*

(1918) 1918 Nag 126 (127) : 19 Cri L Jour 796, *Nanakram* v. *Emperor.*
[But see (1867) 7 Suth W R Cri 2 (2), *Queen* v. *Kali Charan Gangooly.*]
[Compare also (1906) 3 Cri L Jour 15 (17) : 3 Low Bur Rul 87, *Hla Gyi* v *Emperor.*]

10. (1935) 36 Cri L Jour 1333 (1334) : 158 I. C. 200 (All), *Emperor* v. *Bahrai Chi.*

(1932) 1932 All 409 (411) : 1932 Cri Cas 513 : 54 All 756 : 33 Cri L Jour 669, *Emperor* v. *Baijnath.* Conviction under one Section set aside and commitment for offence under another Section ordered—*Held* that there was no acquittal.
[See (1926) 1925 Cal 585 (586) : 53 Cal 192 : 27 Cri L Jour 733, *Emperor* v. *Miajan.* Conviction set aside—Question of re-trial left to District Magistrate — Order setting aside conviction is not acquittal.]

11. (1902) 29 Cal 412 (414), *Abdul Ganni* v.

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conviction on the ground of the lower Court having had no jurisdiction, the order does not amount to an acquittal but only to a discharge.

See also the cases cited below.[12]

9. "Conviction"—Meaning of.

A finding of guilty by a Magistrate proceeding under Section 349 is not a conviction.[1] But it has been held that the finding of guilty by a Magistrate who commits a case under Section 348 would bar the trial of the accused for the offence to which the finding relates.[2] Departmental punishment is not a conviction for the purposes of this Section.[3] *See also* the following case.[4]

10. "While such conviction or acquittal remains in force."

The bar of a fresh trial under this Section applies only where the previous conviction or acquittal *is in force*.[1]

11. Court of competent jurisdiction.

The bar of a fresh trial under this Section will apply only where the

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Emperor.

(1881) 3 Mad 48 (50, 51), *Rami Reddi and Seshu Reddi, In re*.

(1926) 1926 Pat 302 (304) : 5 Pat 452 : 27 Cri L Jour 849, *Mohammad Yasin* v. *Emperor*.

(1934) 1934 Mad 716 (717, 718) : 1934 Cri Cas 1354 : 58 Mad 256 : 36 Cri L Jour 550, *Narayanaswami Vannier* v. *Karumbayiram Pariyari*.

(1932) 1932 Cal 683 (684) : 1932 Cri Cas 636 : 33 Cri L Jour 770, *Nagendra Nath Sirkar* v. *Emperor*.

12. (1872) 18 Suth W R Cri 10 (10), *Ramjoy Surma* v. *Mirza Ali*. Order for the release of the accused, as being not guilty, amounts to an acquittal.

(1924) 1924 All 778 (779) : 26 Cri L Jour 98, *Harbans* v. *Emperor*. Acquittal of accused brought about by fraud established against third person in proceedings to which the accused were not parties is valid unless set aside by independent proceedings.

(1923) 1923 Mad 719 (720) : 24 Cri L Jour 465 : 46 Mad 723, *Ramanna* v. *Gurunatham*. Dismissal for default of complaint under S. 1 of Workmen's Breach of Contract Act—No Acquittal.

(1913) 14 Cri L Jour 404 (404) : 9 Low Bur Rul 35, *Krishna Pardan* v. *Pasand*. Dismissal for default of application under S. 1 of Workmen's Breach of Contract Act—No acquittal.

(1921) 1921 Cal 1 (15) : 48 Cal 388 : 22 Cri L Jour 31 (S B), *Satish Chandra Chakravarthi* v. *Ram Dayal De*. Dismissal of application for sanction to prosecute is not acquittal.

(1930) 1930 Sind 315 (315). 1930 Cri Cas 1147 : 24 Sind L R 446 : 32 Cri L Jour 521, *Rajabali* v. *Emperor*. Doctrine of *autre fois acquit* does not apply to a refusal by a Magistrate under S. 476 to file complaint against the accused.

Note 9.

1. (1928) 1928 Bom 240 (240) : 52 Bom 456 : 29 Cri L Jour 904, *Emperor* v. *Narayan Dhaku Bhil*.

2. (1914) 1914 Mad 149 (149) : 38 Mad 552 : 15 Cri L Jour 188, *In re Kora Sellandi*.

3. (1887) Ratanlal 318 (319), *Queen-Empress* v. *Ramnaik*.

(1915) 1915 Lah 350 (351) : 1915 Pun Re Cri No. 26 : 16 Cri L Jour 788, *The Crown* v. *Gul Muhammad*.

(1894) 17 Mad 278 (279, 280), *Queen-Empress* v. *Fakrudeen*.

(1910) 12 Cri L Jour 143 (144), 9 Ind Cas 831 (Lah), *Sohan Singh* v. *Emperor*.

4. (1870) 7 Bom H C R Crown Cas 55 (56), *Reg.* v. *Durgaram*. Fine levied by pound keeper is no punishment imposed on conviction for offence and is no bar to trial for offence.

Note 10.

1. (1929) 1929 All 710 (719) : 1929 Cri Cas 294 : 31 Cri L Jour 230, *Azam Ali* v. *Emperor*.

(1917) 1917 All 410 (412) : 39 All 293 : 18 Cri L Jour 546, *Husain Khan* v. *Emperor*.

(1875) 7 N W P H C R 371 (373), *Queen* v. *Panna*.

(1867) 7 Suth W R Cri 2 (2), *Queen* v. *Kali Churn*.

(1868) 9 Suth W R Cri 15 (16), *Gopnath* v. *Troylocko Chuckerbutty*.

(1870) 13 Suth W R Cri 42 (42), *Wahad Ali* v. *Baboo Bhowanee Churn*.

(1884) 1 Weir 759 (759, 760), *Kunniya Gounden, In re*.

(1929) 1929 Nag 161 (162) : 1929 Cri Cas 51 : 30 Cri L Jour 763, *Manji Jairam Bhate* v. *Kalekhan*. Conviction of some accused and acquittal of others —Appeal by former—Appellate Court holding whole trial void as without

previous conviction or acquittal has been by a Court of competent jurisdiction.[1] It is also necessary for the application of this Section that the Court by which the accused was first tried should have been competent to try the offence subsequently charged.[2]) **Sec. 403 Note 11**

Where the sanction or complaint of a particular person or authority is necessary under the law for the trial of a person, the question arises whether in the absence of such sanction or complaint a Court which tries him is a Court of competent jurisdiction. On this question there is a conflict of decisions. The majority of the High Courts have held that the Court cannot be deemed to be a Court of competent jurisdiction in such cases.[3] The Madras High Court has taken a contrary view, holding that the words "competent jurisdiction" refer only to the character and status of a Court and not to con-

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jurisdiction—Acquittal also void and does not operate as a bar to fresh trial.

Note 11.

1. (1917) 1917 All 410 (412) : 39 All 293 : 18 Cri L Jour 546, *Husain Khan* v. *Emperor.*
(1884) 8 Bom 307 (308), *Queen-Empress* v. *Husein Gaibu.*
(1881) 3 Mad 48 (51), *Rami Reddi and Seshu Reddi, In re.*
(1884) 1884 Pun Re Cri No 38, page 73 (74), *Gulzar* v. *The Empress.*
(1866) 6 Suth W R Cri 13 (14), *Queen* v. *Sheriff.*
(1865) 2 Suth W R Cri 9 (10), *Queen* v. *Mt. Muthoorapershad Panday.*
(1865) 4 Suth W R Cri Letters 2 (2), *Letter No.* 890 *from the Registrar of the High Court.*
2. (1884) 7 Mad 557 (560), *Viran Kutti* v. *Chiyamu.*
(1919) 1919 Cal 464 (464, 465): 19 Cri L Jour 388, *Abdul Hakim* v. *Emperor.*
(1918) 1918 Cal 943 (945, 946): 18 Cri L Jour 834, *Abdul Hakim Khan* v. *Buzruk Ali Khan.*
(1897-1901) 1897-1901 Upp Bur Rul 91 (93) *Nga Po Han* v. *Nga Tha Le Ii.*
(1900-1902) 1 Low Bur Rul 340 (343), *Nga, San Baw* v. *Crown.*
(1898) 2 Weir 482 (483), *In re Kannachampet Parangodan.*
(1928) 1928 Bom 530 (531, 532): 30 Cri L Jour 54: 53 Bom 69, *Shankar Tulshiram, In re.*
(1928) 1928 Pat 577 (579): 29 Cri L Jour 760, *Chhanu Prasad Singh* v. *Emperor.*
(1925) 1925 Mad 711 (711) : 26 Cri L Jour 1087, *Palani Goundan* v. *Emperor.*
(1919) 1919 Upp Bur 32 (33): 3 Upp Bur Rul 135: 20 Cri L Jour 533, *Mi Chit* v. *Mi Nyun.*
(1887) Ratanlal 337 (338), *Queen-Empress* v. *Ladkia.*
(1875) 7 N W P H C R 371 (373, 374), *Queen* v. *Panna.*
(1903) 5 Bom L R 125 (126), *Emperor* v. *Zuji Manu.*
(1912) 13 Cri L Jour 742 (743) : 1912 Pun Re Cri No. 7, *Wadhawa Singh* v. *Emperor.*
(1918) 1918 Mad 481 (482) : 18 Cri L Jour 643, *In re Venkataranga Josier.*
(1929) 1929 Nag 161 (162) : 1929 Cri Cas 51: 30 Cri L Jour 763, *Manji Jairam* v. *Kalekhan.*
(1919) 1919 Cal 511 (511) : 20 Cri L Jour 112, *Krishnadhon Ghose* v. *Mahendra Nath Dutt.*
(1928) 1928 Lah 844 (844) : 29 Cri L Jour 701, *Mt Allah Di* v. *Emperor.*
(1934) 1934 All 141 (142) : 1934 Cri Cas 193: 56 All 529 : 35 Cri L Jour 865, *Sukhala* v. *Emperor.*
(1867) 8 Suth W R Cri 61 (61), *Queen* v. *Tilkoo Goala.*
(1923) 1923 Pat 228 (229) : 2 Pat 333 : 25 Cri L Jour 1385, *Gobind Swain* v. *Emperor.*
(1921) 1921 All 205 (205) : 22 Cri L Jour 750, *Mohan Lal* v. *Emperor.*
3. (1929) 1929 All 940 (940) : 1929 Cri Cas 668: 30 Cri L Jour 1153, *Abdul Rashid* v. *Harish Chandra.*
(1926) 1926 All 231 (232) : 27 Cri L Jour 705, *Ram Nath* v. *King-Emperor.*
(1921) 1921 All 205 (205): 22 Cri L Jour 750, *Mohan Lal* v. *Emperor.*
(1917) 1917 All 410 (412) : 39 All 293 : 18 Cri L Jour 546, *Husain Khan* v. *Emperor.*
(1915) 1915 All 114 (115) : 37 All 107 : 16 Cri L Jour 144, *Emperor* v. *Jiwan.*
(1909) 9 Cri L Jour 526 (526) : 31 All 317, *Umer-ud-din* v. *King-Emperor.*
(1915) 1915 Bom 203 (204) : 40 Bom 97 : 16 Cri L Jour 761, *Jivaram Dankarji* v *Emperor.*
(1915) 1915 Bom 194 (195) : 16 Cri L Jour 662, *Emperor* v. *Tikaram.*
(1928) 1928 Bom 143 (144) : 52 Bom 257 : 29 Cri L Jour 545, *Emperor* v. *Ambaji.*
(1898) 22 Bom 711 (713), *In re Samsudin.*
(1928) 1928 Bom 530 (531) : 30 Cri L Jour 54 : 53 Bom 69, *Shanker Tulshiram, In re.*

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ditions precedent for the prosecution or trial of a person.[4] The Calcutta High Court has held that a trial held in the absence of the necessary sanction or complaint is not a *trial* at all within the meaning of this Section.[4a]

A Court having no local jurisdiction to try a case is not a Court of competent jurisdiction and a conviction or acquittal by such Court will be no bar to a fresh trial of the accused on the same facts.[5]

Where the previous trial was by a Court of Session with the aid of assessors and the offence subsequently charged was triable by jury, *held* that it could not be said that the Court by which the accused was first tried was not competent to try the offence subsequently charged.[6]

A conviction or acquittal by a Court established under a local or special law is a conviction or acquittal by a Court of competent jurisdiction within the meaning of this Section.[7]

It has been held that a conviction by a Court in a Native State can be pleaded as a bar under this Section.[8]

An illegal conviction is not the same thing as a conviction by a Court having no jurisdiction.[9]

12. Identity of accused necessary for application of Section.

This Section will preclude a fresh trial only if the accused in the second case is the same as the accused in the previous case. The conviction or ac-

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(1926) 1926 Cal 691 (692): 27 Cri L Jour 751, *P. Banerji* v. *Bepin Behary.*

(1930) 1930 Lah 1055 (1055): 1930 Cri Cas 1231: 32 Cri L Jour 253, *Chuhar* v. *Emperor.*

(1918) 1918 Nag 126 (127, 128): 19 Cri L Jour 796, *Nanakram* v. *Emperor.*

(1934) 1934 Pat 411 (411): 1934 Cri Cas 882: 35 Cri L Jour 686, *Mohendra Nath Sahu* v. *Emperor*

(1925) 1925 Pat 330 (333, 334): 4 Pat 24: 26 Cri L Jour 170, *Chimari Singh* v. *Public Prosecutor of Gaya.*

(1926) 1926 Pat 302 (304): 5 Pat 452: 27 Cri L Jour 849, *Mohammad Yasin* v. *Emperor.*

(1930) 1930 Pat 26 (28): 1930 Cri Cas 2: 9 Pat 585: 30 Cri L Jour 806, *Babulal Mahton* v. *Ram Saran Singh.*

(1900-1902) 1 Low Bur Rul 340 (343), *Nga San Baw* v *Crown.*

(1927) 1927 Sind 10 (12, 16) 21 Sind L R 1: 27 Cri L Jour 1105, *Fakiri Mohammed* v. *Emperor,*

See also the following cases in which it was held that in the absence of a complaint or other material on which an offence could have been taken cognizance of legally, the previous trial cannot be held to have been by a Court of competent jurisdiction:—

(1930) 1930 Pat 26 (29): 9 Pat 585: 30 Cri L Jour 806: 1930 Cri Cas 2, *Babulal Mahton* v *Ram Saran Singh.* Want of complaint or other material on which to take cognizance—No jurisdiction to try.

(1905) 4 Cri L Jour 422 (423): 2 Nag L R 149, *Emperor* v. *Mahabirpuri.* (Do.) [But see (1922) 1922 All 502 (502): 45 All 11: 23 Cri L Jour 496, *Emperor* v. *Kohna.*
(1921) 1921 Sind 137 (139, 140, 142): 16 Sind L R 1: 23 Cri L Jour 305, *Emperor* v. *Menghraj Devidas*]

4. (1913) 14 Cri L Jour 214 (217, 218): 36 Mad 308, *K. Ganapathi Bhatta* v. *King-Emperor.*
[See also (1930) 1930 Mad 785 (785): 1930 Cri Cas 896: 32 Cri L Jour 27: *Kolandiswami Pillai* v. *Rajaratna Mudaliar.*]

4a (1926) 1926 Cal 691 (692): 27 Cri L Jour 751, *P. Banerjee* v. *Bepin Behary.*

5. (1928) 1928 Bom 530 (531, 532): 53 Bom 69: 30 Cri L Jour 54, *Shanker Tulshiram Navle, In re.*
[But see (1933) 1933 Mad 765 (766): 1933 Cri Cas 1372: 34 Cri L Jour 1080: 56 Mad 996 (F B), *Rathnavelu* v. *K. S. Iyer.*]

6. (1901) 24 Mad 641 (644), *King-Emperor* v. *Krishna Ayyar.*

7. (1921) 1921 Rang 23 (23): 1 Rang 449: 25 Cri L Jour 233, *Nga E* v. *King-Emperor.*
(1884) 1884 Pun Re Cri No. 30 p. 52 (53, 54), *Sarwar* v. *The Queen-Empress.*

8. (1924) 1924 Lah 238 (239): 24 Cri L Jour 715, *Teja Singh* v. *Emperor.*

9. (1931) 1931 Lah 199 (199, 200): 1931 Cri Cas 319: 32 Cri L Jour 731, *Ram Piyari* v. *Emperor.*

quittal of an accused person is therefore no bar to the trial of *another* person *implicated* in the same offence.[1] But the fact that another person accused of the same offence and on the same facts has been acquitted may be taken into consideration by the Magistrate in determining the question whether there is sufficient ground for proceeding against a person.[2]

13. Dismissal of complaint or discharge of accused.

The explanation to the Section expressly provides that the dismissal of a complaint or the discharge of an accused is not an acquittal for the purposes of the Section. The question has arisen whether notwithstanding this, the provision of a special remedy in such cases under Section 436 and Section 437, *infra*, impliedly bars the institution of a fresh prosecution for the same offence where the order dismissing the complaint or discharging the accused has not been set aside by a competent authority. It is well settled now that a fresh prosecution is not barred in such cases.[1] The contrary view taken in some

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Note 12.

1. (1914) 1914 All 85 (86) : 36 All 168 : 15 Cri L Jour 200, *Emperor* v. *Ghure.*
   (1918) 1918 Cal 650 (650) : 19 Cri L Jour 766, *Hafiz-ud-din Khan* v. *Muhammad Elim.*
   (1914) 1914 Cal 886 (887) : 41 Cal 754 : 15 Cri L Jour 402, *Manindra Chandra Ghose* v. *Emperor.*
   (1910) 11 Cri L Jour 541 (541) : 37 Cal 680, *Kokai Sardar* v. *Mehar Khan.*
   (1905) 4 Cri L Jour 173 (174) (Cal), *The Deputy Legal Remembrancer* v. *Hatim Mollah.*
   (1866) 6 Suth W R Cri 51 (51), *Queen* v. *Morly Sheikh.*
2. (1926) 1926 Cal 795 (798) : 53 Cal 606 : 27 Cri L Jour 788, *Subal Chandra Namadas* v. *Ahadullah Sheikh.*
   (1933) 1933 Mad W N 246 (247, 248), *Seshachalam* v. *Bapanayya.*
   (1899) 4 Cal W N 346 (347), *Panchu Singh* alias *Punchanan Singh* v. *Umor Mahomed Sheikh.* Order in previous trial purporting to terminate all proceedings.

Note 13.

1. *Dismissal of complaint—Fresh prosecution not barred :—*
   (1934) 1934 Lah 435 (436) : 1934 Cri Cas 698 : 36 Cri L Jour 62, *Mahomed Din* v. *Hussain.*
   (1895) 1895 All W N 86 (86), *Umedan* v. *Emperor.*
   (1881) 1881 All W N 68 (68), *Empress* v. *Indar Dawan.*
   (1913) 14 Cri L Jour 2 (2) : 35 All 78, *Angan* v. *Ram Pirbhan.*
   (1916) 1916 Mad 887 (887) 16 Cri L Jour 814, *Pampalli Subbareddi* v. *Chauduboyigari Kamal.*
   (1905) 2 Cri L Jour 651 (652) : 1 Nag L R 18, *Makhatambi* v. *Hasan Ali.*
   (1908) 7 Cri L Jour 297 (299) (All), *Bhagwan Din* v. *Dibba.*
   (1920) 1920 All 8 (9) : 42 All 275 : 21 Cri L Jour 379, *Jai Kishan* v. *Kalla.*
   (1895) 1895 All W N 86 (86), *Queen-Empress* v *Umedan.*
   (1914) 1914 All 79 (80) : 36 All 129 : 15 Cri L Jour 158, *Rambharos* v. *Baban.*
   (1935) 1935 All 60 (63) : 1935 Cri Cas 102 : 35 Cri L Jour 1485, *Kunji Lal* v. *Emperor.*

   Discharge of accused—Fresh prosecution not barred :—
   (1927) 1927 Mad 503 (504) : 28 Cri L Jour 304, *Venkanna* v. *King-Emperor.*
   (1909) 9 Cri L Jour 80 (82) : 31 Mad 545, *Girija Sundar Chakravarti* v. *Emperor.*
   (1872) 18 Suth W R Cri 39 (39), *Jint Sahoo* v. *Bheekon Roy.*
   (1871) 15 Suth W R Cri 55 (56), *Queen* v. *Rajkishore Roy.*
   (1897) 1 Cal W N 49 (51), *Opoorba Kumar Sett* and *Sreemutty Brajangana Dassi* v. *Sreematty Probod Kumari Dassi.*
   (1912) 13 Cri L Jour 120 (121) : 38 Cal 828, *Amodini Dassee* v. *Darson.*
   (1914) 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cri L Jour 174, *Bulchand Tahilram* v. *Chandoomal Ramrakhiamal.*
   (1914) 1914 Oudh 406 (407) : 17 Oudh Cas 273 : 15 Cri L Jour 638, *Alaudin Khan* v. *Emperor.*
   (1930) 1930 Cal 369 (370) : 1930 Cri Cas 568 : 31 Cri L Jour 1153, *Lori Chand Saha* v. *Niroda Sundari Saha.*
   (1929) 1929 Bom 134 (134) : 30 Cri L Jour 594, *Emperor* v. *Amanat Kodar.*
   (1925) 1925 Nag 432 (432) : 26 Cri L Jour 1040, *Ashgar Ali* v. *Akbar Ali.*

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(1934) 1934 All 87 (87) : 1934 Cri Cas 150 : 56 All 425 : 35 Cri L Jour 1062, *Ram Nand* v. *Sheri.*

(1930) 1930 All 92 (95) : 1930 Cri Cas 81 : 30 Cri L Jour 1149, *Hukum Singh* v. *Emperor.*

(1915) 1915 All 417 (418) : 37 All 628 : 16 Cri L Jour 669, *Bateshar* v. *Emperor.*

(1916) 1916 Pat 109 (110) : 18 Cri L Jour 296 : 2 Pat L Jour 34, *Bijoo Singh* v. *Emperor.*

(1923) 1923 All 332 (333) : 24 Cri L Jour 232, *Jasua* v. *Emperor.*

(1919) 1919 All 315 (316) : 20 Cri L Jour 403, *Parmeshwari Das* v. *Jagan Nath.*

(1914) 1914 All 179 (179) : 36 All 53 : 15 Cri L Jour 1, *William Cecil* v. *Emperor.*

Miscellaneous :—

(1872) 4 N W P H C R 23 (25), *Queen* v. *Hur Pershad.*

(1887) 9 All 52 (56), *Queen-Empress* v. *Chotu.*

(1887) 9 All 85 (87, 88), *Queen-Empress* v. *Puran.*

(1886) 1886 All W N 260 (260), *Empress* v. *Jadu.*

(1906) 4 Cri L Jour 59 (60, 61) : 29 All 7, *Emperor* v. *Meharban Hussain.*

(1934) 1934 All 514 (515) : 1934 Cri Cas 614 : 35 Cri L Jour 1059, *Lallain* v. *Emperor.*

(1934) 1934 All 944 (945) : 1934 Cri Cas 1256 : 36 Cri L Jour 202, *Nazir Ahmad* v *Emperor.* Whether discharge is before or after taking evidence fresh prosecution not barred.

(1880) Ratanlal 145 (145), *Queen-Empress* v. *Budhya.*

(1887) Ratanlal 350 (352), *Queen-Empress* v. *Bapuda.*

(1892) Ratanlal 588 (590), *Queen-Empress* v. *Govind.*

(1875) 1 Bom 64 (66), *Reg.* v. *Devama.*

(1888) 13 Bom 384 (388), *Queen-Empress* v. *Shankar.*

(1892) 16 Bom 414 (427), *Queen-Empress* v. *Vajiram.*

(1902) 27 Bom 84 (91), *Emperor* v. *Varjivandas.*

(1907) 5 Cri L Jour 255 (256) (Bom), *The Emperor* v. *Nabi Fakira.*

(1870) 14 Suth W R Cri 65 (66), *In the matter of the petition of Ramjai Majumdar.*

(1873) 20 Suth W R Cri 19 (19), *Queen* v. *Ramsodoy Chuckerbutty.*

(1873) 20 Suth W R Cri 47 (48), *Kistoram Mohara* v. *Anis.*

(1901) 28 Cal 211 (216, 217), *Queen-Empress* v. *Dolegobind Dass.*

(1901) 28 Cal 652 (658) (F B), *Dwarka Nath Mondul* v. *Beni Madhab Banerji.*

(1932) 1932 Mad 369 (371) : 1932 Cri Cas 353 : 55 Mad 622 : 33 Cri L Jour 454, (F B), *Ponnuswamy Gounden* v. *Emperor.*

(1902) 29 Cal 726 (732, 735) (F B), *Mir Ahwad Hossein* v. *Mahomed Askari.*

(1912) 13 Cri L Jour 488 (488) : 40 Cal 71, *Emperor* v. *Idoo.*

(1918) 1918 Cal 485 (486) : 18 Cri L Jour 886, *Umesh Chunder* v. *Satish Chundra.*

(1868) 1868 Pun Re Cri No. 32 p. 90 (99, 100), *Sekunder Khan* v. *Crown.*

(1908) 8 Cri L Jour 249 (249) (Lah), *Behari Lal* v. *Emperor.*

(1911) 12 Cri L Jour 364 (368, 369) : 1911 Pun Re Cri No. 10, *Emperor* v. *Kiru.*

(1934) 1934 Lah 169 (170) : 1934 Cri Cas 347 : 36 Cri L Jour 473, *Nasir* v. *Ch Abdul Karim.* Discharge on withdrawal by Public Prosecutor. Fresh complaint by private party not barred.

(1868) 4 Mad H C Rul App 8*n* (9*n*), *High Court Proceedings, 1st April* 1868.

(1870) 5 Mad H C Rul App 31 (32), *High Court Proceedings, 17th June* 1870.

(1874) 7 Mad H C Rul App 40 (40), *High Court Proceedings, 23rd November* 1874.

(1906) 3 Cri L Jour 274 (280) : 29 Mad 126, *In re Chinna Kaliappa Goundan and Subbier.*

(1908) 8 Cri L Jour 208 (208) (Mad), *In re, Rudra Goud.*

(1910) 11 Cri L Jour 190 (190, 191) : 4 Ind Cas 1113 (Mad), *Emperor* v. *Maheshwara Kondaya.*

(1893-1900) 1893-1900 Low Bur Rul 169 (172, 173), *Queen-Empress* v. *Nga O Bok.*

(1904) 1 Cri L Jour 167 (173, 179) : 2 Low Bur Rul 27, *King-Emperor* v. *Nga Pyu Di.*

(1925) 1925 Rang 114 (115) : 26 Cri L Jour 284, *U Shwe Kyaw* v. *Ma Sein Bwin.*

(1930) 1930 Rang 156 (157) : 1930 Cri Cas 588 : 8 Rang 1 : 31 Cri L Jour 824, *Dhana Reddy* v. *Emperor.*

Fresh prosecution not barred though order dismissing complaint or discharging accused has been confirmed by superior Court :—

(1930) 1930 Lah 879 (880) : 1930 Cri Cas 923 : 12 Lah 9 : 31 Cri L Jour 1180, *Allah Ditta* v. *Karam Baksh.*

(1909) 9 Cri L Jour 563 (564) : 36 Cal 415, *Jyotindra Nath Daw* v. *Hem Chandra Daw.*

But a contrary view was taken in the following cases :—

of the earlier decisions[2] is, it is submitted, not good law.

Where a complaint is dismissed or an accused is discharged by one Magistrate, there is a conflict of decisions as to whether *another* Magistrate of co-ordinate or inferior jurisdiction can start a fresh prosecution against the accused for the same offence. It has been held by the High Courts of Bombay[3] Madras[4] and Rangoon[5] and the Chief Court of the Punjab,[6] that a fresh prosecution can be started by such Magistrate. A contrary view is held by the High Courts of Allahabad[7] and Calcutta[8] and the Judicial Commissioner's

(1928) 1928 Sind 49 (50) : 21 Sing L R 127: 28 Cri L Jour 57, *Shah Mahomed* v. *Emperor*. Discharge or dismissal of complaint confirmed by superior Court—Fresh prosecution barred.

(1910) 11 Cri L Jour 347 (348) : 6 Ind Cas 991 (Lah), *Mohammad Yaqub* v. *Emperor*. (Do.)

[See (1927) 1927 Mad 695 (696) : 28 Cri L Jour 507, *Rama Naidu* v. *Venkataswami Naidu*. Dismissal of complaint by village magistrate (to whom Code does not apply) is not a bar to fresh prosecution.

(1905) 3 Cri L Jour 426 (428): 1905 Upp Bur Rul 4th Qr., Crim. Pro. Code 41 (43), *Nga Kun* v. *Emperor*.]

2. (1896) 23 Cal 983 (988, 989), *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*.

(1901) 24 Cal 286 (288), *Komal Chandra Pal* v. *Gour Chand Audhikari*.

(1899) 3 Cal W N 760 (761), *Simbhoo Ram Lall* v. *Kari Hazari*.

(1898) 4 Cal W N 26 (27), *Ram Coomar* v. *Ramjee*.

(1898) 4 Cal W N 46, *Damini Dassi* v. *Hurry Mohun*.

(1894) 1894 Pun Re Cr No. 33, page 110 (111, 112), *Jowahir Singh* v. *Queen Empress*.

(1878) 2 Weir 247 (1) (247), *High Court Proceedings*, 28*th March* 1878, *No.* 671.

(1878) Weir, 3rd Edn., 874 (874, 875) *High Court Proceedings*, 28*th March* 1878, *No.* 671.

(1882) 6 Mad 25 (26), *Queen* v. *Venguvayyangar*.

(1905) 2 Cri L Jour 752 (753): 24 Mad 255, *Mahomed Abdul Mennan* v. *Panduranga Row*.

[See (1905) 2 Cri L Jour 758 (759): 28 Mad 310, *Chinnathambi Mudali* v. *Sallaguruswamy Chetty*. Discharge without taking evidence — Fresh prosecution not barred—Discharge after taking evidence—Fresh prosecution barred.]

3. (1925) 1925 Bom 258 (259): 26 Cri L Jour 991, *Mahadev Laxman Satardeker*, *In re*.

(1892) 16 Bom 414 (427), *Queen-Empress* v. *Vaji Ram*. (*Per* Telang, J.)

(1884) Ratanlal 209 (209), *Krishna*.

4. (1932) 1932 Mad 369 (371). 1932 Cri Cas 353: 55 Mad 622: 33 Cri L Jour 454, *Ponnuswami Goundan* v. *Emperor*.

(1916) 1916 Mad 887 (887) : 16 Cri L Jour 814, *Pampalli Subbareddi* v. *Chauduboyigari Kamal*.

5. [See (1934) 1934 Rang 40 (41): 1934 Cri Cas 263: 35 Cri L Jour 802, *U Sein Ywet* v. *U Maung Tyi*.]

6. (1911) 12 Cri L Jour 364 (369): 11 Ind Cas 132: 1911 Pun Re Cri No. 10, *Emperor* v. *Kiru*.

[Compare (1926) 1926 Lah 445 (445): 27 Cri L Jour 719, *Dhari Mal* v. *Emperor*. Fresh complaint should preferably be disposed of by Magistrate by whom complaint was dismissed or accused was discharged.]

7. (1900) 22 All 106 (108), *Queen-Empress* v. *Adam Khan*.

(1934) 1934 All 87 (87, 88) : 1934 Cri Cas 150 : 56 All 425 : 35 Cri L Jour 1062, *Rama Nand* v. *Sheri*.

(1927) 1927 All 815 (816) : 28 Cri L Jour 536, *Nanda* v. *Emperor*.

[See (1915) 1915 All 50 (50) : 16 Cri L Jour 73, *Mohammed* v. *Ali Raza*. Magistrate who dismissed complaint had jurisdiction in case merely by reason of transfer of the case to him—Subsequent complaint instituted in the Court which alone could take cognizance of the complaint, previous Magistrate having left the district—*Held* that the entertainment of complaint was legal.

(1935) 1935 All 59 (60) : 1935 Cri Cas 38 : 36 Cri L Jour 128, *Phonsia* v. *Emperor*. Discharge — Subsequent complaint on same facts — Application for transfer—Maintainability—Procedure.

(1881) 3 All 251 (253), *Empress of India* v. *Tika Singh*.

(1935) 1935 All 60 (63) : 1935 Cri Cas 102 : 56 All 990 : 35 Cri L Jour 1485, *Kunji Lal* v. *Emperor*. Same Magistrate entertaining complaint can transfer it to another Magistrate for disposal.

(1934) 1934 All 514 (515) : 1934 Cri Cas 614: 35 Cri L Jour 1059, *Lallain* v. *Emperor*. Compare observations in.]

[But see (1926) 1926 All 298 (298) : 27 Cri L Jour 383, *Puran* v. *Emperor*.]

8. (1897) 24 Cal 528 (531, 532), *Girish Chandra*

Sec. 403 Note 13

Court of Sind[9] on the ground that it would be contrary to sound principle to allow one Magistrate to practically displace the orders of another Magistrate of equal rank and powers. It is submitted that there is no warrant for limiting the effect of the words of the Explanation in this way.

It is settled that the *successor* of the Magistrate by whom a complaint was dismissed or an accused was discharged can start proceedings against the accused afresh.[10]

Whether it is the same Magistrate or a different Magistrate before whom proceedings against an accused are sought to be re-commenced, the Magistrate has a discretion in the matter;[11] he ought not to start a fresh prosecution in the absence of exceptional circumstances.[12]

As to whether the *same* case can be re-opened, *see* Notes under Section 369.

Roy v. *Dwaraka Das Agarwallah.*

9. (1922) 1922 Sind 23 (24) : 15 Sind L R 131 : 23 Cri L Jour 737, *Chandi Ram Vehomal* v. *Emperor.*

(1929) 1929 Sind 61 (61) : 23 Sind L R 43 : 29 Cri L Jour 1097, *Mt. Tirathbai* v. *Mt. Sugnibai.*

[See (1929) 1929 Sind 242 (243) : 1929 Cri Cas 536 : 31 Cri L Jour 687, *Emperor* v. *Allias.* It is *undesirable* that a different Magistrate should revive the proceedings.]

10. (1925) 1925 Nag 432 (433) : 26 Cri L Jour 1040, *Ashgar Ali* v. *Akbar Ali.*

(1914) 1914 All 79 (80) : 36 All 129 : 15 Cri L Jour 158, *Rambharos* v. *Baban*

(1920) 1920 Pat 523 (524) : 21 Cri L Jour 660, *Sheo Gobind Singh* v. *Emperor.*

(1934) 1934 All 514 (515) : 1934 Cri Cas 614 : 35 Cri L Jour 1059, *Lallain* v. *Emperor.*

(1934) 1934 All 87 (88) : 1934 Cri Cas 150 : 56 All 425 : 35 Cri L Jour 1062, *Rama Nand* v. *Sheri.*

(1920) 1920 All 267 (268) : 21 Cri L Jour 815, *Mohan Singh* v. *Emperor.*

11. See Section 190, Note 17.

12. (1930) 1930 Lah 879 (880) : 1930 Cri Cas 923 : 12 Lah 9 : 31 Cri L Jour 1180, *Alla Ditta* v. *Karam Baksh.*

(1918) 1918 Mad 494 (495) : 18 Cri L Jour 329, *Mayayil Kottayal Koyassan Kutty, In re.*

(1922) 1922 Pat 372 (375) : 23 Cri L Jour 236, *Bisoram* v. *Emperor.*

(1925) 1925 Rang 114 (115) : 26 Cri L Jour 284, *Shwe Kyaw* v. *Mt. Shin Bwin.*

(1905) 2 Cri L Jour 651 (653) : 1 Nag L R 18, *Maknatambi* v. *Hasan Ali.*

(1904) 1 Cri L Jour 867 (869) (Rang), *Mi The Kin* v *Nga E. Tha.*

(1906) 4 Cri L Jour 59 (60) : 29 All 7, *Emperor* v. *Meharban Hussain.*

(1908) 8 Cri L Jour 249 (249) (Lah), *Behari Lal* v. *Emperor.*

(1911) 12 Cri L Jour 364 (368, 369) : 11 Ind Cas 132 : 1911 Pun Re Cri No. 10, (F B), *Emperor* v. *Kiru.*

(1887) 2 C P L R 82 (85, 86), *Emperor* v. *Bhawagan Malee.*

(1904) 1 Cri L Jour 867 (868) : 1904 Upp Bur Rul 2nd Qr Cr P C, 19 (20) : *Mi The Kin* v. *Nga E Tha.*

(1887) Ratanlal 350 (352), *Queen-Empress* v. *Bapuda.*

(1932) 33 Cri L Jour 493 (495) : 137 Ind Cas 520 (Lah), *Mohamad Din* v. *Mehatab Din.*

(1929) 30 Cri L Jour 444 (444) : 115 Ind Cas 309 (Sind), *Parsram Bhagwan Das* v. *Emperor.*

(1910) 11 Cri L Jour 582 (582) : 4 Sind L R 52 : 12 Ind Cas 846, *Mohammad Hassim Haji Nazar Ali* v. *Emperor.*

(1925) 1925 Bom 258 (259) : 26 Cri L Jour 991, *In re Mahadev Laxman.*

(1929) 1929 Bom 134 (134) : 30 Cri L Jour 594, *Emperor* v *Amanat Kader.*

(1914) 1914 Sind 44 (44) : 8 Sind L R 195 : 16 Cri L Jour 174, *Bulchen Tahiram* v. *Ghandhoomal.*

(1929) 1929 Lah 544 (544) : 1929 Cri Cas 87, *Budh Singh* v. *Mt. Soman.*

(1929) 1929 Sind 242 (243) : 1929 Cri Cas 536, *Emperor* v. *Alias.*

(1925) 1925 Cal 104 (104) : 25 Cri L Jour 311, *Easatulla Mian, In re.* Person discharged and examined as witness

14. "Discharge"—Meaning of.

It has been seen in Note 13, *ante*, that a discharge of an accused is not an acquittal for the purposes of this Section. For instance, where the accused is discharged under section 259 on the ground of the absence of the complainant[1] or under Section 494, Clause (a)[2] the fresh trial of the accused is not barred under this Section.

Where on a complaint of a major offence the Magistrate frames a charge only for a minor offence his action has been held to amount to a discharge of the accused in regard to the major offence.[3] Where an offence triable as a warrant case is tried as a summons case and the accused has been acquitted, it has been held that the order only amounts to a discharge.[4] *See also* the undermentioned case.[5]

15. General Clauses Act, Section 26.

Sub-section 5 of this Section provides *inter alia* that nothing in this Section shall affect the provisions of Section 26 of the General Clauses Act. That Section runs as follows:—

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of these enactments but shall not be liable to be punished twice for the same offence."

The effect of this is not to authorise or prohibit a *second prosecution* of a person in any case. The Section only means that at *one and the same trial* a person may be charged under the different enactments under which his act may be punishable provided that he is not punished twice for such

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in case against accomplice — Trial again is unfair.

Note 14.

1. (1925) 1925 Nag 432 (432) : 26 Cri L Jour 1040, *Ashgar Ali* v. *Akbar Ali.*
   (1905) 2 Cri L Jour 758 (759) : 28 Mad 310, *Sinnathambi Mudali* v. *Salla Gurusami Chetty.*
   (1934) 1934 Nag 215 (216) : 1934 Cri Cas 986 : 31 Nag L R 93 : 36 Cri L Jour 57, *Ram Prasad* v. *Ganpat Rao.*
2. (1924) 1924 Pat 797 (798) : 26 Cri L Jour 129, *Ramanand Lal* v. *Ali Hassan.*
   (1929) 1929 Lah 315 (315) : 30 Cri L Jour 233, *Hata* v. *Emperor.*
   (1933) 1933 Nag 78 (79) : 29 Nag L R 201 : 1933 Cri Cas 315 : 34 Cri L Jour 519, *Kanhaiyalal* v. *Baijnath Mehesri.*
3. (1901) 24 Mad 136 (139, 140, 146), *Krishna Reddy* v. *Subbamma.*
   (1929) 1929 All 940 (940) : 1929 Cri Cas 668 : 30 Cri L Jour 1153, *Abdul Rashid* v. *Harish Chandra.*
   (1920) 1920 Mad 94 (95) : 43 Mad 330 : 21 Cri L Jour 91, *In re Gandi Apparazu.*
   (1932) 1932 Nag 85 (85) : 1932 Cri Cas 435 : 33 Cri L Jour 558, *Ramrao* v. *Emperor.*
   (1925) 1925 Sind 190 (191) : 19 Sind L R 353 : 25 Cri L Jour 1368, *Khanu* v. *Emperor.*
   [See (1926) 27 Cri L Jour 615 (615) : 94 Ind Cas 359 (All), *Yad Ram* v. *Emperor.*
   (1903) 5 Bom L R 125 (126), *Emperor* v. *Zujai Manudibrit.*]
4. (1888) 1888 All W N 96 (97), *Queen-Empress* v. *Lajju Ram.*
   (1886) 1886 All W N 260 (260), *Empress* v. *Jadu.*
   [But compare (1880) 3 All 129 (131), *Empress of India* v. *Gurdu.* Mere failure to frame charge does not invalidate acquittal and convert it into discharge.]
5. (1934) 1934 All 944 (945) : 36 Cri L Jour 202 : 1934 Cri Cas 1256, *Nazir Ahmad* v. *Emperor.* For the purposes of this Section there is no distinction between discharge after taking prosecution evidence and discharge before.
   (1867) 8 Suth W R Cri 41 (42), *Queen* v. *Neetie.* Magistrate used the words acquittal and release when he intended only to discharge a person accused of an offence not triable by him— *Held* Sessions Court could order commitment of such person.
   (1875) 1 Bom 64 (66), *Reg.* v. *Devamma.* Non-compoundable case dismissed on parties coming to amicable settlement—Order of dismissal amounts to discharge.

Sec. 403 Notes 15—16

act.[1] (Compare Section 235 sub-section 2 of this Code and Section 71 of the Penal Code.)

The effect of sub-section 5 is to enact that the above provision which enables a person being proceeded against at the *same trial* under different enactments in regard to the same act is not affected by the prohibition of a *fresh trial* in respect of such act which this Section contains.

15a. Section 188 of the Code.

Sub-section 5 of this Section provides *inter alia* that nothing in this Section shall affect the provisions of Section 188 of the Code. The second proviso to that Section provides that the trial of a person under the Section in British India for an offence committed out of British India will preclude *extradition proceedings* being taken against him for the same offence. This Section precludes only a *fresh trial* of a person on the same facts in the circumstances stated in the Section. The object of this sub-section is to provide that the fact that only a *fresh trial* is barred under this Section does not affect the bar of *extradition of proceedings* created by Section 188.

16. Practice.

A plea of bar under this Section can be raised at any stage of the case.[1] The plea can be raised even in revision.[2] The burden of proving the facts necessary to establish the plea is on the accused.[3] When a plea of bar is raised under this Section it must be determined after hearing the evidence and ascertaining what the facts are in the two cases.[4]

(1933) 1933 Mad 98 (99): 1933 Cri Cas 129 : 34 Cri L Jour 12, *Tolladagu Musalayya* v. *Mateli Ranga Rao.* Accused tried for offence triable as warrant case on complaint by police—Before charge framed case withdrawn but order of acquittal passed – Order of acquittal was no bar to subsequent trial for same offence.

(1918) 1918 Mad 371 (373) : 41 Mad 727 : 19 Cri L Jour 613, *Raghavalu Naicker* v. *Singaram.* Case under S. 352 (summons case) and S. 504 (warrant case)—Complainant absent — Accused discharged—Discharge does not operate as acquittal with reference to offence under S. 504,

Note 15.

1. (1903) 6 Oudh Cas 153 (157) (Bench), *Raghubar Dayal* v. *King-Emperor.*

It is submitted that the following decisions which have proceeded on the footing that the question of a subsequent trial being barred or not may come within the purview of S. 26, General Clauses Act have not approached the question from the correct point of view :—

(1935) 1935 Pesh 18 (19) : 36 Cri L Jour 813 : 1935 Cri Cas 191, *Arsala Khan* v. *Emperor.*

(1933) 1933 All 461 (462) : 1933 Cri Cas 761 : 34 Cri L Jour 1018, *Reoti* v. *Emperor.*

(1916) 1916 Pat 86 (1) (86) : 18 Cri L Jour 321, *Rahmatullah* v. *Emperor.*

(1932) 1932 Mad 537 (537) : 1932 Cri Cas 525 : 33 Cri L Jour 629, *President, Panchayat Board, Velgode* v. *Chinna Venkata Reddy.*

Note 16.

1. (1914) 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cri L Jour 460, *Emperor* v. *Nirmal Kanta Roy.*

(1928) 1928 Pat 577 (579) : 29 Cri L Jour 760, *Chhanu Prasad Singh* v. *Emperor.*

2. (1934) 1934 All 877 (878): 1934 Cri Cas 1084: 35 Cri L Jour 1177, *Ali Bux* v. *Emperor.*

(1921) 1921 Sind 137 (138) : 16 Sind L R 1 : 23 Cri L Jour 305, *Emperor* v. *Menghraj Devidas.* Objection to trial can be taken notice of by High Court in revision of its own motion.

(1935) 1935 Nag 23 (25) : 1935 Cri Cas 111, *Jagannatha Rao Dani* v. *Emperor.* (Do.)

3. (1928) 1928 Pat 577 (579) : 29 Cri L Jour 760, *Chhanu Prasad* v. *Emperor.*

(1915) 1915 Mad 315 (315) : 15 Cri L Jour 672, *Imandy Appalaswami* v. *Emperor.*

4. (1920) 1920 Cal 972 (973) : 22 Cri L Jour 67, *Radha Kishen Goenka* v. *Fateh Chand Borah*

(1919) 1919 Cal 57 (57) : 20 Cri L Jour 572, *M. N. Mukherjee* v. *Matangi Charan Palit.*

PART VII.

Of Appeal, Reference and Revision.

CHAPTER XXXI.

OF APPEALS.

Unless otherwise provided, no appeal to lie.

404.* No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force. **Sec. 404**

Synopsis.

Other Topics.

Accused not to be examined—In appeal also. See Note 1, F-N (14).
Appeal—Continuation of trial. See Note 1, Pt. 13.
Appeal from order under Section 118. See Note 1, F-N (1).
Appellate Court's powers same as original. See Note 1, Pt. 14.
Civil Procedure Code applies to appeals under Sections 195 and 476. See Note 1, F-N (10).
Effect of Act of 1923. See Note 1.
Error of procedure—Appeal not lost. See Note 1, Pt. 7.
Interlocutory order non-appealable. See Note 1, Pt. 12.
Judgment, order, conviction, and sentence—Meaning. See Note 1, Pt. 11.
Letters Patent—Leave to appeal. See Note 2, Pt. 3.
Limitation in civil and criminal appeals compared. See Note 3, Pt. 8.
Power of superior Court to cancel or vary—No right of appeal. See Note 1, Pts. 3 to 5.
Procedure for appeals under special or local law. See Note 4, Pts. 4 and 5.
Procedure in appeals. See Note 1.
Right of appeal—Expressly by statute and not implication. See Note 1, Pts. 1 to 5; Note 4, Pt. 2.
Right of appeal subject to conditions. See Note 1, Pt. 6.
Right of appeal under rule-making power. Note 4, Pt. 1.
Section 428 not applicable to Section 250. See Note 1, Pt. 9.
Sections 250, 486, 515, 524 and 562. See Note 1.
Sections 476, 486, 195 and procedure. See Note 1, Pt. 10.
"Sentences final"—No appeal. See Note 4, Pt. 3.
Transfer—Appeal not lost. See Note 1, Pt. 8.

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* **(Code of 1882—S. 404—Same.)**

(Code of 1872—S. 282, Para. 2 and S. 286, Illustrations.)

282. * * * * * * *

If the appellate Court takes further evidence and passes judgment and sentence, no fresh right of appeal arises in respect of such sentence.

Cr. P. C. 254 & 255

Sec. 404 Note 1

1. Right of appeal.

A right of appeal is not a natural or inherent right. It must be expressly given by statute.[1] It cannot arise by implication.[2] Thus, the existence of a power in a superior Court to cancel or vary an order of a subordinate

Unless otherwise provided, no appeal to lie from judgment, order or sentence of criminal Court.

286. No appeal shall lie from any judgment, sentence or order of a criminal Court, except in the cases provided for by this Act or by any law for the time being in force.

Illustrations.

(*a*) There is no appeal against an order refusing to grant compensation, or to grant an enhanced award.

(*b*) There is no appeal against an order of a competent Magistrate dismissing a complaint.

(*c*) There is no appeal against an order requiring a person to furnish security to keep the peace.

(*d*) There is no appeal against an order requiring a person to furnish security to be of good behaviour, when such order is passed by the Magistrate of the District.

(*e*) There is no appeal against an order passed under Chapter XXXIX; nor against a report by a jury under that Chapter.

(*f*) There is no appeal against an order of maintenance.

Section 404—Note 1.

1. (1912) 40 Cal 21 (27): 6 Low Bur Rul 150: 39 I A 197 (P C), *The Rangoon Botatoung Co., Ltd.* v. *The Collector, Rangoon.*
(1915) 1915 Mad 831 (832): 39 Mad 539: 16 Cri L Jour 303, *Adur Desikachari* v. *Emperor.*
(1925) 1925 All 380 (382): 47 All 513, *Abdul Rahman* v. *Abdul Rahman.*
(1905) 2 Cri L Jour 329 (330) (All), *In the matter of the petition of Chet Ram.* Before S. 406 was amended in 1923, there was no right of appeal from an order under S. 118 requiring security to *keep the peace.*
(1893) 15 All 61 (62), *Mehdi Hasan* v. *Tota Ram.* The word 'appeal' in Ss. 195 and 439, Criminal P. C., does not grant an appeal. It is only intended to designate the Court in question.
(1873) 19 Suth W R Cri 53 (54), *Belilios* v. *Queen.*
(1881) 2 Weir 308 (309), *Narayanaswami, In re.*
(1912) 13 Cri L Jour 169 (170): 34 All 118, *Emperor* v. *Ram Naresh Singh.* Where there is no order of acquittal no appeal by the Government lies.
(1905) 2 Cri L Jour 24 (26): 27 All 415, *Manki* v. *Bhagwanti.* No appeal from an order under S. 522, Criminal P. C.
(1898) 25 Cal 630 (636), *Ram Chandra Mistry* v. *Nobin Mirdha.* (Do.)
(1912) 13 Cri L Jour 782 (782): 17 Ind Cas 414 (All), *Syed Iltaf Husain* v. *Emperor.* Order of transfer by Sub-Divisional Magistrate under S. 528. Appeal to District Magistrate not maintainable.
(1911) 12 Cri L Jour 322 (322): 38 Cal 547, *Rudolf Stallman* v. *Emperor.* A Magistrate acting under the Exradition Act is not subject to any appellate or revisional jurisdiction.
(1909) 9 Cri L Jour 306 (307): 1909 Pun Re Cr. No. 1, *Hale* v. *Emperor.* Appeal is not competent from the judgment of a single Judge on original side.
[See (1891) 1891 All W N 48 (51): 13 All 171, *Queen-Empress* v. *Pohpi.* "May appeal" in Ss. 407 and 408, etc., does not mean that right of appeal is left to the option of the appellate Court.
(1899) 21 All 181 (182), *In the matter of the petition of Madho Ram.* No appeal from order under S. 36, Legal Practitioners Act.
(1909) 9 Cri L Jour 59 (60): 31 All 59, *In re Kedar Nath.* (Do.)]
[See, however, (1878) 2 All 53 (54), *Empress of India* v. *Nadna.* The High Court in this case, though doubtful whether the law allows an appeal entertained an appeal, relying on the practice of the Court.
(1886) 10 Bom 258 (263, 264), *Queen-Empress* v. *Mangal Tekchand.* By the Aden Act, II of 1864, S. 29 no appeal lies from an order or sentence of the resident at Aden in any criminal case. The High Court of Bombay, being doubtful if this provision applied to the island of Perim admitted appeal from death sentence of the Resident who was a Sessions Court subject to the High Court of Bombay.]

2. (1932) 1932 Sind 88 (89): 26 Sind L R 200: 1932 Cri Cas 528: 33 Cri L Jour 898, *Emperor* v. *Nim.*

Court, as for instance, under Section 125,[3] or under Section 195, sub-section 6, as it stood before 1923,[4] or under Section 123, sub-section 2,[5] cannot be construed as giving a right of appeal in such cases. Sec. 404 Note 1

Where a right of appeal is given by statute subject to certain conditions and limitations, the right cannot be enlarged so as to nullify such conditions or limitations.[6] A right of appeal duly conferred on a person cannot be taken away by reason of an error of procedure[7] or by transfer.[8]

A right of appeal has been given not only by Sections 405 to 418 of this Chapter but by other Sections of the Code. *See* Sections 250, 486, 515, 524 and 562. The procedure to be adopted in all such appeals under the Code is that prescribed by this Chapter (Sections 419 to 431) unless any of the provisions thereof specifically restrict the application of such provisions to appeals under this Chapter. Thus Section 428 applies only to appeals under this Chapter; it consequently does not apply to appeals under Section 250.[9]

(*g*) There is no appeal against an order placing a name on the jury list.

(*h*) There is no appeal against an order by a Court of Session fining a juror or an assessor for non-attendance.

(*i*) There is no appeal against the order of a competent Court refusing to order a commitment.

(*j*) There is no appeal against an interlocutory order, such as a claim to appear by agent.

(*k*) There is no appeal from an order to pay compensation under S. 22 of Act 1 of 1871. (An Act to consolidate and amend the law relating to trespasses by cattle.)

(Code of 1861—S. 414.)

Unless otherwise provided, no appeal to lie from any order or sentence of a criminal Court.

414. Unless otherwise provided by this Act or by any other law for the time being in force, no appeal shall lie from any order or sentence of a criminal Court.

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3. (1914) 1914 Mad 613 (619): 14 Cri L Jour 546 (552, 554): 37 Mad 125, *Mare Gowd* v. *Emperor*. Power under S. 125 is larger than appellate or revisional.
   (1917) 1917 All 428 (428): 39 All 466: 18 Cri L Jour 630, *Sita Ram* v. *Emperor*. [But see (1877-78) 3 Cal 379 (381), *In re Captain Michell*. Power to alter or annul under S. 520 held to imply right of appeal.]
4. (1912) 13 Cri L Jour 296 (296): 40 Cal 37, *Hari Mandal* v. *Keshav Chandra Manna*. Not being an appeal District Judge cannot transfer the proceeding to a Subordinate Judge under the Civil Courts Act.
   (1912) 13 Cri L Jour 599 (601): 40 Cal 239, *Pochay Mitay* v. *Emperor*. Not being an appeal law of limitation does not apply.
   [But see (1904) 1 Cri L Jour 7 (9): 26 All 244, *Hardeo Singh* v. *Hanuman Dat Narain*. An application under the old sub-s. 6 to S. 195 is in the nature of an appeal. *N.B.*—S. 476-B introduced by the Amending Act of 1923 now makes specific provision for appeal in such cases.]
5. (1932) 1932 Sind 88 (89): 26 Sind L R 200: 1932 Cri Cas 528: 33 Cri L Jour 898, *Emperor* v. *Nim*. Not being an appeal no re-trial can be ordered as if on appeal.
6. (1881) 7 Cal 447 (451), *Poona Churn Pal, In re*. e. g. right of appeal under S. 417 is not available to a private complainant.
   (1884) 7 Mad 213 (214), *Rangaswami Ayyangar* v. *Narasimhulu Nayak*. No appeal to a District Magistrate from an acquittal by a Second Class Magistrate—See S. 417.
   (1896) 20 Bom 145 (145), *Queen-Empress* v. *Hari Savba*. Appeal under S. 411 lies only in cases of sentences specified in it and not otherwise.
7. (1877) 3 Cal 765 (766), *Empress* v. *Mohin Chunder Roy*. Trial by a jury of a case triable by assessors. Trial not being invalid on the ground, prisoner does not lose right of appeal on facts also.
8. (1879) 4 Cal 667 (669), *Empress* v. *Tsit Ooe*.
9. (1921) 1921 Mad 281 (282): 22 Cri L Jour 583, *Krishna Kone* v. *Narayana Dass*. But Ss. 407, 419, 421, 422 and 423 of Ch. 31 apply.

Sec. 404 Notes 1—2

The Section refers to *criminal* Courts. It does not, however, follow from this that the Code deals only with the appeals from criminal Courts. Sections 476-B and 486 deal with orders passed by any civil or revenue Courts. Appeals in respect of orders from such Courts are specially provided for in those Sections. As to the procedure applicable to such appeals *see* Sections 195 and 476 and the following cases.[10]

The words judgment, order, conviction and sentence are not used in a consistent sense in this Chapter, with the result that a clear and consistent scheme as to appeals cannot be evolved from the Chapter.[11]

The term "order" in this Section means a final order. An *interlocutory* order is thus not open to appeal.[12]

An appeal is only a continuation of the trial[13] and consequently the Appellate Court, unless otherwise provided, has powers to do only what the lower Court could do and should have done and not to pass any order under any circumstances.[14]

The general tendency of the Amending Act of 1923 is to enlarge rather than curtail the right of appeal.[15]

2. Appeal to Privy Council.

The Criminal Procedure Code does not provide for any appeal to the Privy Council.[1] In fact the Privy Council is not a Court of Criminal appeal

10. (1931) 1931 Cal 3 (4): 1931 Cri Cas 35: 58 Cal 402: 32 Cri L Jour 325, *Mahomed Boyetulla* v. *Emperor*. Ch. 31 applies.
(1907) 5 Cri L Jour 288 (289): 30 Mad 311, *Rama Iyer* v. *Venkatachala Padayachi* (Do.)
(1931) 1931 Cal 604 (605, 606): 1931 Cri Cas 756: 59 Cal 68: 33 Cri L Jour 38, *Surendra Nath Maity* v. *Susit Kumar Chakrabarty*. Civil P. C. applies.
(1929) 1929 Cal 428 (429): 31 Cri L Jour 750: 1929 Cri Cas 54, *Mahendra Nath Das* v. *Emperor*. (Do.) *Per* Suhrawardy, J.
(1927) 1927 Cal 98 (100): 53 Cal 827: 28 Cri L Jour 92, *Nasaruddin Khan* v. *Emperor*. (Do.)
(1927) 1927 Cal 284 (284, 285): 54 Cal 355, *Hamid Ali* v. *Madhusudhan Das*. *Per* Chotzner, J., Ch. 31 applies, *Per* Duval, J., Civil P. C. applies.
[See (1913) 14 Cri L Jour 197 (204): 40 Cal 477, *Har Prasad Das* v. *Emperor*.
(1928) 1928 Mad 391 (392): 51 Mad 603: 29 Cri L Jour 445, *Sami Vannia Nainar* v. *Periaswami Naidu*. Ch. 31 applies.]
11. (1904) 1 Cri L Jour 543 (545): 1904 Upp Bur Rul 7, *Mi Shwe* v. *King-Emperor*. For example the bearing of S. 408 on Ss. 380, 562 and 563.
(1925) 1925 Cal 329 (330, 331): 52 Cal 463: 26 Cri L Jour 455, *Bahadur Molla* v. *Ismail*.
[See (1886) 9 Mad 448 (449), *Queen-Empress* v. *Ahmed*.]
12. (1926) 1926 Oudh 280 (280, 281): 1 Luck 48: 27 Cri L Jour 191, *Kashi Ram Khosla* v. *R. L. Dikshit*.
13. (1914) 1914 Mad 258 (259): 37 Mad 119: 15 Cri L Jour 180, *Kantam Bali Reddy* v. *Emperor*.
(1932) 1932 Nag 121 (123): 28 Nag L R 233: 33 Cri L Jour 849: 1932 Cri Cas 672 (F B), *Mohammadi Gul Rohilla* v. *Emperor*.
14. (1906) 29 Mad 190 (191): 3 Cri L Jour 461, *Muthia Chetty* v. *Emperor*.
(1911) 12 Cri L Jour 444 (445, 446): 7 Nag L R 109, *Sita Ram* v. *Emperor*. Appellate Court cannot inflict a greater punishment than the lower Court.
(1908) 7 Cri L Jour 224 (226) (Cal), *Bansi Lal* v. *Emperor*. S. 191 applies in case of appeals also.
(1889) 12 Mad 451 (453), *Queen-Empress* v. *Subbayya*. Accused cannot be examined as a witness in criminal appeal.
[See (1907) 30 Mad 48 (50), *Paramasiva Pillai* v. *Emperor*.]
15. (1925) 1925 Cal 329 (330, 331): 52 Cal 463: 26 Cri L Jour 455, *Bahadur Molla* v. *Ismail*. e. g. Ss. 406, 406-A, 413, 414, 415-A, 418 (2) and 563.

Note 2.

1. [See (1933) 1933 Nag 216 (216): 1933 Cri Cas 798: 29 Nag L R 340: 34 Cri L Jour 934, *Zhaprya Kondba Teli* v. *Emperor*.]

for India.[2] But under the relevant clauses of the Letters Patent granted to the various Chartered High Courts, such Courts can grant leave to appeal to the Privy Council in certain cases.[3] The Privy Council may also grant special leave in special cases.[4] In any case, the Privy Council will not interfere with the course of criminal proceedings in British India unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.[5]

2. (1931) 1931 P C 111 (111): 1931 Cri Cas 521: 12 Lah 280: 32 Cri L Jour 727 (P C), *Bhagat Singh* v. *Emperor.*
(1930) 1930 P C 57 (58, 59): 1930 Cri Cas 193: 11 Lah 192: 31 Cri L Jour 378 (P C), *Atta Mohammad* v. *Emperor.*
(1930) 1930 P C 201 (202): 31 Cri L Jour 701: 1930 Cri Cas 884 (P C), *Benjamin Knowles* v. *Emperor.*
(1925) 1925 P C 59 (60): 48 Bom 515: 26 Cri L Jour 391 (P C), *Rustom* v. *Emperor.*
(1925) 1925 P C 130 (131): 6 Lah 226: 26 Cri L Jour 1059 (P C), *Begu* v. *Emperor.*
(1922) 1922 P C 162 (162): 23 Cri L Jour 743 (P C), *Muruga Goundan* v. *King-Emperor.*
(1921) 1921 P C 29 (30): 2 Lah 34: 22 Cri L Jour 129 (P C), *Kali Nath Roy* v. *Emperor.*
(1919) 1919 P C 31 (38): 43 Mad 146: 20 Cri L Jour 593 (P C), *Annie Besant* v. *Advocate-General of Madras.*
(1919) 1919 P C 108 (108): 20 Cri L Jour 799 (P C), *Bugga* v. *Emperor.*
(1915) 1915 P C 29 (30): 42 Cal 739: 16 Cri L Jour 494 (P C), *Bal Mukund* v. *Emperor.*
(1914) 15 Cri L Jour 144 (144): 41 Cal 568: 40 Ind App 241 (P C), *Clifford* v. *Emperor.*
(1864) 1 Suth W R P C 13 (14), *Joy Kissen Mookerjee, In re.*
(1841-46) 3 Moor Ind App 468 (484, 485): 5 Moor P C 276 (PC), *Queen* v. *Eduljee Byramjee.*
(1935) 1935 Mad 793 (793): 1935 Cri Cas 1049: 37 Cri L Jour 64 (S B), *M. Ramanuja Iyengar* v. *Emperor.*
[See (1872) 18 Suth W R 407 (407), *In re Gooroo Das Roy.*
(1872) 18 Suth W R 407*n* (407*n*), *In re Ameer Khan.*]

3. See Letters Patent: All., Cl. 32; Bom., Mad. and Cal., Cl. 41; Lah., Cl. 31; Pat., Cl. 33 and Rang., Cl. 39.
(1933) 1933 Nag 216 (216): 1933 Cri Cas 798: 29 Nag L R 340: 34 Cri L Jour 934, *Zhaprya Kondba Teli* v. *Emperor.* A non-chartered High Court cannot grant leave. In such cases, special leave of Privy Council to be applied for.
(1873) 10 Bom H C R Crown Cas 75 (92), *Reg.* v. *Pestanji Dinsha.* Consideration that guide the Court in granting leave to appeal stated.
(1935) 1935 Rang 214 (214): 1935 Cri Cas 847: 13 Rang 141: 36 Cri L Jour 1232, *H. W. Scott* v. *Emperor.*
(1935) 1935 Mad 793 (793): 37 Cri L Jour 64: 1935 Cri Cas 1049 (S B), *M. Ramanuja Iyengar* v. *Emperor.*
[See (1857-59) 7 Moor Ind App 72 (92, 93), *Nga Hoong* v. *Queen.*
(1935) 1935 Pat 66 (67): 14 Pat 318: 36 Cri L Jour 815, *Rahman* v. *Emperor.* Limitation on the powers of Patna High Court in granting leave in appellate Criminal Jurisdiction stated.
(1884) Oudh Cas 551 (559, 560), *Reg.* v. *Alu Paru.*]

4. (1925) 1925 P C 180 (180): 49 Bom 455: 26 Cri L Jour 1419 (P C), *Hanmant Rao* v. *Emperor.*
(1864) 1 Suth W R P C 13 (13): 9 Moor Ind App 168 (P C), *Joy Kissen Mookerjee, In re.*
(1933) 1933 P C 124 (125): 34 Cri L Jour 322: 1933 Cri Cas 442 (P C), *Dwarkanath Varma* v. *Emperor.* If the High Court refuses, special leave may be obtained from Privy Council.
(1930) 1930 P C 291 (296): 1930 Cri Cas 1171 (P C), *Chung Chuck* v. *Rex.* It is difficult to induce the Board to advise the granting of special leave to appeal in a criminal case.
(1922) 1922 P C 351 (351): 49 Cal 845: 18 Nag L R 176 (P C), *Shankar Ganesh Dabir* v. *Secretary of State.* The Board is not bound to give reasons, if it refuses leave to appeal.
(1907) 14 Bur L R 148 (P C), *Loku Nova* v. *King.* Case from Supreme Court of Ceylon.

5. (1927) 1927 P C 44 (49): 5 Rang 53: 54 Ind App 96: 28 Cri L Jour 259 (P C), *V. M. Abdul Rahman* v. *Emperor.*
(1932) 1932 P C 234 (234, 235): 59 Ind App 233: 13 Lah 479: 1932 Cri Cas 776: 34 Cri L Jour 18 (P C), *Mohindar Singh* v. *Emperor.*
(1931) 1931 P C 112 (114): 53 All 183: 1931 Cri Cas 519: 58 Ind App 152 (P C), *A Pleader* v. *The Judges of the High Court of Judicature, Allahabad.*

Sec. 404 Note 3

3. Limitation.

See Sections 4, 5, 12 and 29 of the Indian Limitation Act.

The Indian Limitation Act, in Articles 150, 154, 155 and 157 thereof prescribes the periods of limitation for appeals under this Code. Any appeal coming under the said Articles filed after the lapse of the period prescribed therein will be barred and liable to be dismissed by force of Section 3 of the Act.

In computing the period of time prescribed by the said Articles, the following rules are laid down by the Act:

1. Section 12. The day from which the period is to be reckoned and the day on which the judgment complained of was pronounced will be excluded.
2. Section 12. The time taken for obtaining a copy of the sentence or order appealed from is to be excluded.[1] In an appeal by a convicted person in prison the time taken in forwarding an application for copies to the Court through the Superintendent of the jail and in transmitting the copy from the Court should be excluded.[2] The time taken for obtaining copies of any record other than the sentence or order cannot, however, be excluded.[3]

In the case of appeals presented after the expiry of the period of limitation the delay may be excused, under Section 5 of the Limitation Act,

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(1931) 1931 P C 111 (111) : 1931 Cri Cas 521 : 12 Lah 280 : 58 Ind App 169 : 32 Cri L Jour 727 (P C), *Bhagat Singh* v. *Emperor*.

(1921) 1921 P C 24 (25) : 22 Cri L Jour 174 : 44 Mad 297 : 48 Ind App 35 (P C), *Chinnayya Dhora* v. *Emperor*.

(1917) 1917 P C 25 (26) : 39 Ind Cas 311 (316) : 44 Cal 876 : 44 Ind App 137 : 13 Nag L R 100 : 18 Cri L Jour 471 (P C), *Dal Singh* v. *Emperor*.

(1914) 1914 P C 155 (162, 163) : 15 Cri L Jour 326 (P C), *Ibrahim* v. *Emperor*. Practice of the P C stated.

(1911) 12 Cri L Jour 100 (100) : 6 Ind Cas 581 (P C), *Birch* v. *Emperor*.

(1914) 15 Cri L Jour 305 (309) : 23 Ind Cas 657 (P C), *Louis Edward Lanier* v. *The King*. Crown was directed to pay costs of successful appellant.

(1913) 14 Cri L Jour 577 (578, 579) : 36 Mad 501 : 40 Ind App 193 (P C), *Vaithinatha Pillai* v. *Emperor*.

(1924) 1924 Cal 545 (550) : 26 Cri L Jour 52, *Barendra Kumar Ghose* v. *Emperor*.

(1925) 1925 P C 305 (305) : 27 Cri L Jour 228 (P C), *Shafi Ahmad* v. *Emperor*. Privy Council will not interfere on the ground of misdirection to jury.

(1914) 1914 P C 116 (125, 126) : 41 Cal 1023 : 8 Low Bur Rul 16 : 41 Ind App 149 : 15 Cri L Jour 309 (P C), *Channing Arnold* v. *Emperor*. (Do.)

(1914) 15 Cri L Jour 144 (144) : 41 Cal 568 : 40 Ind App 241 (P C), *Clifford* v. *Emperor*. (Do.)

(1925) 1925 P C 52 (53) : 6 Lah 45 : 52 Ind App 121 : 26 Cri L Jour 1020 (P C), *Umra* v. *Emperor*. Wrong interpretation of Sections of Acts does not justify interference by Privy Council.
[See (1904) 8 Cal W N 43*n*, *Painda Khan* v. *Emperor*.
(1913) 14 Cri L Jour 577 (578) : 36 Mad 501 : 40 Ind App 193 (P C), *Vaithinatha Pillai* v. *Emperor*.
(1902) 25 Mad 61 (98) : 28 Ind App 257 (P C), *Subramania Iyer* v. *Emperor*.
(1898) 22 Bom 528 (532) : 25 Ind App 1 (P C), *Bal Gangadhar Tilak* v. *Queen-Empress*.]

Note 3.

1. (1892-96) 1 Upp Bur Rul 130 (130), *Bagavathi* v. *Queen-Empress*.
(1892-96) 1 Upp Bur Rul 129 (129), *Nga Po Thang* v. *Queen-Empress*,
(1886) 9 Mad 258 (259), *Queen-Empress* v. *Lingaya*.
2. (1888) 1888 Pun Re Cr No. 5 (page 9), *Ghamma* v. *Empress*.
[See (1884) 10 Cal 642 (643), *In re Jhabbu Singh*.]
3. (1925) 1925 Rang 239 (240) : 3 Rang 220 : 26 Cri L Jour 1371, *U. Zagriya* v. *Emperor*. The time spent in obtaining a copy of the diary orders in

Sec. 404 Note 3

if sufficient cause is shown for the delay.[4] The discretion to excuse the delay must be exercised by the Court judicially and upon sound principles.[5] Unless the delay is satisfactorily explained, an appeal presented beyond time should not be admitted.[6] This rule must be applied to criminal appeals as strictly as to civil appeals[7] though in a criminal appeal the Crown is not a successful litigant who can be said to have secured a "valuable right" by the convicted accused not preferring the appeal within time.[8]

Limitation under special or local Acts:

Under Section 29 of the Limitation Act a period of limitation prescribed by any special or local law is as binding as if prescribed by the Limitation Act itself. By the same Section the rule of computation laid down in Section 12 in respect of copies of judgments or orders is extended to appeals under any special or local Act. But Section 5 of the Limitation Act is not one of the Sections, the application of which is extended by Section 29 to appeals under special or local Acts. But the local or special Act may make Section 5 applicable to such appeals.[9]

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the case, which were filed with the appeal should not be deducted.

4. (1914) 1914 Lah 545 (546) : 1915 Pun Re Cr No. 3 : 16 Cri L Jour 300, *Hidayata* v. *Emperor*. Application for copy made in time—But mislaid — 2nd application had to be made—Delay excused.
(1923) 1923 Lah 662 (662) : 26 Cri L Jour 19, *Rahman* v. *Emperor*. Appellant in jail—His power-of-attorney holder for appeal neglecting to appeal in time—Appeal by appellent after time admitted.
(1871) 1871 Pun Re Cr No. 7, page 9 (9), *Crown* v. *Mohammad Bux*. Several accused jointly convicted—Only one appealed and acquitted—Others appealing subsequently—Acquittal of former held *sufficient cause* for delay in appeal by latter.
(1921) 22 Cri L Jour 426 (427) : 61 Ind Cas 714 (715) (Cal), *Sona Sheikh* v. *Naib Ali*. Sufficient notice of the sittings of the vacation Judge not having been given, appeal presented on the re-opening day—The delay excused.
(1890) 1890 Pun Re Cr No. 29, page 96 (97), *Muhammad* v. *Empress*. Appeal by prisoner presented to officer in charge of jail in time under S. 420—Delay in forwarding it to proper Court is no delay of appellant.
[See (1892-1896) 1 Upp Bur Rul 130 (130), *Bagavathi* v. *Queen-Empress*. (Do.)
(1892-1896) 1 Upp Bur Rul 129 (129), *Nga Po Thang* v. *Empress*. (Do.)
(1891) 1891 All W N 10 (10), *Queen-Empress* v. *Bhoni Ram*. Appeal may be admitted subject to question of limitation.]

5. (1907) 6 Cri L Jour 221 (223) (Bom), *Emperor* v. *Shiva Adar*. Appeal by Government against acquittal—Delay due to want of clearness in communications between the District Magistrate and the Government—Not excused.

6. (1925) 1925 Mad 709 (709) : 26 Cri L Jour 1110, *Janakiramayya* v. *Nimmagaddu Brahmayya*. Appeal filed after limitation—Lower appellate Court not satisfied as to sufficient cause—Proper course for it is to move High Court for revision.

7. (1891) 1891 All W N 10 (10, 11), *Queen-Empress* v. *Bhoni Ram*. Ignorance of right of appeal or an impression that relations would appeal *not sufficient cause*.

8. (1920) 1920 Lah 241 (242) : 1 Lah 508 : 22 Cri L Jour 124, *Surta Singh* v. *Emperor*. The appellant who was in jail should not be deprived of the advantage of his appeal being heard on the merits, merely because his counsel has been somewhat careless in filing the appeal in the wrong Court.

9. (1923) 1923 Mad 95 (95) : 24 Cri L Jour 89, *Mittoor Moideen Hajee, In re*.
(1933) 1933 Cal 124 (126) : 1933 Cri Cas 140 : 60 Cal 571 : 34 Cri L Jour 633, *Nil Ratan Ganguli* v. *Emperor*. S. 39, Bengal Ordinance 2 of 1932—7 days fixed for appeal—No provision to extend time under S. 5, Limitation Act.
[See also (1933) 1933 Cal 132 (133) : 1933 Cri Cas 193 : 60 Cal 618 : 34 Cri L Jour 299, *Manmatha Nath Biswas* v. *Emperor*. So also under S. 33 (2), Bengal Emergency Powers Ordinance, 1931.]

Sec. 404 Note 4

4. By any other law.

As is seen in Note 1 above, a right of appeal must be conferred expressly by a statute. If the right is created by a rule of the Government, such a rule must not be *ultra vires* of the statute conferring the rule making power.[1] Though an order may be that of a criminal Court there will be no appeal unless provided for by the statute.[2] There is no right of appeal when a special or local Act lays down that sentences passed thereunder in criminal cases are *final*.[3]

Where a special or local law provides a special procedure in regard to appeals such procedure will prevail over that of the Code.[4] Otherwise

Note 4.

1. (1891) 15 Bom 505 (509, 511), *Queen-Empress* v. *Sarya*. Bombay Government Rule 44 framed under S. 3 of Act 11 of 1846—Creating right of appeal to High Court from political Agent—Held rule *ultra vires* of Act and no appeal lay.
   (1916) 1916 Bom 313 (315) : 17 Cri L Jour 533, *Emperor* v. *Khalpa Ranchod*. Bombay Government R. 44 framed under S. 3 of Act 11 of 1846 held to create the right of appeal—15 Bom 505 not referred to.
2. (1914) 1914 Sind 79 (80) : 15 Cri L Jour 372 (373) : 7 Sind L R 80, *Thairio* v. *Emperor*. Order under the first part of S. 2 (1) of the Workmen's Breach of Contract Act to re-pay sum of money received as advance and on failure to comply with that order sentencing under the second part of S. 2 (1) of the Act to a term of imprisonment—No appeal.
   (1872) 17 Suth W R Cri 11 (11), *Queen* v. *Boydanath Mookerjee*. No appeal to the High Court under Act 37 of 1855 from a conviction by the Deputy Commissioner of the Sonthal Parganas.
   (1872) 17 Suth W R Cri 11 (12), *In re Mukta Bibee*. Contagious Diseases Act 14 of 1868, S. 11. There is no appeal from a conviction under S. 11.
   (1872) 1872 Pun Re Cri No. 16 (p. 21), *Havat Alakhan* v. *Jahana*. A commisioner's order refusing to impose a fine under S. 42, Act IV of 1872, not appealable.
   (1895) 1 Weir 835 (835), *In re Ramanna*. No appeal lies against an order of confiscation passed under S. 11 of the Opium Act.
   [See (1910) 11 Cri L Jour 390 (391) : 1910 Pun Re Cri No. 14, *Bishan Das* v. *Emperor*. Order of District Magistrate in trials by him as superintendent of Hill States under orders of Local Government, outside British India — No appeal to Chief Court.
   (1870) 14 Suth W R Cri 71 (72), *Queen* v. *Mudhoo Dutt*. Order of Magistrate fining defaulter under S. 25 of the Income-tax Act 9 of 1869—No appeal to Sessions Court.]
   [But see (1925) 1925 Rang 12 (13) : 2 Rang 321 : 26 Cri L Jour 289, *Maung Po Lou* v. *Emperor*. Conviction under S. 6, Upper Burmah Ruby Regulations—No appeal provided in the Regulation—*Held* that right of appeal and revision under Cr. P. C., not thereby taken away.]
3. (1886) 12 Cal 536 (538), *Dular Dut Rai* v. *Nijabat Hosein*. e. g. S. 4 (Cl. 1) of Act 37 of 1855, Sonthal Parganas.
   (1884) 1884 Pun Re Cri No. 40, page 77 (84), *Charde* v. *Empress*. S. 28, Cantonments Act III of 1880, bars an appeal in any case tried under that Section.
   [See (1910) 11 Cri L Jour 426 (427) : 1910 Pun Re Cri No. 19, *King-Emperor* v. *Mussamat Alam Khatun*. Sentence and order of Magistrate under S. 59—Frontier Crimes Regulation 3 of 1901—Open to appeal under Cr. P. Code in the ordinary course—S. 60 of the Regulation prohibits appeals in certain cases.]
   [See however (1893) Ratanlal 672 (673), *Queen-Empress* v. *Louis Frances*. Under S. 35, Public Conveyances Act, no conviction under the Act shall be open to appeal—*Held* that if a person *not punishable* under the Act is punished, appeal by him lies.]
4. *Special procedure prevails over Criminal Procedure Code*—See S. 1 (2), Cr. P. C.
   (1928) 1928 Pat 370 (372) : 7 Pat 421 : 29 Cri L Jour 420, *Krishna Prasad Singh* v. *Emperor*. Orders under S. 63 of the Chota Nagpur Tenancy Act are appealable to the officers mentioned in S. 215 of the Act and not under the Criminal Procedure Code.
   (1933) 1933 Bom 1 (4, 6) : 57 Bom 93 : 34 Cri L Jour 199 (SB), *Balkrishna Hari Phansalkar* v. *Emperor*. Emergency Powers Ordinance (1932) — Appeal in certain cases from Special Courts lies to High Court.
   (1869) 6 Bom H C R Crown Cas 45 (46), *Reg.* v. *Malhari Lanji*. An

the Code will be applicable.[5] *See* Section 5.

5. **Appeal and revision.**—*See* Section 439.

6. **Withdrawal of appeals.**—*See* Section 423.

7. **Death of appellant—Abatement of appeal.**—*See* Section 431, *infra*.

8. **Transfer of territory and appeal, forum.**—*See* Section 1.

405.* Any person whose application under Section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Appeal from order rejecting application for restoration of attached property.

Synopsis.

"Ordinarily lie." Note No. 1

Other Topics.

Appellate jurisdiction by delegation. See Note 1, Pt. 2 and F-N (2).
Rejection by District Magistrate—Appeal to Sessions Court. See Note 1, F-N (1).

1. "Ordinarily lie."

The Court to which appeals ordinarily lie is the Court to which appeals are normally and in the majority of cases provided for by the statute.[1] A Subordinate Court getting only delegated jurisdiction as for example under Section 407, sub-section 2 of the Code, to hear appeals is not such a Court.[2]

* **(Code of 1882—S. 405**—Same.)

(Codes of 1872 and **1861**—Nil.)

appeal lies to the Sessions from the summary decision of the Zillah Magistrate under S. 16 of the Bombay Ferries Act.
[See (1884) 1884 Pun Re Cri No. 40, page 77 (84), *Charde* v. *Empress*. Cantonment Act.
(1932) 1932 Cal 867 (868): 59 Cal 1248: 1932 Cri Cas 891: 34 Cri L Jour 107, *Sukumar Majumdar* v. *Emperor*. Bengal Emergency Powers Ordinance (11 of 1931), S. 33—Sentence of four years—Appeal not to High Court but to a special tribunal or to Sessions Court where there is no such tribunal.]

5. (1916) 1916 Lah 207 (208): 1916 Pun Re Cri No. 10: 17 Cri L Jour 225, *Sher Singh* v. *Emperor*. Foreigners Ordinance (3 of 1914)—Offence under —Conviction by District Magistrate —Appeal lies to Sessions Court under S. 408, Cr. P. C.
[See (1872) 9 Bom H C R Crown Cas 166 (166), *Reg.* v. *Sadu Dadabhai*. Opium Act (1866) 5 Suth W R Cri 22 (23), *In re Thakoor Das*. Conviction for an offence under Police Act 5 of 1861—Appeal lies under S. 408, Cr. P. C.]

Section 405—Note 1.

1. (1887) 11 Bom 438 (440), *In re Anant Ramchandra Lotlikar*.
(1895) 22 Cal 487 (490), *Maduray Pillai* v. *H. T. Elderton*.
(1919) 1919 Lah 57 (59): 1919 Pun Re Cri No. 32: 21 Cri L Jour 210, *Emperor* v. *Multan Singh*. *e. g.* order of rejection by District Magistrate—Appeal lies to the Sessions Court.
[See (1916) 1916 Mad 1105 (1106): 16 Cri L Jour 439, *Boddu Ramayya* v. *Chitturi Surayya*.]
2. (1903) 26 Mad 656 (658, 659) (F B), *Eroma Variar* v. *Emperor*. Benson, J., dissenting.
(1904) 1 Cri L Jour 422 (424): 27 Mad 124 (126), *In re Subbamma*.
[See (1912) 13 Cri L Jour 191 (192): 39 Cal 774 (777, 778, 780), *Ramcha-*

Sec. 406

406. Any person ordered by a Magistrate, other than the District Magistrate or a Presidency Magistrate, to give security for good behaviour under Section 118 may appeal to the District Magistrate.

Appeal from order requiring security for good behaviour.

406.* *Any person who has been ordered under Section 118 to give security for keeping the peace or for good behaviour may appeal against such order.*

Appeal from order requiring security for keeping the peace or for good behaviour.

(a) if made by a Presidency Magistrate, to the High Court ;

(b) if made by any other Magistrate, to the Court of Session :

Provided that the Local Government may, by notification in the local official Gazette, direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session :

Provided, further, that nothing in this Section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3-A) of Section 123.

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* (Code of 1882—S. 406—Same as that of 1898 Code.)

(Code of 1872—S. 267.)

267. Any person required by a Magistrate of the First Class to give security for good behaviour under S. 504 or S. 505, may appeal to the Magistrate of the District.

Appeals in bad livelihood cases.

(Code of 1861—S. 409.)

409. Any person convicted on a trial held by the Magistrate of the District or other Officer exercising the powers of a Magistrate, or required by such Magistrate or other Officer under S. 295 or S. 296 of this Act to give security for good behaviour, may appeal to the Court of Session to which such Magistrate or other Officer is subordinate.

Appeal from Magistrates.

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ran Chandra v. *Tarifulla Sheikh.*] [See however (1916) 1916 Mad 1105 (1106): 16 Cri L Jour 439, *Boddu Ramayya* v. *Chitturi Surayya.* If by Government Notification appeals are presentable to the Subordinate Court directly such Court is one to which appeals *ordinarily lie.*]

Synopsis.

Other Topics.

Appeals from Additional District Magistrate. Note 2, Pts. 1 and 2.
Accused's preparedness to give security—Failure of counsel to refer to defence evidence—Immaterial. See Note 3, F-N (1).
Appeal from order of security compared with other appeals. See Note 3, Pt. 1.
Applicability to order for security under special or local law. See Note 2, Pt. 3 and F-N (3).
Order of Sessions Judge on reference under Section 123—Non-appealable. See Note 4, Pts. 3 and 4.
Orders under Section 106 not appealable. See Note 2.
Re-trials in appeals under the Section—Section 423—Applicability of. See Note 3, Pts. 2 and 3.

1. Legislative changes.

The Amending Act of 1923 has largely altered the old Section 406 and introduced the following changes in the law:—

1. Under the old Section there was no right of appeal in cases of orders under Section 118 read with Section 107, (i. e.) orders for security for keeping the peace.[1] The present Section has conferred this right.
2. Even in respect of orders in good behaviour cases, there was no right of appeal from the orders of the District Magistrate or the Presidency Magistrate.[2] Under the present Section appeals are provided from such orders to the Court of Session and the High Court.
3. Whereas under the old Section appeals lay only to the District Magistrate, the present Section provides appeals to Courts of Session and the High Court except where there is a Government Notification under the 1st proviso to the Section. *See* Note 2 below.
4. The law has been made clear as to appeals in cases where proceedings are laid before a Sessions Judge under Section 123 of the Code. *See* Note 4 below.

Section 406—Note 1.

1. (1916) 1916 All 338 (338) : 17 Cri L Jour 165, *Har Dutt Pande* v. *Emperor*.
(1917) 1917 All 428 (428) : 39 All 466 : 18 Cri L Jour 630, *Emperor* v. *Sita Ram*.
(1905) 2 Cri L Jour 329 (330) (All), *In the matter of the Petition of Chet Ram*.
(1913) 14 Cri L Jour 63 (63) : 35 All 103, *Baranasi v. Partap*.
(1909) 10 Cri L Jour 375 (377, 378) : 3 Ind Cas 774 (Bom), *Suliman* v. *Emperor*.
(1905) 2 Cri L Jour 550 (551) : 32 Cal 948, *Barkachandra Dey* v. *Janmejoy Dut*.
(1915) 1915 Nag 113 (113) : 11 Nag L R 98 : 16 Cri L Jour 555, *Emperor* v. *Dalli*. Reason for old law stated.
(1920) 1920 Nag 138 (138) : 21 Cri L Jour 591, *Khuskhal* v. *Emperor*. In the case of an order to keep the peace the District Magistrate's powers were limited to the cancellation of the bonds under S. 125.
(1924) 1924 Nag 60 (61) : 19 Nag L R 160 : 25 Cri L Jour 67, *Shamrao* v. *Emperor*.
(1902) 1902 Pun Re Cri No. 15, page 41 (44) (F B), *Khuda Baksh* v. *Emperor*.
(1866) 3 Bom H C R Crown Cas 1 (2, 3), *Reg.* v. *Bhaskar K. Kharkar*.

2. (1874) 22 Suth W R Cr 68 (68), *Queen* v. *Nujuah*.
(1883) 9 Cal 878 (879), *Chand Khan* v. *Empress*.
(1898) 1898 All W N 127 (128), *Empress* v. *Phullu*.
[See (1906) 10 Cal W N 188*n*, *Bidhu Bhusan* v. *Emperor*. Where there is a right of appeal the execution of security bond is no bar to appeal.]

Sec. 406 Notes 2—3

2. Scope of the Section.

The present Section, while extending the right of appeal to orders for security for keeping the peace, confines the right only to such orders as fall under Section 118. In other words an order under Section 106 as it is not covered by the terms of Section 118 read with Section 112 still remains non-appealable.[1a] (*See* Section 106, Note 23.)

The forum to hear appeals in security cases which was vested only in the District Magistrate is now vested in the Sessions Judge and the High Court ordinarily. But power has been given to the Local Government by the 1st proviso to the Section, to direct that in any particular district notified in the Gazette appeals from subordinate Magistrates lie to the District Magistrate. Before the amendment of the Section, appeals from the orders of an Additional District Magistrate also lay to the District Magistrate as the former was held not to be a District Magistrate under Section 406.[1] The same would appear to be the law under the present Section in cases covered by the 1st proviso thereof.[2]

When a Special or Local Act empowers a Magistrate to proceed under the security Sections of Chapter VIII of the Code in respect of persons specified in the Act, an order by the Magistrate for furnishing security is one under Section 118, of the Code, and Section 406 applies to such an order.[3]

The Code does not confer a right of appeal from an order of imprisonment in default of furnishing security passed under Section 123.[4]

3. Hearing of security appeals.

An appeal from an order requiring a person to furnish security to be of good behaviour or to keep the peace is distinguishable from an appeal against a conviction in respect of an offence specifically charged, where the only matter for consideration may be the credibility or otherwise of certain direct and positive evidence. In appeals of the former class it is not unreasonable to insist that the appeal is not disposed of in a summary manner but by a judgment showing on the face of it that the Judge has applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant.[1]

Note 2.

1a (1889) 2 Weir 460 (460), *Rowtha Goundan* v. *Muthuswami Goundan.*

(1935) 1935 Rang 363 (363) : 13 Rang 287 : 1935 Cri Cas 1087, *Emperor* v. *Nga Tun Lu.*

1. (1921) 1921 Cal 347 (348) : 48 Cal 874 : 23 Cri L Jour 229, *Mahendra Bhumji* v. *Emperor.*

2. (1932) 1932 Lah 463 (463) : 13 Lah 254 : 1932 Cri Cas 578: 32 Cri L Jour 849, *Emperor* v. *Jahangir Chand.*

3. (1905) 2 Cri L Jour 317 (319) (Rang), *Nga Tet Pya* v. *Emperor.* S. 17, Burmah Gambling Act, empowers a competent Magistrate, who received information that any person in his jurisdiction earns his livelihood wholly or in part, by unlawful gaming to deal with that person, as nearly as may be as if the information were of the description mentioned in S. 110 of the Criminal Procedure Code and he is authorised to make an order in respect of him under S. 118; therefore, that there is an appeal against the order.

(1919) 1919 Upp Bur 27 (27) : 3 Upp Bur Rul 117 : 20 Cri L Jour 321, *Law Kaw* v. *Emperor.* A Magistrate under S. 3 of the Burmah Opium Law Amendment Act, may proceed in accordance with the Sections of the Code and, demand security under S. 118. Against such an order an appeal lies under S. 406 of the Code.

(1897-1901) 1 Upp Bur Rul 227 (227), *Queen* v. *Nga Kyauk Maw.* With reference to S. 17, Gambling Act.

4. (1935) 1935 Rang 363 (363) : 13 Rang 287 : 1935 Cri Cas 1087, *Emperor* v. *Nga Tun Lu.*

Note 3.

1. (1916) 1916 All 197 (197) : 38 All 393 : 17 Cri L Jour 309, *Lal Behari* v. *Em-*

Has an appellate Court hearing appeals under Section 406 the power to order retrial? The Lahore High Court[2] has held that it cannot on the ground that such appeals not being appeals from convictions under Cl. (b) of Section 423 the power to order retrial is not available. The Allahabad High Court[3] on the other hand has held that as an incidental order under Cl. (d) of Section 423 retrial can be ordered. It is submitted the latter view is correct. The provision for retrial in Cl. (b) of Section 423 is only one of the consequential orders on reversal mentioned in Cl. (d) and is not inconsistent with retrial being ordered under Cl. (d) after reversing the order under Cl. (c). An appellate Court can modify or alter the bond in appeal under Clause (c) to Section 423.[4]

4. Second proviso.

Under sub-section 2 to Section 123 of the Code, where a person has been ordered to give security for a period exceeding one year and does not give such security, the Magistrate (other than a Presidency Magistrate) is bound to lay the proceedings before the Sessions Judge for orders. Notwithstanding such reference to the Sessions Judge an appeal from the order of the Magistrate as such lay as a matter of right to the District Magistrate under the terms of Section 406 as it stood before the amendment of 1923. Two different Courts were thus likely to be in *seisin* of the same matter at the same time and this state of the law gave rise to conflict of procedure. Under the circumstances the High Courts tried to lay down complex rules of procedure to mitigate the anomalies. It was held that the Sessions Judge should proceed to decide the case under reference before him only on satisfying himself that no appeal had been preferred and, in case an appeal had been filed, should stay his hand till the disposal of the appeal and that the right of appeal under Section 406 was lost as soon as the Sessions Judge passed orders under Section 123.[1] It was sometimes held that an appeal under Section 406 was meant only for cases in which there was no necessity to lay the proceedings before the Sessions Judge.[2] The present Section, by enacting the second proviso, has removed the right of appeal in such cases and simplified the law.[2a] But

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peror.

(1912) 13 Cri L Jour 9 (9) : 13 Ind Cas 102 (All), *Babu Prasad* v. *Emperor.*

(1916) 1916 All 180 (181) : 17 Cri L Jour 167, *Sarwan* v. *Emperor.*

(1926) 1926 All 614 (615) : 27 Cri L Jour 370, *Ram Charan* v. *Emperor.* The preparedness of accused to furnish security does not relieve the Court of this duty.

(1909) 9 Cri L Jour 528 (529) : 2 Ind Cas 225 (All), *Shiam Lal* v. *Emperor.*

(1913) 14 Cri L Jour 419 (420) : 40 Cal 376, *Fidoi Hossein* v. *Emperor.* Appellate Court should consider the defence evidence of the accused, although the defence counsel did not make any reference to it.

(1929) 1929 Nag 328 (330, 331) : 31 Cri L Jour 20 : 1929 Cri Cas 532, *Kashiram* v. *Asaram.*
[See (1921) 23 Cri L Jour 378 (378) : 67 Ind Cas 202, *Sunehri* v. *Emperor.*]

2. (1929) 1929 Lah 28 (28) : 30 Cri L Jour 491, *Chandan* v. *Emperor.*
[See also (1906) 3 Cri L Jour 243 (243) : 33 Cal 8, *Dayanath Jaluqdar* v. *Emperor.*]

3. (1926) 1926 All 403 (403) : 48 All 501 : 27 Cri L Jour 945, *Bhagwat Singh* v. *Emperor.*

4. (1922) 1922 Nag 180 (180) : 23 Cri L Jour 394, *Baines* v. *Emperor.*
[See (1920) 1920 Nag 67 (67) : 21 Cri L Jour 352, *Azizul Jabar Khan* v. *Emperor.*]

Note 4.

1. (1910) 11 Cri L Jour 725 (726) : 13 Oudh Cas 354, *Pattu* v. *Emperor.*
(1899) 2 Oudh Cas 307 (310), *Subba* v. *Crown.*

2. (1922) 1922 Lah 475 (476) : 23 Cri L Jour 454, *Qamar Din* v. *Emperor.*

2a [See (1935) 1935 Pesh 55 (55) : 1935 Cri Cas 346 : 36 Cri L Jour 936, *Fazal Mahomed* v. *Emperor.*]

Sec. 406 Note 4

it may be noted that the said proviso affects only cases of reference by the Magistrate to the Sessions Judge and has no application to cases laid before the High Court by a Presidency Magistrate under Section 123.

An order passed by a Sessions Judge on reference under Section 123 is not an order of the Magistrate and therefore continues to be non-appealable under Section 406.[3]

See also the undermentioned case.[4]

Sec. 406-A

Appeal from order refusing to accept or rejecting a surety.

406-A. *Any person aggrieved by an order refusing to accept or rejecting a surety under Section 122 may appeal against such order:—*

(a) if made by a Presidency Magistrate, to the High Court ;

(b) if made by the District Magistrate, to the Court of Session ; or

(c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

Synopsis.

Scope. Note No. 1

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1. Scope.

An appeal lies to the Sessions Judge from an order of a District Magistrate rejecting sureties.[1]

Sec. 407

Appeal from sentence of Magistrate of the Second or Third Class.

407. (1) Any person convicted on a trial held by any Magistrate of the Second or Third class, or any person sentenced under Section 349 by a

407.* (1) Any person convicted on a trial held by any Magistrate of the Second or Third class, or any person sentenced under Section 349 *or in*

*** (Code of 1882—S. 407.)**

The words "may be presented" were substituted in sub-section 2 for the words "shall be presented" otherwise Section was same.

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3. (1911) 12 Cri L Jour 257 (258) : 35 Bom 271, *Emperor* v. *Amir Bala*. Decided under the old Section.
(1900) 1900 Pun Re Cri No. 15, page 35 (35, 36), *Crown* v. *Ida*. (Do.)
(1883) 9 Cal 878 (879), *Chand Khan* v. *Queen*. Under the Code of 1882.
(1886) 1886 Pun Re Cri No. 23, page 55 (55), *Kanhaya* v. *Queen*. (Do.)
(1893-1900) 1893-1900 Low Bur Rul 381 (382), *Queen* v. *Shwe Gyaw Aung*. (Do.)
(1891) 1891 All W N 219 (219), *In re Haridas*. (Do.)
(1893) 1893 All W N 183 (184), *Queen* v. *Chhotia*.
(1875) 24 Suth W R Cri 12 (12), *Queen* v. *Roghoo*. Under Code of 1872.

4. (1930) 1930 Pat 274 (275) : 9 Pat 131 : 31 Cri L Jour 958 : 1930 Cri Cas 455.

Section 406-A—Note 1.

1. [See (1934) 1934 Cal 482 (487) : 1934 Cri Cas 690 : 61 Cal 588 : 35 Cri L Jour 952, *Parbati Charan Baisya* v. *Emperor*.

Sub-divisional Magistrate of the Second Class, may appeal to the District Magistrate.

respect of whom an order has been made or a sentence has been passed under Section 380 by a Sub-divisional Magistrate of the Second Class, may appeal to the District Magistrate. **Sec. 407**

Transfer of appeals to First Class Magistrate.

(2) The District Magistrate may direct that any appeal under this Section, or any class of such appeals, shall be heard by any Magistrate of the First Class subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Synopsis.

Other Topics.

(Code of 1872—Ss. 266 and 47, Para. 2.)

PART VI.

Appeal, Reference and Revision.

CHAPTER XX.

Appeals.

Appeals from officers exercising powers less than those of a Magistrate of the First Class.

266. Any person convicted on a trial held by any Magistrate of the Second or Third Class, or any person sentenced by a competent Magistrate of the Second Class under Section 46, may appeal to the Magistrate of the District, or to a Magistrate of the First Class who has been empowered by the Local Government to hear such appeals.

47. * * * *

Magistrates of Districts may withdraw any criminal appeal from any subordinate Magistrate who has been authorised to hear appeals from the convictions of Magistrates of the Second and Third Classes, and may refer criminal appeals to any competent Magistrate subordinate to them.

Sec. 407 Note 1

1. "Convicted on a trial."

Section 4 of the Code of 1872 defined "trial" as the proceedings taken in Court after a charge has been drawn up and as including the punishment of an offence. Subsequent Codes have not defined the term 'trial' as such; but in Section 4 of the present Code the term is distinguished as being different from an "inquiry" under the Code. A "trial" under the Code would imply the proceedings in which a person stands before a Court empowered to convict him of some 'offences' alleged against him.[1] The essentials of a trial are thus the charge of an "offence" and the power in the Court to "convict" the offender for the offence. The term "conviction" denotes the finding of guilty as distinguished from an *acquittal* or *discharge* on a finding of not guilty. On a conviction a sentence will follow in the usual course except as otherwise provided by the Code as for example, in Section 562. The expression "convicted on a trial" has thus sole reference to cases in which an accused has been held *guilty* of an *offence*.[2] *See* the language of Sections 243, 258, 262 (2), 306 (2), 307 (2) and (3) and 367.

It follows that a decision in which an offence is not involved is not a conviction on a trial. Before the Code in Section 4 (o), constituted an illegal seizure of cattle an 'offence' under the Cattle Trespass Act, 1871, an order under the Act for compensation for illegal seizure was held not to amount to a conviction on trial.[3] Such an order now amounts to a "conviction on a trial" and is appealable.[4] An order under Section 488 of this Code directing payment of a monthly allowance in default of maintenance is not an order

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(Code of 1861—S. 412.)

Appeals from officers exercising powers less than those of a Magistrate.

412. Any person convicted on a trial held by an officer exercising powers less than those of a Magistrate, may appeal to the Magistrate of the District or other officer exercising the powers of a Magistrate who shall have been empowered by the Government to hear such appeals.

Section 407—Note 1.

1. (1920) 1920 Mad 337 (341): 21 Cri L Jour 402: 43 Mad 511, *Yeluchuri Venkatachennayya* v. *Emperor*.
   (1878) 2 Mad 169 (170), *Ananthachari* v. *Ananthachari*.
2. (1868) 4 Mad H C R 146 (148), *Re Chappu*. Proceeding under S. 480, Cr. P. Code, in a case of conviction on trial.
   [See (1865) 2 Mad H C R 473 (473), *Re Evans*. The offence may be under special or local law, *e. g.* Merchant Seamans Act, 1 of 1859.
   (1925) 1925 Rang 12 (13): 2 Rang 321: 26 Cri L Jour 289, *Maung Po Zone* v. *Emperor*. (Do.), *e. g.* Upper Burma Ruby Regulation 1887.]
3. (1896) 23 Cal 442 (445), *Raghu Singh* v. *Abdul Wahab*.
   (1888) 15 Cal 712 (712), *Dhiku* v. *Deno*.
   (1886) 10 Bom 230 (231), *Queen* v. *Raya Lakhma*.
   (1896) 19 Mad 238 (239), *Queen* v. *Lakshmi Nayakan*.
   (1888) 11 Mad 359 (360), *Khadar Khan, In re*.
   (1890) Ratanlal 520 (521), *Queen* v. *Sadashiv*.
   (1871) 3 N W P H C R 200 (201), *In re Gunesh Pershad*.
   (1886) 1886 Pun Re Cri No. 22, page 54 (55), *Empress* v. *Baksh*.
   [See (1896) 23 Cal 300 (301, 302), *Shama* v. *Lechhu Shekh*.
   (1900) 27 Cal 992 (992), *Bhagirathi Naik* v. *Gangadhar Mahanty*.
   (1879) 1 Weir 711 (712), *High Court Proceedings, 27th November* 1879, *No.* 2113.]
4. (1922) 1922 Bom 191 (191, 192): 46 Bom 58: 22 Cri L Jour 624, *Barthol Duming Rodrik's* v. *Papa Dada*.
   (1920) 1920 Bom 85 (85): 44 Bom 42: 21 Cri L Jour 95, *Emperor* v. *Vishvanath Vishnu Joshi*.
   (1907) 6 Cri L Jour 363 (364): 34 Cal 926, *Budhan Mahto* v. *Issur Singh*.
   (1907) 5 Cri L Jour 86 (86, 87): 29 Mad 517, *In re Ponnusamy*.
   (1907) 6 Cri L Jour 121 (121, 122): 4 Low Bur Rul 10, *Emperor* v. *Mi Hari Ma*.

of "conviction on a trial."[5] So also an order under the Workmen's Breach of Contract Act for refund of the amount of advance[6] or an order imposing a penalty and inflicting a sentence of imprisonment[6a] or to perform a contract under the said Act,[7] or an order under the Code sanctioning prosecution[8] or forfeiting the security furnished under Chapter VIII[9] is not an order of "conviction on a trial."

The appeal being from a conviction, the absence of a *sentence* as in cases falling under Section 562, is no bar to an appeal[10] nor will an appeal lie against the sentence alone except in cases provided for in Section 412 of the Code.[11]

2. Trial held by a Second Class Magistrate.

According to the wording of Section 407 it is not the conviction by a second class Magistrate but the holding of a trial by such Magistrate that determines the forum of the appeal.[1] Where a second class Magistrate in the course of the proceedings in the same case is invested with first class powers, the question arises whether the appeal lies to the District Magistrate under this Section or to the Court of Session. Where the trial was completely held by the Magistrate as a second class Magistrate but the higher powers were conferred only at the time of the judgment there is no doubt that the appeal lies to the District Magistrate.[2] Similarly where most part of the trial is held by the Magistrate as a first class Magistrate, as for example, when, after examining eight prosecution witnesses as 2nd class Magistrate, two more pro-

5. (1867) 7 Suth W R Cri 10 (11), *Queen* v. *Golam Hossein Chowdhury*. The person ordered against is not a person convicted of an offence—Per Peacock, C. J.
(1868) 5 Bom H C R Crown Cas 81 (82), *Reg.* v. *Thaku*.

6. [See (1919) 1919 Bom 158 (159): 43 Bom 607: 20 Cri L Jour 316, *Emperor* v. *Devappa*. But an order on disobedience of the order for refund may involve an offence—*Obiter*.]
[But see (1879) 1 Weir 694 (694), *In Re Higgins*.]

6a (1914) 1914 Sind 79 (80): 7 Sind L R 80: 15 Cri L Jour 372, *Thairio* v. *Emperor*.

7. (1914) 1914 Cal 909 (909): 15 Cri L Jour 697, *Anukul* v. *Kamarali*.

8. [See (1912) 13 Cri L Jour 273 (274): 34 All 244, *Lal Singh* v. *Emperor*.]

9. (1878) 2 Mad 169 (170), *Ananthachari* v. *Ananthachari*.

10. (1925) 1925 Cal 329 (330, 332): 52 Cal 463: 26 Cri L Jour 455, *Bahadur Molla* v. *Ismail*.
(1904) 1 Cri L Jour 543 (545): 1904 Upp Bur Rul 7, *Mi Shwe* v. *Emperor*.
(1904) 1 Cri L Jour 1098 (1099): 1904 Pun Re Cri No. 24, *Emperor* v. *Manohar Das*.
(1910) 11 Cri L Jour 152 (153): 5 Low Bur Rul 129, *Ma Chit Su* v. *Emperor*.
(1917) 1917 Lah 413 (413): 1917 Pun Re Cri No. 20: 18 Cri L Jour 401, *Hayata* v. *Emperor*. Subject to limitation, appeal may be filed even after expiry of the bond ordered under S. 562.
[See also (1869) Ratanlal 18. Accused previously convicted and sentenced—Conviction subsequently for another offence and sentence to run concurrently with former—Though sentence inoperative, appeal lies against later conviction.]

11. (1931) 1931 Pat 351 (351): 1931 Cri Cas 799: 32 Cri L Jour 1017, *Sheikh Rijhu* v. *Emperor*.
[See (1922) 1922 Nag 71 (72): 23 Cri L Jour 73, *Dheklia Kunbi* v. *Emperor*. Suspension of license under S. 18 (2) of the Motor Vehicles Act is part of the sentence on conviction and appeal lies.]

Note 2.

1. (1932) 1932 Cal 460 (461): 1932 Cri Cas 450: 33 Cri L Jour 516, *Baramaddi* v. *Magorali*.
(1925) 1925 Pat 472 (472): 26 Cri L Jour 914, *Sheobhanjan Singh* v. *Emperor*.
[See however (1928) 1928 Mad 55 (55): 51 Mad 257: 29 Cri L Jour 71, *Tirumala Venkata Reddi* v. *Sikatapu Ramayya*.]

2. (1932) 1932 Cal 460 (461): 33 Cri L Jour 516: 1932 Cri Cas 450, *Baramaddi* v. *Magorali*.
(1908) 8 Cri L Jour 48 (49): 4 Low Bur Rul 239, *Emperor* v. *Nga Paw*.
[See however (1885) 7 All 414 (418, 419, 423), *Queen* v. *Pershad*. But the question of the forum of appeal did not arise for decision in this case.]

Sec. 407 Notes 2—4

secution witnesses are examined and charge framed and the case concluded as a first class Magistrate, the appeal lies to the Court of Session.[3] But in cases where only a small part of the trial is held by the Magistrate as a first class Magistrate,[4] the appeal has been held to be to the Court of Session, apparently on the ground that if any part of the trial is held by the Magistrate as a Magistrate of the first class and the case has been concluded by him it must be considered to be a trial held by a Magistrate of the first class. The Madras High Court in *Venkatareddi* v. *Ramayya*,[5] is of the opinion that a *conviction* as a first class Magistrate and not the *trial* is the determining factor. It is submitted this is against the current of authority in India.

See also Notes to Section 39, *ante*.

3. Appeals from the Bench of Magistrates of the Second Class.

Where a trial Bench is composed of Magistrates of the second class but is invested, as a Bench with first class powers, appeals from the decisions of the Bench lie to the Sessions Judge and not to the District Magistrate.[1]

See also Section 414.

4. Transfer of appeals by the District Magistrate—Sub-section 2.

The District Magistrate may, under the powers conferred by the sub-section transfer only appeals[1a] and again only such appeals as lie to him "under this Section," that is to say, appeals from *convictions*. He cannot transfer any other class of appeals from his Court under this sub-section.[1] Nor will the power to hear appeals on transfer render the Court of the first class Magistrate, the Court to which appeals "ordinarily lie" under the Code. The Court of the District Magistrate will continue to be such Court notwithstanding that appeals under Section 407 may be *presented* to a subordinate Magistrate's Court under the sub-section.[2]

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3. (1927) 1927 Lah 138 (139): 28 Cri L Jour 50, *Durgadas* v. *Emperor*.
4. (1925) 1925 Pat 472 (472): 26 Cri L Jour 914, *Sheobhanjan Singh* v. *Emperor*. The Magistrate was vested with first class powers some time before the hearing of the arguments.
   (1927) 1927 Bom 366 (366): 28 Cri L Jour 474, *Emperor* v. *Maganlal Jhavarchand*. Higher powers were conferred after charge and before conclusion of trial.
   (1927) 1927 Lah 398 (399): 8 Lah 203: 28 Cri L Jour 781, *Babu Ram* v. *Emperor*. Higher powers conferred when the Magistrate concluded the trial.
5. (1928) 1928 Mad 55 (55): 51 Mad 257: 29 Cri L Jour 71, *Venkata Reddi* v. *Ramayya*. Trial continued as first class Magistrate—Case renumbered after higher powers—Conviction as first class Magistrate.

Note 3.

1. (1934) 1934 Bom 176 (177): 1934 Cri Cas 664: 36 Cri L Jour 592, *Emperor* v. *Bhimabai Sitaram Mane*.

Note 4.

1a(1900) 2 Bom L R 536 (539), *Bai Harku* v. *Sitaram Kalian*. But not any revisional work.
1. (1912) 13 Cri L Jour 273 (274): 34 All 244, *Lal Singh* v. *Emperor*. For example an appeal from an order for prosecution under S. 195.
2. (1903) 26 Mad 656 (659), *Eroma Variar* v. *Emperor*. For the purposes of S. 195 (3).
   (1920) 1920 Lah 479 (479), *Mt. Jiwani* v. *Emperor*. (Do.)
   (1907) 5 Cri L Jour 432 (433): 3 Nag L R 50, *Ram Piayal* v. *Ram Prasad*. (Do.)
   (1924) 1924 Oudh 239 (239): 26 Oudh Cas 358: 26 Cri L Jour 423, *Ahmed Hussein* v. *Mt. Rahiman*, (Do.).
   (1903) 30 Cal 394 (396), *Sadulal* v. *Ramchurn*. For purposes of S. 195 (5).
   (1904) 1 Cri L Jour 422 (424): 27 Mad 124, *In re Subbamma*. (Do.)
   (1929) 1929 Cal 172 (173): 56 Cal 824: 30 Cri L Jour 658, *Mohin Chandra Nath Bhoumick* v. *Emperor*. For purposes of S. 476-B.
   [But see (1895) 18 Mad 487 (490), *Queen* v. *Subbaraya Pillai*. This ruling was influenced by the words "shall be presented" used in the Section in the Code of 1882—Distinguished in 26 Mad 656.]

The power of withdrawal of appeals vested in the District Magistrate can be exercised at any time even though an appeal may be part-heard before the subordinate Magistrate.[3] Once an appeal is withdrawn the District Magistrate becomes solely responsible for the disposal of the appeal and he is not bound by any opinion formed or recorded by the subordinate Magistrate prior to the withdrawal as to the necessity of examining further evidence in the case.[4]

Sec. 407 Note 4

408. Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the First Class, or any person sentenced under Section 349 by a Magistrate of the First Class, may appeal to the Court of Session.

Appeal from sentence of Assistant Sessions Judge or Magistrate of the First Class.

408.* Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the First Class, or any person sentenced under Section 349 *or in respect of whom an order has been made or a sentence has been passed under Section 380*, by a Magistrate of the First Class, may appeal to the Court of Session :

Sec. 408

Appeal from sentence of Assistant Sessions Judge or Magistrate of the First Class.

* (Code of 1882—Ss. 408 and 31, Para. 3.)

Appeal from sentence of Assistant Sessions Judge or Magistrate of the First Class.

408. Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under Section 349 by a Magistrate of the first class, may appeal to the Court of Session :

Provided as follows :—

(*a*) when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such case shall lie to the High Court, but shall not be presented until the case has been disposed of by the Court of Session ;

(*b*) any European British subject so convicted may, at his option, appeal either to the High Court or the Court of Session.

31 * * * * *

An Assistant Sessions Judge may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years ; but any sentence of imprisonment for a term exceeding three years passed by an Assistant Sessions Judge shall be subject to confirmation by the Sessions Judge.

(Code of 1872—Ss. 79 ; 269, Para. 1 ; 270 and 18, Para. 2.)

Appeal from conviction of such subject by Magistrate.

79. Any European British subject who is convicted by a competent Magistrate of any offence, may appeal either to the Court of Session or to the High Court.

Appeal from Magistrates.

269. Any person convicted on a trial held by the Magistrate of the District or other Magistrate of the first class, or any person sentenced under Section 46 by a competent Magistrate of the first class, may appeal to the Court of Session.

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3. (1908) 7 Cri L Jour 329 (330) : 31 Mad 277, *In re Alaga Ambalam.*

4. (1908) 7 Cri L Jour 329 (330) : 31 Mad 277, *In re Alaga Ambalam.*

Sec. 408

Provided as follows :—	Provided as follows :—
(*a*) any European British subject so convicted may, at his option, appeal either to the High Court or the Court of Session ;	(*a*) [*Omitted by Criminal Law Amendment Act, Section 23.*]
(*b*) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under Section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal shall lie to the High Court ;	(*b*) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under Section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal *of all or any of the accused convicted at such trial* shall lie to the High Court ;

(*c*) when any person is convicted by a Magistrate of an offence under Section 124-A of the Indian Penal Code, the appeal shall lie to the High Court.

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270. Any person convicted on a trial held by any officer invested with the power described in Section 36 may appeal to the High Court, if it appear from the sentence awarded that such officer was in such trial exercising such special powers. No appeal in such case shall lie to the Court of Session.

Appeals by persons convicted by officers invested under Section 36.

Any person convicted by an Assistant Sessions Judge may appeal to the Sessions Judge, if the sentence appealed against does not exceed three years' imprisonment. A sentence of an Assistant Sessions Judge, confirmed under Section 18 by the Sessions Judge, may be appealed to the High Court.

Appeals from convictions of Assistant Sessions Judges.

* * * * *

18 Any sentence of more than three years' imprisonment passed by an Assistant Sessions Judge shall be subject to confirmation by the Sessions Judge. The Sessions Judge may either confirm, modify or annul such sentence of the Assistant Sessions Judge.

(Code of 1861—Ss. 409 and 22, Para. 3.)

409. Any person convicted on a trial held by the Magistrate of the district or other officer exercising the powers of a Magistrate, or required by such Magistrate or other officer under Section 295 or Section 296 of this Act to give security for good behaviour, may appeal to the Court of Session to which such Magistrate or other officer is subordinate.

Appeals from Magistrates.

* * * * *

22 In the Presidency of Bombay it shall be lawful for a Sessions Judge to delegate cases for trial by an Assistant Sessions Judge ; and such Assistant Sessions Judge shall be competent in such cases to pass sentences within the following limits :—Imprisonment of either description for a term not exceeding seven years (including such solitary confinement as is authorised by law), or fine or both. If the sentence be one of imprisonment for a term exceeding three years, it shall be passed subject to confirmation by the Sessions Judge. The Sessions Judge may review and hear appeals against the proceedings of his assistants, and may confirm and amend (but not so as to enhance), or may reverse their sentences or orders. It shall not be competent to an Assistant Sessions Judge to review or hear an appeal against the proceedings of a Magistrate.

Assistant Sessions Judges in Bombay.

* * * *

Synopsis.

Other Topics.

Agency tracts. See Note 6, Pt. 2.
Appeal from an order under Section 562. See Note 2, F-N (1) ; Note 5, F-N (1).
Assistant Sessions Judge becoming Sessions Judge—Appeal. See Note 7, Pt. 7 and F-N (7).
British Baluchistan. See Note 6, Pt. 3.
District Magistrate as special officer in Native States. See Note 7, Pt. 8.
Legislative changes. See Note 5, Pt. 1.
Merchants and Seamen's Act (1 of 1859). See Note 6, Pt. 4.
No appeal by accused sentenced to more than four years—Effect. See Note 7, Pt. 2.
Sections 30, 32 and 33. See Note 4.
Sentence exceeding four years, contrary to Sections 32 and 33—Appeal. See Note 4, Pt. 1.
Sentence is substantive sentence. See Note 7, Pt. 3.
Several charges—Some appealable to High Court. See Note 8, F-N (1).
Trial for more than one offence. See Note 8, Pt. 1 ; Note 9, Pt. 1.
Trial partly as first class and partly as second class. See Note 3.
Two Sessions Divisions. See Note 6, Pt. 1.

1. Scope.

Section 408 is a general provision conferring a right of appeal in the cases mentioned therein. The Section, however, must be read subject to the exceptions and modifications embodied in subsequent Sections, viz., Sections 412, 413 and 414, *infra*.[1] *See also* the undermentioned case.[2]

2. "Convicted on a trial."

See Note 1 to Section 407 and also the undermentioned cases.[1]

3. "Trial held by."

As to an appeal from a conviction where a Second class Magistrate is invested with higher powers in the course of the case, *see* Note 2 to Section 407 and Notes to Section 39, *ante*.

4. Sentence under Section 349.

In a case submitted, by an inferior Magistrate under Section 349 for severer punishment, the District Magistrate or the Sub-Divisional Magistrate

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Section 408—Note 1.

1. (1911) 12 Cri L Jour 389 (389) : 33 All 510, *Alam* v. *Emperor*. S. 413 is an exception to the general rule laid down in S. 408.
(1931) 1931 Cal 642 (643): 59 Cal 19: 33 Cri L Jour 90 : 1931 Cri Cas 842, *Akbar Ali* v. *Emperor*. (Do.)
(1919) 1919 Pat 556 (557, 559) : 20 Cri L Jour 545 : 4 Pat L Jour 435 : *Phekujha* v. *Emperor*. (Do.)
(1913) 14 Cri L Jour 170 (171) : 15 Oudh Cas 386, *Sheopal* v. *Emperor*. (Do.)
(1910) 11 Cri L Jour 152 (152) : 5 Low Bur Rul 129, *Ma Chit Su* v. *Emperor*. Ss. 412, 413 and 414 are exceptions to S. 408.
2. (1910) 11 Cri L Jour 426 (427) : 1910 Pun Re Cri No. 19, *Emperor* v. *Alam Khatun*. Trial of offence under Punjab Frontier Crimes Regulation —Trial by First Class Magistrate—Appeal lies to Sessions Judge.

Note 2.

1. (1926) 1926 Bom 382 (383) : 27 Cri L Jour 873, *Madhav* v. *Emperor*. An appeal lies under S. 408, Criminal P. C., from an order passed under S. 562 (1).
(1914) 1914 All 543 (544) : 37 All 31 : 16 Cri L Jour 43, *Emperor* v. *Ghasite*. (Do.)
(1935) 1935 Mad 157 (158) : 1935 Cri Cas 179 : 58 Mad 517 : 36 Cri L Jour 589, *Mayandi Nadar* v. *Pala Kuduban*. A person dealt with under S. 562 is "convicted" and hence such person can appeal under this Section.

Sec. 408 Notes 4—7

to whom it is submitted, cannot pass a higher sentence than he is empowered to inflict under Sections 32 and 33.[1a] *See* Proviso to sub-section 2 of Section 349. Again Section 30 authorises the Local Government to empower the District Magistrate or any Magistrate of the first class to try, as a Magistrate, all offences not punishable with death. Now, suppose the Magistrate to whom proceedings are submitted under Section 349 is a Magistrate empowered under Section 30. Can he pass a sentence more severe than he is empowered to inflict under Sections 32 and 33? It has been held that he cannot do so, that in such a case the said proviso to Section 349 will prevail and that even should the Magistrate sentence him to imprisonment for a term exceeding 4 years the appeal will lie not to the High Court under proviso (b) to Section 408, but only to the Court of Session.[1]

5. Order or sentence under Section 380.

The amendment of 1923 making an order or sentence under Section 380 appealable to the Court of Session has given legislative sanction to the view expressed to that effect in the undermentioned case.[1]

6. Court of Session.

Where, in a district there are two Sessions divisions, an appeal from a conviction by a Magistrate having jurisdiction over the whole district lies to the Sessions Judge of the division within which the headquarters of the Magistrate are situate irrespective of the place of offence.[1]

In Agency Tracts to which the Code of Criminal Procedure is extended, an appeal from the Agency Magistrate of the first class lies to the Sessions Judge of the Agency Tracts and not to the non-agency Sessions Judge.[2]

The Code being extended to British Baluchistan, a Court of Session in the said territory has all the powers in respect of appeals as are conferred by the Code.[3] A sentence of the justice of the peace under the Merchants Seamen's Act (1 of 1859) is appealable to a Court of Session.[4]

7. Proviso (b).

The Section says "*all or any of the accused convicted at such trial.*" An appeal, therefore, by an accused person sentenced for a term not exceeding four years will lie to the High Court[1] even though no appeal has been preferred

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Note 4.

1a (1873) 1873 Pun Re Cri No. 2 p. 3 (3), *Crown* v. *Rahim.*

1. (1907) 6 Cri L Jour 289 (290) : 4 Low Bur Rul 53, *Nga Pya* v. *Emperor.*

Note 5.

1. (1915) 1915 Bom 263 (264) : 16 Cri L Jour 738, *Emperor* v. *Bhimappa Ulvappa.* Case submitted to First Class Magistrate under S. 562—Conviction by the Magistrate is under S. 380 that of a First Class Magistrate—Appeal lies to Court of Session.

Note 6.

1. (1906) 4 Cri L Jour 443 (444) (Mad), *Ambu Podaval* v. *Emperor.*
2. (1912) 13 Cri L Jour 850 (852) : 17 Ind Cas 786 (Mad), *The Public Prosecutor* v. *Sadananda Patnaik.*
3. (1929) 1929 Lah 187 (189) : 30 Cri L Jour 918, *Barnsfield* v. *Emperor.*
4. (1864-65) 2 Mad H C R 473 (473), *In re W. M. Evans.*

Note 7.

1. (1915) 1915 All 20 (20) : 16 Cri L Jour 353, *Richard* v. *Emperor.*
   (1931) 1931 Mad W N 1068 (1068), *Perumal* v. *Emperor.*
   (1907) 5 Cri L Jour 496 (496) (Mad), *Palani Koravan* v. *Emperor.*
   (1911) 12 Cri L Jour 236 (238) : 10 Ind Cas 278 (Lah), *Hardit Singh* v. *Emperor.*
   [See (1893-1900) 1893-1900 Low Bur Rul 516 (518), *Nga Po Saing* v. *Empress.*
   (1897-1901) 1 Upp Bur Rul 94 (95), *Empress* v. *Nga Tun Baw.*
   (1900) 1900 Pun Re Cr No. 12 p. 28 (29), *Empress* v. *Jai Singh.*]

by the accused who has been sentenced in the same case for a term exceeding four years.[2]

The 'sentence' in Clause (b) has reference only to the *substantive* sentence of imprisonment apart from any sentence of whipping or fine or imprisonment in default of fine.[3]

It is only when a Magistrate *empowered under Section* 30 *of the Code* passes a sentence referred to in this proviso that the appeal lies to the High Court.[4] Where, however, the Magistrate is not so empowered[5] or has not acted in exercise of such powers[6] the appeal will lie only to the Court of Session notwithstanding the higher sentence.

Where an Assistant Sessions Judge convicts and sentences an accused for a term less than four years an appeal lies only to the Court of Session and the fact that at the time of the appeal the Assistant Sessions Judge himself became the Sessions Judge will not give a right of appeal to the High Court.[7]

Where a District Magistrate, appointed as a special officer to try a criminal case in a Native State, convicts and sentences the accused for the term mentioned in clause (b) no appeal will lie to the High Court as he did not act as a Magistrate of the First Class under the Code.[8]

For "concurrent sentences," *see* Note 8 below.

8. Concurrent sentences.

In a trial for more offences than one the aggregate of sentences if they are *consecutive* must be deemed as one sentence for purposes of an appeal.[1]

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2. (1926) 1926 All 160 (160) : 27 Cri L Jour 175, *Debi Din* v. *Emperor.*
(1915) 1915 All 356 (357) : 37 All 471 : 16 Cri L Jour 606, *Hardayal* v. *Emperor.*
(1916) 1916 Lah 441 (441) : 1916 Pun Re Cr No. 5 : 17 Cri L Jour 299, *Ahmad Khan* v. *Emperor.*

3. (1934) 1934 Oudh 433 (433) : 35 Cri L Jour 1288 : 1934 Cri Cas 1311, *Khajjan* v. *Emperor.*
(1918) 1918 Lah 384 (384) : 1918 Pun Re Cr No. 19 : 19 Cri L Jour 742, *Khuda Bukhsh* v. *Emperor.*
(1900-1902) 1 Low Bur Rul 57 (58), *Nga Tun Tha* v. *Empress.*
[See (1927) 1927 Nag 255 (256) : 28 Cri L Jour 672, *Jagadish Chandra Ray* v. *King-Emperor.*]

4. (1925) 1925 Rang 39 (39) : 2 Rang 386 : 26 Cri L Jour 293, *In re Abdulla.*
[See (1925) 1925 Lah 318 (318) : 26 Cri L Jour 757, *Dalip Singh* v. *Emperor.*
(1920) 1920 Cal 87 (88) : 47 Cal 154 : 21 Cri L Jour 386, *Kaseem Ali* v. *Emperor.*
(1898) 1898 Pun Re Cr No. 3 (p. 6), *Empress* v. *Batera.*
(1893) Ratanlal 655 (655), *Empress* v. *Alibux.* Code of 1882.
(1883) 9 Cal 513 (516), *Rongai* v. *Empress.* Where the sentence is less than mentioned in the Section appeal lies to sessions.]

5. (1907) 6 Cri L Jour 289 (290) : 4 Low Bur Rul 53, *Nga Pya* v. *Emperor.*

6. (1875) 1875 Pun Re Cr No. 10, p. 14 (14), *Nathu* v. *Crown.*
(1870) 14 Suth W R Cr 33 (34), *Empress* v. *Dhonah Bhooyah.*
[See (1877) 1877 Pun Re Cr No. 8, p. 19 (21), *Bahadar* v. *Crown.* If it appears, *from the sentence awarded*, that the Magistrate has acted in the exercise of enhanced powers, appeal lies to High Court—Case under S. 270 of the Code of 1882.
(1879) 1879 Pun Re Cr No. 33 p. 91 (95), *Mahamed Newaz* v. *Crown.* (Do.)
(1881) 1881 Pun Re Cr No. 23 p. 51 (pp. 52, 53), *Tulsi Ram* v. *Empress.* (Do.)]

7. (1918) 1918 Pat 240 (240) : 3 Pat L Jour 192 : 19 Cri L Jour 442, *Garib* v. *Emperor.* In such a case it is open to the officiating Sessions Judge, on receipt of the appeal, to either send the case to the High Court for disposal or to admit the appeal and postpone it till the return of the Sessions Judge.

8. (1910) 11 Cri L Jour 390 (391) : 1910 Pun Re Cri No. 14, *Lishen Das* v. *Crown.*

Note 8.

1. (1913) 14 Cri L Jour 119 (119) : 35 All 154, *Tulsi Ram* v. *Emperor.*
(1933) 1933 Pesh 90 (94) : 35 Cri L Jour 399 : 1933 Cri Cas 1445, *Akbar* v. *Emperor.*

Sec. 408 Notes 8—9

See Section 35. *Concurrent* sentences cannot be aggregated to carry an appeal to a higher forum.[2]

9. Proviso (c).

Where in a single trial an accused person is convicted under Section 124-A of the Penal Code and also under Section 153-A of that Code, the aggregate of sentences must be deemed as one sentence for purposes of appeal under Section 35, sub-section 3 of the Code, the *forum* for appeal being the High Court.[1]

Sec. 409

Appeals to Court of Session, how heard.

409.* An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge :

Provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

Synopsis.

Proviso. Note No. 1

Other Topics.

Appeals transferred by High Court—Transfer to Additional Sessions Judge. See Note 1, Pt. 2.

No transfer to Assistant Sessions Judge—Even under Section 193, sub-section (2). See Note 1, Pt. 1.

1. Proviso.

It is only the Sessions Judge or an Additional Sessions Judge that has jurisdiction to hear an appeal to the Court of Session. The Sessions Judge cannot, therefore, make over an appeal under the proviso to an *Assistant* Sessions Judge for hearing. Nor can he do so under sub-section 2 of Section 193 of the Code as an appeal is not a 'case' within the meaning of that Section.[1]

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* **(Code of 1882—S. 409.)**

Same as 1898 Code ; the proviso was added in 1923.

(Codes of 1872 and 1861—Nil.)

(1930) 32 Cri L Jour 469 (469) : 129 Ind Cas 731 (All), *Emperor* v. *Hamid.*

[See (1911) 12 Cri L Jour 348 (351) : 38 Cal 214, *Joy Chandra Sarkar* v. *Emperor.*

(1880) 1880 Pun Re Cr No. 36, p. 89 (90), *Jeytu Mal* v. *Empress.* Several charges at one trial—For the sentence of some charges appeal lying to High Court—Appeal from lesser sentences on other charges also lies to High Court.]

2. (1909) 10 Cri L Jour 250 (250) : 3 Ind Cas 171 (Bom), *Tulsi Das Lakshman* v. *Emperor.*

(1917) 1917 Pat 33 (33) : 3 Pat L Jour 138 : 19 Cri L Jour 90, *Gurusahay Ram* v. *Emperor.*

(1912) 13 Cri L Jour 877 (877) : 17 Ind Cas 813 (Cal), *Abdul Khalek* v. *Emperor.*

(1921) 1921 Cal 152 (152): 23 Cri L Jour 225, *Abdul Jabbar* v. *Emperor.*

(1916) 1916 Cal 464 (464): 17 Cri L Jour 266, *Lachmi Ram* v. *Emperor.*

(1927) 1927 Nag 255 (255) : 28 Cri L Jour 672, *Jagadish Chandra Roy* v. *Emperor.*

(1901) 1901 Pun Re Cri No. 25, p. 83 (83), *Sher Muhammad* v. *Emperor.*

Note 9.

1. (1911) 12 Cri L Jour 348 (351) : 38 Cal 214 *Joy Chandra Sarkar* v. *Emperor.* (Obiter).

Section 409—Note 1.

1. (1915) 1915 All 101 (101, 102) : 37 All 286 : 16 Cri L Jour 316, *Emperor* v. *Abdul Razyak.*

The power of the Sessions Judge to make over an appeal to an Additional Sessions Judge is not confined to appeals arising within his territorial jurisdiction but extends also to appeals which might have been transferred to the Sessions Judge by the High Court.[2] Sec. 409 Note 1

Appeal from sentence of Court of Session.

410.* Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court. Sec. 410

Synopsis.

Appeal from sentence of Court of Session. Note No. 1

Other Topics.

Additional evidence in appeal under S. 428. See Note 1, Pt. 3.
Agent of Mewar—Act II of 1846. See Note 1, Pt. 5.
Appeal by European British Subjects. See Note 1, Pt. 7.
Chittagong Hill Tracts. See Note 1, Pt. 6.
Conviction for insult — Appeal. See Note 1, Pt. 1.
Decision on reference for confirmation under Section 374 — No further appeal. See Note 1, Pt. 8.
Judicial Commissioner of Oudh. See Note 1, F-N (7).
Judicial Commissioner of Sind. See Note 1, Pt. 4.
Security case referred under S. 123. See Note 1, Pt. 2.

*** (Code of 1882—S. 410.)**

Appeal from sentence of Court of Session.

410. Any person convicted on a trial held by a Sessions Judge, or an additional or a joint Sessions Judge may appeal to the High Court.

(Code of 1872—Ss. 80; 270, Para. 3 and 271, Paras. 1, 4, 5, 6 and 7.)

Appeal from conviction by Court of Session.

80. Any European British subject who is convicted of any offence by any Court of Session, may appeal to the High Court.

270. * * * *

A sentence of an Assistant Sessions Judge, confirmed under Section 18 by the Sessions Judge, may be appealed to the High Court.

Appeals by persons convicted by Sessions Court.

271. Any person convicted on a trial held by a Sessions Judge may appeal to the High Court.

* * * *

If such person be sentenced to death, the Sessions Court shall inquire whether he wishes to appeal, and if he signifies his intention to appeal, the Court shall inform him that his appeal must be made within seven days, and shall delay the transmission of the reference hereinafter required for a reasonable time, not exceeding seven days, to allow of the appeal and reference being made at the same time.

When it appears that the execution of the sentence should not be delayed, the Sessions Court may record its reasons and forward the reference at once.

In no case requiring confirmation shall the High Court grant a longer delay than is herein allowed for the presentation of an appeal.

Where the reasons given by the Sessions Court for forwarding the reference at once are sufficient, the High Court shall decide the case in the absence of an appeal.

* * * *

(Code of 1861—S. 408.)

Appeals in what cases in trials by jury or with assessors.

408. Any person convicted on a trial held by a Court of Session may appeal to the Sudder Court. If the conviction was in a trial held with the aid of assessors, the appeal may be on a matter of fact as well as on a matter of law.

* * * *

2. (1934) 1934 Pat 114 (115, 116) : 35 Cri L Jour 1167 : 1934 Cri Cas 300, *Kedarnath Sahay* v. *Emperor*. Unless the contrary is directly expressed.

Sec. 410 Note 1

1. Appeal from sentence of Court of Session.

A conviction by a Sessions Judge for intentional insult to him in Court is equally a conviction on a trial held by the Sessions Judge and an appeal lies to the High Court.[1] But an order of the Sessions Judge in a security case referred to him under Section 123 of the Code, is not a conviction or a trial held by him and no appeal lies to the High Court.[2] Where a Sessions Judge, acting under Section 428, causes additional evidence to be taken in an appeal and then convicts the accused the latter is not *convicted on a trial held* by a Sessions Judge and no appeal lies to the High Court.[3]

A Judge of the Court of the Judicial Commissioner of Sind sitting in a Sessions trial is a Sessions Judge for the purposes of this Section.[4] The High Court of Bombay has power to hear appeals from a conviction by the Agent of Mewar, under the special jurisdiction conferred on the said High Court by Rule 44 of the Bombay Act, II of 1846.[5] The High Court of Calcutta has no jurisdiction to hear appeals from Chittagong Hill Tracts as those tracts have been removed from the operation of the existing civil and criminal jurisdiction.[6]

For the meaning of 'High Court' in regard to appeals by European British subjects, *see* Section 4 (*j*) of the Code.[7]

Where a case has been submitted to the High Court under Section 374 for confirmation and the High Court has pronounced a decision thereon no appeal is open to the accused subsequently from the order of the Sessions Judge.[8]

Sec. 411

411.* Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

Appeal from sentence of Presidency Magistrate.

Synopsis.

* (Code of 1882—S. 411—Same.)

(Codes of 1872 and 1861—Nil.)

Section 410—Note 1.

1. (1868-69) 4 Mad H C R Cr 146 (148), *Chappu Menon, In re.*
2. (1883) 9 Cal 878 (879), *Chand Khan* v. *Empress.*
3. (1900) 27 Cal 372 (375, 376), *Empress* v. *Ishasak.*
   (1871) 15 Suth W R Cri 33 (34), *In re Dhunobur Ghose.*
   (1865) 2 Suth W R Cri 13 (14, 19, 24), *Empress* v. *Mohesh Chunder Chuttopadhia.* Contra — No longer law—See 27 Cal 372.
4. (1925) 1925 Sind 249 (250, 251, 253) : 19 Sind L R 309 : 26 Cri L Jour 562 (F B), *Haji Khudabux* v. *Emperor.* The definition in S. 226, Criminal P. C., does not apply to Chapter 31.
5. (1917) 1917 Bom 224 (226) : 41 Bom 657 : 18 Cri L Jour 817 (F B), *Nazir Mahomed* v. *Emperor.*
6. (1900) 27 Cal 654 (654), *Empress* v. *Sonai Mugh.*
7. (1910) 11 Cri L Jour 723 (724) : 13 Oudh Cas 335, *Thomas* v. *Emperor.* Before the amendment of S. 4 (*j*) in 1923 the Court of the Judicial Commissioner of Oudh was not a *High Court* for the purposes of an appeal by a European British subject from a conviction by a Sessions Judge.
8. (1867) 1867 Pun Re Cr No. 33 (page 55), *Crown* v. *Soojun Singh.*

Other Topics.

Concurrent sentences. See Note 1, P. 4.
Imprisonment is substantive. See Note 1, Pts. 1 and 2.
Presidency Magistrate — Release under Section 562. See Note 1, Pt. 5.

1. Appeal from Presidency Magistrate.

The imprisonment for a term exceeding six months' in this Section has reference only to the *substantive* term of imprisonment and does not include the imprisonment which may be contingent on default of payment of fine.[1] A substantive sentence of imprisonment for a term of six months cannot, therefore, be combined with any term of imprisonment imposed in default of payment of fine for claiming a right of appeal.[2] Where the sentence does not contain any one of the punishments specified in the Section no appeal lies.[3] Concurrent sentences against the accused in the same trial cannot be aggregated to bring the case under the Section.[4]

In a case where a Presidency Magistrate proceeds under Section 562 and passes an order for release of the accused on furnishing security for good behaviour thereunder, the question arises whether an appeal lies from such an order. It has been seen in Note 1 to Section 407 that the absence of a *sentence* is no bar to an appeal from a conviction which underlies an order under Section 562. But under the strict terms of Section 411 no appeal can lie from a conviction by a Presidency Magistrate unless it is accompanied by one or the other of the sentences specified in the Section. The answer, therefore, in the case under consideration is that no appeal lies.[5]

412.* Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

No appeal in certain cases when accused pleads guilty.

Synopsis.

Scope of bar under the Section. Note No. 1

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* **(Code of 1882—S. 412.)**

No appeal in certain cases when accused pleads guilty.

412. Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or a Presidency Magistrate on such plea, there shall be no appeal except as to the extent or legality of the sentence.

Section 411—Note 1.

1. (1878-80) 2 Mad 30 (32), *In re Jotharam Davay.*
2. (1896) 20 Bom 145 (145), *Empress* v. *Hari Savba.*
   (1878-80) 2 Mad 30 (31), *In re Jotharam Davay.*
   (1889) 16 Cal 799 (801), *Schein* v. *Empress.*
3. (1909) 10 Cri L Jour 255 (256) : 3 Ind Cas 285 (Bom), *Datta Ram* v. *Emperor.* One day's simple imprisonment and a fine of Rs. 150—No appeal.
   (1915) 1915 Bom 61 (61) : 39 Bom 558 : 16 Cri L Jour 585, *Emperor* v. *Goodhew.* Simple imprisonment for a day and forfeiture of pay of two days—No appeal.
   (1905) 2 Cal L Jour 45 (Note 2), *Max Minck* v. *Emperor.* Imprisonment for one day and 200 rupees fine.
4. (1912) 13 Cri L Jour 787 (788) : 17 Ind Cas 531 (Cal), *Sukanandan Singh* v. *Emperor.* Two concurrent sentences of six months each—it is only a single sentence of 6 months.
5. (1932) 1932 Cal 488 (488) : 33 Cri L Jour 639 : 1932 Cri Cas 480, *H. Birks* v. *Emperor.*

Sec. 412 Note 1

Other Topics.

Admission of appeal as to sentences only illegal. See Note 1, F-N (7).
Appeal in spite of confession. See Note 1, Pt. 11.
Appealable sentences as to other accused. See Note 1, F-N (9).
Applicable to revision. See Note 1, Pt. 10.
Confession accepted — No subsequent attack. See Note 1, Pt. 5a.
Confession is waiver. See Note 1, Pt. 1.
Confession not real. See Note 1, Pts. 2 to 4a; Note 1, F-N (10).
Conviction essential.. See Note 1, Pt. 5.
Denial of confession — Vakil's affidavit. See Note 1, F-N (10).
No sentence but released under Section 562. See Note 1, Pt. 9.
Previous conviction—Confession— No appeal. See Note 1, Pt. 6.

1. Scope of bar under the Section.

The principle underlying the provision is that a plea of guilty by the accused person operates as a *waiver* of his right to question the legality of the conviction based on such a plea.[1] But, before the bar of this Section could be applied against a convicted person, the plea of guilty must be really such a plea. For instance a plea which only amounts to an admission of *facts* alleged and not of the offence,[2] or a plea of guilty based on a misconception of the law of criminal liability[3] or on a misconception of one's right in property[4] or in answer to a charge defectively framed and not properly explained to the accused,[4a] is really a plea of not guilty. Again, it is only in cases where the Court has accepted the plea of guilty and has *convicted* the accused person *on such plea* that the right of an appeal from the conviction is taken away.[5] But once the Court has in its discretion accepted the plea such discretion cannot afterwards be attacked as improperly exercised so as to affect the provisions of Section 412.[5a]

A plea of guilty with regard to previous convictions equally precludes the appellate Court from re-opening the question of the previous convictions in appeal.[6]

As a rule an appeal cannot be admitted on the question of sentence only. But this Section creates an exception to the rule in cases where the convic-

(Code of 1872—S. 273, last para.)

273. * * * * * *

Where an accused person has been convicted on his own plea, whether on a trial with assessors or by jury, there is no appeal, except as to the extent or legality of the sentence.

(Code of 1861—Nil.)

Section 412—Note 1.

1. (1920) 1920 Cal 522 (522) : 21 Cri L Jour 547, *Emperor* v. *Akub Ali Mazumdar.*
(1880) 5 Bom 85 (87), *Empress* v. *Jafar M. Tulah.*
[See (1866) 5 Suth W R Cri 52 (52), *Queen* v. *Kurmo Koormee.*
(1928) 1928 Rang 49 (49) : 5 Rang 710 : 29 Cri L Jour 115, *Emperor* v. *Nga Lu Gale.*]
2. (1919) 1919 Bom 160 (160) : 43 Bom 842 : 20 Cri L Jour 684. *Emperor* v. *Mansur.* Whether on admitted facts the accused is liable is a question of law.
(1869) 11 Suth W R Cri 53 (53), *Queen* v. *Mittun Chowdhry.*
3. (1920) 1920 Cal 522 (523) : 21 Cri L Jour 547, *Emperor* v. *Akub Ali Mazumdar.*
4. (1931) 1931 All 265 (266) : 53 All 437 : 32 Cri L Jour 576 : 1931 Cri Cas 425, *Emperor* v. *Sat Narain.* Case under S. 380, I. P. C.
4a (1893-1900) 1893-1900 Low Bur Rul 328 (328), *Nga Nga* v. *Empress.*
5. (1909) 10 Cri L Jour 325 (340) : 3 Ind Cas 625 (Cal), *Khudiram* v. *Emperor.* Evidence taken and convicted on evidence.
(1931) 1931 Bom 195 (196, 198) : 1931 Cri Cas 339 : 32 Cri L Jour 719 (F B), *Emperor* v. *Janardhan Kashinath Abhyankar.* (Do.)
5a (1934) 1934 Pat 330 (334) : 35 Cri L Jour 1322 : 1934 Cri Cas 722, *Shyama Charan Bharthnar* v. *Emperor.*
6. (1909) 9 Cri L Jour 56 (59) : 4 Nag L R 163, *Emperor* v. *Kissan Yessu.*

tion has taken place on an admission of guilt by the accused person.[7] In the latter case, the accused is entitled to question in appeal the sentence of the lower Court and the sentence only either on the ground that the *extent* of the sentence is beyond what the circumstances of the case required or that the sentence is *illegal* as not authorised by law.[8] Where on the plea of guilty of the accused the Court, proceeding under Section 562 of the Code, releases him on recognizance and passes *no sentence* at all the right of appeal is absolutely barred.[9] **Sec. 412 Note 1**

The principle of this Section would seem to apply to Criminal Revision also.[10]

For a special case of the right to appeal against the *conviction* notwithstanding a plea of guilty, *see* Section 439, sub-section 6, and the undermentioned case.[11]

413. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the First Class passes a sentence of imprisonment not exceeding one

No appeal in petty Cases.

413.* Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only or *in which a Court of Session or District Magistrate*

Sec. 413

No appeal in petty cases.

*** (1882—S. 413 ; 1872—S. 273, Paras. 1 and 2 and 1861—S. 411.)**
The matter found in Explanation was added in 1872.

7. (1914) 1914 Cal 276 (277) : 41 Cal 406 : 14 Cri L Jour 485, *Nafar Sheikh* v. *Emperor*. A restriction order for admission of a criminal appeal on the ground of sentence only is *ultra vires*.
(1931) 1931 Pat 351 (351) : 32 Cri L Jour 1017 : 1931 Cri Cas 799, *Rijhu* v. *Emperor* (Do.)
(1895) Ratanlal 826 (827), *Empress* v. *Dagdu Gangaram* (Do.)
(1898) 22 Bom 759 (760), *Empress* v. *Kalu*. Corresponding Section of the Code of 1882 did not include in the Section a conviction by a Magistrate of the First Class.
(1898) Ratanlal 954 (954), *Empress* v. *Govind Radhu* (Do.)
8. (1880) 5 Bom 85 (87), *Empress* v. *Jafar M. Talab*.
(1898) 22 Bom 759 (760), *Empress* v. *Kalu Dosan*.
9. (1917) 1917 Lah 413 (413) : 1917 Pun Re Cri No. 20 : 18 Cri L Jour 401, *Hayata* v. *Emperor*.
(1931) 1931 Sind 151 (151, 152): 1931 Cri Cas 923 : 25 Sind L R 337 : 32 Cri L Jour 1142, *Tejumal Jagumal* v. *Emperor*. Although other accused in the case have been convicted and given appealable sentences—See S. 415-A.
10. (1920) 1920 Cal 522 (522) : 21 Cri L Jour 547, *Emperor* v. *Akub Ali Mazumdar*.
(1907) 6 Cri L Jour 153 (154) (All), *Emperor* v. *Puttan Lal*.
[See also (1896) 19 Mad 209 (210), *Empress* v. *Bhashyam*. Prisoner in revision denied factum of plea of guilty—*Held* his own affidavit to that effect not enough—But that vakil must file affidavit.]
[See however (1927) 1927 Bom 67 (67) : 27 Cri L Jour 1148, *Emperor* v. *Chunilal Hargovan*.
(1930) 1930 Rang 349 (350) : 32 Cri L Jour 206 : 1930 Cri Cas 1177, *Ali Hossein* v. *Emperor*. The High Court in revision is not bound by S. 412, Criminal P.C., but may examine the record for the purpose of seeing whether the plea was based on proper conception of the facts.]
11. (1935) 1935 Rang 49 (50) : 1935 Cri Cas 176: 36 Cri L Jour 336 (337) : 12 Rang 616, *Nga Ywa* v. *Emperor*.

Sec. 413 Notes 1—3

month only or of fine not exceeding fifty rupees only or of whipping only.

or other Magistrate of the First Class passes a sentence of fine not exceeding fifty rupees only.

Explanation.—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed.

Synopsis.

Other Topics.

Co-accused—Non-appealabe sentence. See Note 7.
Code of 1861. See Note 8, Pt. 1.
Compensation under Section 22, Cattle Trespass Act—Not final. See Note 5, Pt. 1.
First non-appealable sentence — Subsequent addition to make it appealable. See Note 4, Pt. 1 and F-N (1).
Non-appealable sentences instead of appealable one deprecated. See Note 4, F-N (1).
Order under Section 31, Court-fees Act — Not fine. See Note 5, Pt. 2.
Repeal of Section 416—Effect—European British subjects. See Note 1.
Strict construction of the Section. See Note 3, Pts. 2 and 3.

1. Legislative changes.

The restrictions on appeal laid down in Section 413 have now been made applicable to European British subjects by the repeal of Section 416.

2. Scope of the Sections 413 to 415-A.

Sections 413 to 415-A have to be read together. Sections 413 and 414 enact certain exceptions to the right of appeal given by Sections 408 and 410. Section 413 takes away the right of appeal in certain petty cases and Section 414 in certain convictions in summary trials. Sections 415 and 415-A are added by way of proviso. Explanations to Sections 413 and 414 are intended to remove possible doubts in the construction of those Sections.[1]

3. Order under Section 562.

It has been already noticed, in Section 407, that an appeal lies from an order under Section 562, notwithstanding the absence of any sentence against the accused. In view of the fact that Section 413 bars an appeal in cases of slight sentences, can it be mentioned that an appeal lies where there is no sentence at all? The answer is that an appeal does lie and that the restrictive provisions of Section 413 are not applicable to the case.[1] Any restrictive provision on the right of appeal must be strictly construed and in favour of the subject.[2] On a strict construction of Section 413, an appeal is barred only in

Section 413—Note 2.

1. (1911) 12 Cri L Jour 389 (389, 390) : 33 All 510, *Alam* v. *Emperor*. This case is confined to S. 415 and was before S. 415-A was enacted.

Note 3.

1. (1926) 1926 Bom 382 (383) : 27 Cri L Jour 873, *Madhav Raghvendra Kulkarni* v. *Emperor*.
(1904) 1 Cri L Jour 1098 (1100) : 1904 Pun Re Cr No. 24, *Emperor* v. *Manohar Das*.
2. (1931) 1931 Cal 642 (643) : 1931 Cri Cas 842 : 59 Cal 19 : 33 Cri L Jour 90, *Akbar Ali* v. *Emperor*.

the specific cases mentioned therein. The Section cannot bar the right of appeal existing in respect of cases not falling within its specific terms.[3]

4. Passes a sentence.

Once a sentence exceeding the limits prescribed by the Section is passed an appeal will lie, as of right, whether the sentence was legal or not. Where, for example, a Magistrate passes a non-appealable sentence at first and subsequently adds to it so as to make it appealable, an appeal lies from such a sentence and the appellate Court cannot strike out the added sentence and decline to go into the merits of the whole appeal on the ground that the original sentence was not appealable.[1]

5. Sentence of fine.

An award of compensation under Section 22 of the Cattle Trespass Act 1 of 1871 is not a sentence of *fine* within the meaning of this Section.[1] Similarly, an order under Section 31 of the Court-fees Act, directing payment to the complainant of the Court-fee paid by him on his complaint was held not to be a sentence of *fine*.[2] In such cases the fact, that the amounts are to be collected as if they were fines, is immaterial.

6. Combination of sentences for purposes of an appeal.

See Notes under Section 415.

7. "By a convicted person."

For the law as to the right of appeal by a co-accused who has been awarded only a non-appealable sentence in the same trial, *see* Notes under Section 415-A.

8. "Explanation" to the Section.

Under the Code of 1861, there was an appeal when the sentence fixed a term of imprisonment exceeding one month in default of payment of fine of less than 50 rupees.[1]

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3. [See (1924) 1924 All 765 (765) : 46 All 828 : 25 Cri L Jour 1244, *Hiralal* v. *Emperor*. S. 413 only says in what cases appeal does not lie. It does not say in what cases appeal lies. It does not bar an appeal under S. 408 from an order under S. 562.]

Note 4.

1. (1911) 12 Cri L Jour 431 (431) : 11 Ind Cas 615 (Bom), *Emperor* v. *Keshavlal Virchand*. Additional sentence imposed at the request of the accused.
(1911) 12 Cri L Jour 402 (402) : 35 Bom 418, *Emperor* v. *Keshavlal*. Additional sentence imposed without jurisdiction.
[See (1893) 20 Cal 483 (486), *Jatra Shekh* v. *Reazat Shekh*. Imposition of non-appealable sentences instead of appealable sentences in proper cases deprecated.]

Note 5.

1. (1922) 1922 Bom 191 (191) : 46 Bom 58 : 22 Cri L Jour 624, *Bakthol Duming Rodriks* v. *Papa Dada*. And S. 413 has no application.
(1888) 15 Cal 712 (712), *Dhiku* v. *Deno Nath*.
[See (1900) 27 Cal 992 (992), *Bhagirathi Naik* v *Gangadhar Mahant*.]

2. (1893) 20 Cal 687 (689), *Madan Mandul* v. *Haran Ghose*.
N. B.—S. 31, Court-fees Act, was repealed by Act 18 of 1923.
(1909) 9 Cri L Jour 83 (83) : 31 Mad 547, *Emperor* v. *Maddipatla Subbarayudu*.
(1894) 1 Weir 724 (724), *Para Muriyan, In re*.

Note 8.

1. (1872) 1872 Pun Re Cri No. 3, page 3 (3), *Fattah* v. *Mahomed Din*.
[See (1866) 3 Bom H C R Crown Cas. 15 (15), *Reg.* v. *Shankar Venkaji*.]

Sec. 414

414.

No appeal from certain summary convictions.

Notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under Section 260 passes a sentence of imprisonment not exceeding three months only, or of fine not exceeding two hundred rupees only, or of whipping only.

414.*

No appeal from certain summary convictions.

Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under Section 260 passes a sentence of fine not exceeding two hundred rupees only.

Synopsis.

Other Topics.

Addition of other penalties to fine. See Note 4, Pts. 2 to 4 and F-N. (2 to 4.)

Conviction by Bench of Second or Third Class Magistrates—Not within the Section. See Note 3, Pt. 2.

Illegal trial as summary. See Note 3, Pt. 3.

No fine—Order under Section 562. See Note 4, Pt. 1.

Repeal of Section 416—Effect. See Note 2.

1. Legislative changes.

By the amendment made in this Section in 1923, cases in which a sentence of imprisonment or whipping has been passed, have been made appealable.[1]

2. European British subjects.

Under Section 416 of the Code, now repealed, it was laid down that the provisions of Section 414 did not apply to European British subjects.[1]

3. Magistrate empowered to act under Section 260.

This Section embodies another exception to the right of appeal. It takes away the right of appeal in cases tried summarily under Section 260 of the Code where the sentence is one of fine not exceeding Rs. 200 only. The restriction in this Section applies only to convictions by a Magistrate or a Bench of Magistrates of the first Class to whom alone Section 260 has reference.[1] Any conviction, therefore, by a Bench of Magistrates of the Second

* (1882—S. 414 ; 1872—S. 274, Para. 1 ; 1861—Nil.)

Section 414—Note 1.

1. [See (1929) 1929 Pat 716 (716) : 30 Cri L Jour 869 : 1929 Cri Cas 588, *Jagadish Prasad* v. *Emperor*.]

Note 2.

1. (1906) 3 Cri L Jour 433 (436, 437) (Rang), *Narayanswamy* v. *A. Blake*.

Note 3.

1. (1886) 9 Mad 36 (37), *Empress* v. *Narayansami*.
[See (1883) 9 Cal 96 (97), *Havaldar Roy* v. *Jagu Mean*. A Bench of Magistrates consisting of an assistant Magistrate with second class powers and two or more Honorary Magistrates is a Bench with first class powers as per G. O. in Calcutta.]

or Third Class is appealable under Section 407 and is not affected by this Section.[2] Sec. 414 Notes 3—5

The jurisdiction to try a case summarily must be validly exercised. A Magistrate cannot deprive an accused person of his right of appeal by trying a case summarily without having the power to do so.[3]

As to the constitution and power of a Bench of Magistrates, *see* Section 15, *ante*.

4. "Passes a sentence of fine."

The bar under this Section operates only when the specific non-appealable sentence mentioned in the Section is awarded. Where, therefore, no sentence is passed at all, as for example, an order under Section 562 is passed,[1] this Section has no application and an appeal lies from the conviction. *See also* Notes under Section 407. So also, when the sentence is any other than of a "fine not exceeding Rs. 200 only" the right of appeal is not taken away. A sentence of fine of Rs. 60 *and suspension of license* under the Motor Vehicles Act is not a sentence of fine only within the meaning of this Section and an appeal is not barred.[2] Similarly where, in addition to a non-appealable sentence, a further order to furnish security for good behaviour is passed the sentence has no application.[3] But an order of confiscation under the Excise Act in addition to a non-appealable sentence has been held not to make the case appealable.[4]

5. Combination of sentences.—*See* Section 415, *infra*.

415.* An appeal may be brought against any sentence referred to in Section 413 or Section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence

Sec. 415

Proviso to Sections 413 and 414.

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* **(Code of 1882—S. 415—Same.)**

(Code of 1872—S. 274, Para. 2)

274. * * * * * *

An appeal may be brought against any sentence referred to in Section two hundred and seventy-three or two hundred and seventy-four, by which any two or more of the punishments therein mentioned are combined; but not against a sentence in which imprisonment is awarded in default of payment of fine and in addition thereto;

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2. (1886) 9 Mad 36 (37), *Empress* v. *Narayansami*.

3. (1879) 4 Cal 18 (19), *Empress* v. *Golam Mahommad*. Magistrate is not entitled to split up an offence for giving himself summary jurisdiction.

(1932) 1932 Lah 188 (189): 33 Cri L Jour 108, *Robert John* v. *Emperor*. Summary trial by Magistrate not empowered — And without informing accused.

Note 4.

1. (1924) 1924 All 765 (766): 46 All 828: 25 Cri L Jour 1244, *A. Hira Lal* v. *Emperor*.

2. (1933) 1933 Rang 329 (330): 35 Cri L Jour 116: 1933 Cri Cas 1146, *Garanand Singh* v. *Emperor*. The order of suspension is part of sentence.

3. (1909) 9 Cri L Jour 368 (370): 4 Low Bur Rul 359, *Kathan & Karpana* v. *Emperor*. Security for good behaviour on conviction for an offence is not provided for in Criminal Procedure Code. Such an order in this case was passed under S. 31-A of Rangoon Police Act.

(1900-1902) 1 Low Bur Rul 3 (4), *Empress* v. *Tagarajan*. Such an order is not part of sentence.

4. (1877) 3 Cal 366 (369), *Empress* v. *Baidanath Das*. Confiscation under S. 49, Act 21 of 1856 (County spirits)—Not part of sentence.

[See (1866) 3 Bom H C R Crown Cas 12 (14), *Reg.* v. *Jivan Usman*. *Quaere*. Confiscation of cotton under Bombay Cotton Frauds Act 9 of 1863 whether part of sentence.]

Sec. 415 Note 1

which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Explanation.—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this Section.

Synopsis.

Combination of sentences. Note No. 1 | Order for security to keep the peace. Note No. 2

Other Topics.

Amendment in 1923 of Sections 413 and 414 and not of Section 415 also—Effect. See Note 1.
Combination of two sentences of fine. See Note 1, Pts. 2 to 5.
Concurrent sentences — Aggregation. See Note 1, Pts. 7 and 8.
Different charges. See Note 1, F-N (1).
Imprisonment not actually suffered—Immaterial. See Note 1, F-N (1).
Security for good behaviour under Section 31-A of Rangoon Police Act. See Note 2, Pt. 2.
Sentences in same trial and not separate cases. See Note 1, Pt. 6.

1. Combination of sentences.

It has already been seen in Note 2 to Section 413 that Section 415 is intended by the Legislature as a proviso or an explanation to Sections 413 and 414. Section 415 has not been altered by the Amending Act of 1923 and remains as it stood before. Sections 413 and 414 were amended in 1923. In understanding the meaning of Section 415 it will, therefore, be necessary to notice how the law stood under Sections 413 and 414 before their amendment. The old Section 413 laid down that no appeal lay in cases in which a sentence of imprisonment not exceeding one month only *or* of fine not exceeding Rs. 50 only *or* of whipping only was passed. The old Section 414 also contained the same three kinds of alternative punishments. It followed that if each of the two Sections barred an appeal, only in case there was a sentence, either of a petty imprisonment only or of a petty fine only or of whipping only, the right of appeal was not taken away when any two or more of the alternative punishments were jointly awarded, though each of the said joint punishments, taken by itself, was of the extent not appealable under the said Sections.[1] This

nor against any sentence which would not otherwise be liable to appeal because the person convicted is ordered to find security to keep the peace.

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(Code of 1861—Nil.)

Section 415—Note 1.

1. (1911) 12 Cri L Jour 389 (389, 390) : 33 All 510, *Emperor* v. *Alam.* Imprisonment for one day and Rs. 50 fine—*Held* appeal lay. It is not necessary that the accused must have actually suffered imprisonment to claim right of appeal.
(1879) 3 Cal L R 511 (512), *Empress* v. *Haradhan Tamuli.* Rs. 20 on one charge and imprisonment for one month on another—Appeal lay as to whole.
(1869) 1 N W P H C R 302 (303), *Cri Ref. No.* 271, *dated 4th May* 1869.
(1878) 2 Cal L R 511 (512), *In re Sher Mahomed.*
[See (1902) 3 Pun L R No. 45, page 170 (171), *Crown* v. *Rura.* Imprisonment for one month and whipping under old Section.
(1878) 3 Cal L R 405*n* (405*n*), *Mohesh Mundul* v. *Bholanath.* An order against accused persons jointly and severally for payment of money to the complainant is not a "fine"

Sec. 415 Note 1

position was only made clear in Section 415. The words "any two or more of the punishments therein mentioned" in that Section were clearly referable to any two or more of the punishments of imprisonment, fine and whipping mentioned in Sections 413 and 414 as they stood before the amendment in 1923.

Now by virtue of the amendment in 1923 the punishment of whipping was taken out of Section 413 and whipping as well as imprisonment were taken out of Section 414. But the words "any two or more of the punishments therein mentioned" have been retained in Section 415. In view of the fact that now Section 414 mentions only *one* punishment, what is the meaning of the words "any two or more of the punishments therein mentioned" in this Section? It can very well be urged that those words while *meaning* punishments of the two kinds mentioned in Section 413, also *include* several punishments of the *same kind* mentioned in Sections 413 and 414. This view derives support from the fact that Sections 413 and 414 say that no appeal lies from *a* sentence of fine, etc., thus implying that if there are two or more sentences of fine, etc., the bar will not apply. When there are two or more such sentences it does not matter if the aggregate of those sentences does not exceed the limits of duration or amount fixed by Sections 413 and 414. It has thus been held by the Chief Court of Oudh[2] that a person convicted under Section 447 of the Penal Code, and Section 24 of the Cattle Trespass Act and fined Rs. 50 and Rs. 20 respectively by a Magistrate in the exercise of summary powers was not deprived of the right of appeal by the terms of Section 414, on the ground that two punishments of the nature mentioned in Section 414 have been combined. In a Calcutta case[3] the High Court accepted the contention that Section 413 mentions only *a* sentence of fine, etc., and does not therefore affect a case of two or more sentences of fine. In a later Calcutta case[4] the above contention was rejected and it was held, relying on a case of the Bombay High Court,[5] that two sentences of fine must, in the aggregate, be above Rs. 50 in order to avoid the bar of Section 413. It is submitted that the latter view, though it might be unexceptionable under the old Sections 413 and 414, fails to take into consideration the inevitable effect of construing Section 415 read with Sections 413 and 414 as they stand at present.

A combination of sentences will give a right of appeal only if the sentences are in the *same trial* and not in *separate cases*.[6]

On the question whether concurrent sentences of imprisonment can be aggregated under Section 415 for escaping the bar of Section 413 and Section 414 (as it stood before the amendment) there was a difference of opi-

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impossed against the accused. Such order added to an imprisonment of one month will not make the case appealable.]

2. (1932) 1932 Oudh 27 (28) : 1932 Cri Cas 59 : 7 Luck 501 : 33 Cri L Jour 278, *Kandhai* v. *Emperor*.
3. (1931) 1931 Cal 642 (643) : 1931 Cri Cas 842 : 59 Cal 19 : 33 Cri L Jour 90, *Akabbar Ali* v. *Emperor*. It is to be noted, however, that the aggregate of the two fines in this case was more than Rs. 50 although this aspect does not appear to have influenced the decision.
4. (1932) 1932 Cal 551 (552) : 1932 Cri Cas 551 : 59 Cal 1131 : 33 Cri L Jour 704, *Nawab Ali* v. *Joinab Bibi*. Two sentences of fine of Rs. 20 and Rs. 15 against an accused and of Rs. 20 and Rs. 30 against another. *Held* appeal barred.
5. (1926) 1926 Bom 416 (416) : 27 Cri L Jour 926, *Shidlingappa Gurulingappa* v. *Emperor*. Two sentences of fine of Rs. 50 and Rs. 30. It was *held* that there was one sentence of fine exceeding Rs. 50.
6. (1866) 6 Suth W R Cri 51 (51), *Queen* v. *Morley Sheikh*.
   (1868) 10 Suth W R Cri 3 (4), *Queen* v. *Nagardi Paramanik*.

Sec. 415 Notes 1—2

nion. In some cases it was held[7] that such sentences could not be aggregated and in others that they could.[8] The amendment of 1923 in Section 35 of the Code has now settled the point by upholding the former view.

2. Order for security to keep the peace.

The Section says that the fact of a convicted person being ordered to furnish security to keep the peace will not alter the non-appealable nature of the sentences mentioned in Sections 413 and 414.[1] In a case decided by the Rangoon High Court,[2] where in a summary trial an accused person was convicted and sentenced to three months imprisonment and was also ordered to give security for *good behaviour* under Section 31-A of the Rangoon Police Act, it was held that an appeal lay under Section 408 and was not taken away by Section 414 (as it stood before the amendment) on the ground that the said security was also ordered. It was observed that an appeal lay under Section 408 and that reading Sections 414 and 415 together an appeal was barred under Section 415 only in cases where there was an order for security to *keep the peace* and not where, under a Special Act, there is an order for security *for good behaviour.*

Sec. 415-A

Special right of appeal in certain cases.

415-A. *Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any such persons, all or any of the persons convicted at such trial shall have a right of appeal.*

Synopsis.

Other Topics.

Amending Act of 1923. See Note 1.
Co-accused non-European British subject. See Note 3, F-N (1).
Proceedings under Section 562. See Note 1, F-N (3).
Reference to High Court for revision only in appeal. See Note 1, F-N (1).

1. Scope and object.

This Section was newly introduced by the Amending Act of 1923. It was intended to remove doubts that previously existed with regard to the right of appeal in cases where in the same trial appealable and non-appealable sentences were passed against different accused. In some cases the Courts were of the opinion that the accused against whom a non-appealable sentence was passed was also entitled to appeal,[1] and in other cases it was held that such

7. (1913) 14 Cri L Jour 254 (254) : 40 Cal 631, *Aziz Sheikh* v. *Emperor.*
(1921) 1921 Cal 152 (152) : 23 Cri L Jour 225, *Abdul Jabbar* v. *Emperor.* Magistrate of First Class—Concurrent sentences of one month for each offence—S. 413 *held* to apply.
8. (1912) 13 Cri L Jour 877 (877): 17 Ind Cas 813 (Cal), *Abdul Khalik* v. *Emperor.*
(1911) 12 Cri L Jour 391 (392) : 11 Ind Cas 255 (Cal), *Bepin Behari Dey* v. *Emperor.*

Note 2.

1. (1904) 1 Cri L Jour 1054 (1055) : 7 Oudh Cas 338, *Meghu* v. *Emperor.*
(1935) 1935 Rang 363 (363) : 1935 Cri Cas 1037 : 13 Rang 287, *Emperor* v. *Nga Tun Lu.*
2. (1909) 9 Cri L Jour 368 (369, 370) : 4 Low Bur Rul 359, *Kattan* v. *Emperor.*

Section 415-A—Note 1.

1. (1916) 1916 All 236 (237) : 38 All 395 : 17 Cri L Jour 513, *Lal Singh* v. *Emperor.*

accused had no right of appeal.[2] The controversy is now set at rest by the enactment of Section 415-A which recognises the right of appeal on behalf of an accused person against whom a non-appealable sentence is passed in a trial in which an appealable judgment is passed against any of the accused persons.[3]

2. Sections 415-A and 412.

Does Section 415-A give a right of appeal to an accused person who has been convicted on his own plea of guilty where an appealable judgment has been passed against another accused person in the same trial? In other words does Section 415-A control Section 412? Section 415-A opens with the words "Notwithstanding anything contained in this chapter" and would, thereby appear to control Section 412. But the words in the body of the Section itself, *viz.*, "an appealable judgment, etc.," and "right of appeal," when read together, suggest that the right of appeal should be the same in both cases. Under Section 412 there can be no appeal against the conviction but only from the sentence. This restricted right of appeal does not appear to be extended by Section 415-A.[1]

3. Sections 415-A and 449.

Where leave to appeal is granted under Section 449 of the Code to one of two accused persons jointly tried by the High Court Sessions, leave to appeal should be granted to the other accused also by reason of the provisions of this Section.[1]

(1916) 1916 Lah 193 (194) : 1915 Pun Re Cr No. 30 : 17 Cri L Jour 27, *Emperor* v. *Naurats.*

(1916) 1916 Lah 302 (303) : 1916 Pun Re Cr No. 16 : 17 Cri L Jour 173, *Emperor* v. *Jaisukh.*

(1919) 1919 Pat 556 (557, 560) : 20 Cri L Jour 545 : 4 Pat L Jour 435, *Phaku Jha* v. *Emperor.* Per Atkinson, J., *contra.*

(1920) 1920 Pat 802 (803) : 22 Cri L Jour 297, *Biswanath Singh* v. *Emperor.* Even though the accused had applied to appellate Court only to refer his case to High Court for revision.

(1913) 14 Cri L Jour 170 (171): 15 Oudh Cas 386, *Sheopal* v. *Emperor.*

(1909) 9 Cri L Jour 356 (358) : 4 Low Bur Rul 354, *Ba Thaw* v. *Emperor.*

(1909) 9 Cri L Jour 368 (370) : 4 Low Bur Rul 359, *Kathan* v. *Emperor.*

2. (1917) 1917 All 372 (373) : 39 All 549 : 18 Cri L Jour 684, *Bhola* v. *Emperor.*

(1917) 1917 All 410 (411) : 39 All 293 : 18 Cri L Jour 546, *Husain Khan* v. *Emperor.*

(1923) 1923 All 609 (609) : 24 Cri L Jour 679, *Jhagru* v. *Emperor.*

(1914) 1914 Mad 433 (434) : 15 Cri L Jour 371, *Uruma Mudali, In re.*

(1918) 1918 Mad 918 (918) : 40 Mad 591 : 18 Cri L Jour 454, *In re Venkatakrishnayya.*

(1919) 1919 Mad 1163 (1163) : 19 Cri L Jour 623, *In re Annasami Madavan.*

(1917) 1917 Sind 34 (35) : 10 Sind L R 156: 18 Cri L Jour 72, *Unar Gools* v. *Emperor.*

(1870) 7 Bom H C R Crown Cas 35 (37), *Reg.* v. *Kalubhai.*
[See (1911) 12 Cri L Jour 63 (63) : 9 Ind Cas 340 (Mad), *In re Chode Balavi Ramaswami.*
(1923) 1923 Mad 95 (96): 24 Cri L Jour 89, *Nittoor Moideen Hajee, In re.*]

3. (1931) 1931 Cal 642 (643) : 59 Cal 19 : 33 Cri L Jour 90 : 1931 Cri Cas 842, *Akabbar Ali* v. *Emperor.*

(1925) 1925 Cal 329 (332) : 52 Cal 463 : 26 Cri L Jour 455, *Bahadur Molla* v. *Ismail.* Even where the appealable judgment is a proceeding under S. 562.

(1935) 1935 Mad 157 (158) : 1935 Cri Cas 179 : 58 Mad 517 : 36 Cri L Jour 589, *Mayandi Nadar* v. *Pala Khuduban.*
[See also (1926) 1926 Bom 382 (382) : 27 Cri L Jour 873, *Emperor* v. *Madhav.*]

Note 2.

1. (1931) 1931 Sind 151 (152) : 25 Sind L R 337 : 32 Cri L Jour 1142 : 1931 Cri Cas 923, *Tejumal Jagumal* v. *Emperor.*

Note 3.

1. (1927) 1927 Cal 307 (308) : 54 Cal 52 : 28 Cri L Jour 481, *Gallagher* v. *Emperor.* Though the other accused is not a European British subject.

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416.* Nothing in Sections 413 and 414 applies to appeals from sentences passed under Chapter XXXIII on European British subjects.

Saving of sentences on European British subjects.

416. [*Repealed by S. 26 of Criminal Law Amendment Act of 1923*].

Sec. 417

417.† The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Appeal on behalf of Government in case of acquittal.

Synopsis.

Other Topics.

Acquittal of serious charge though conviction of some other charge. See Note 6, Pts. 5 to 8.
Amendment of charges—Order—If appealable. See Note 7, Pts. 2 and 3.
Appeal by accused as well as by Government. See Note 3, Pts. 7 and 8.
Appeal to be expeditiously filed. See Note 8, Pt. 3.
Dismissal for non-appearance under Section 247—Is acquittal. See Note 6, Pt. 2.
High Court not to question power of Local Government. See Note 3, Pt. 6.
Inapplicable to Bengal Act 12 of 1932. See Note 1, Pt. 8.
Leglislative changes. See Note 1.
No right of appeal to private person. See Note 2, Pt. 3.
Not controlling Section 439. See Note 1, Pt. 7.
Object is to remedy injustice and not to get High Court's opinion on abstract points of law. See Note 1, Pt. 5.
Order under Section 118—Not acquittal. See Note 6, Pt. 1.
Power of Local Government—Nature and exercise. See Note 3, Pts. 1 to 5.
Refusal to try for want of jurisdiction—No appeal. See Note 7, Pt. 1.
Sections 414 and 260—Summary acquittal. See Note 1, Pt. 6.
Sessions Judge or District or Deputy Magistrate—No power in cases of acquittal. See Note 5, Pts. 1 to 3.
Who can move Local Government. See Note 2, Pt. 4.
Withdrawal of complaint under Section 248—Is acquittal. See Note 6, Pt. 3.

* (1882—S. 416 ; 1872—S. 274, Para. 3 ; 1861—Nil.)

† (Code of 1882—S. 417—Same.)

(Code of 1872—S. 272—Paras. 1 and 2.)

No appeal in case of acquittal, except on behalf of Government.

272. The Local Government may direct an appeal by the Public Prosecutor or other officer specially or generally appointed in this behalf, from an original or appellate judgment of acquittal; but in no other case shall there be an appeal from a judgment of acquittal passed in any criminal Court.

Such appeal shall lie to the High Court, and the rules of limitation shall not apply to appeals presented under this Section.

* * *

(Code of 1861—Nil.)

1. Scope and application of the Section. **Sec. 417 Note 1**

Section 407 of the Code of 1861 prohibited appeals from a judgment of acquittal of any criminal Court and an order of acquittal was therefore conclusive.[1] The extraordinary remedy of an appeal against an acquittal received a statutory recognition for the first time in 1872[2] in the interests of public safety, peace and order.[3]

But the Legislature has by no means overlooked the fact that an appeal against an acquittal is an exception to the general principle of criminal law, and is one which, needs considerable safe-guarding. Such safe-guards are three in number, namely:—

(a) that the right of appeal shall be exercised by the Local Government only,

(b) that every such appeal shall be made through the Public Prosecutor,

(c) that every such appeal shall be tried by the High Court only.

Before, therefore, a person acquitted, can undergo any further trial for the offence of which he has been acquitted the highest executive authority must hold that it is desirable; the highest legal authority must advise that it is legal and proper and the highest judicial authority must find that it is just that the order should be set aside.[4]

The object of the Section is only to enable the Local Government to have a wrongful acquittal converted into a conviction or to have a re-trial and not to enable it to obtain from the High Court opinions on abstract questions which do not arise on the facts established.[5]

The provisions of this Section are not qualified by any restriction which may be derived from a consideration of the terms of Section 414, *ante*; an appeal will therefore lie against an order of acquittal in a case tried summarily under Section 260.[6] This Section does not control the powers of the High Court under Section 439, *infra*.[7] This Section is inapplicable to cases of orders of acquittal passed by special Magistrates under Bengal Act 12 of 1932 under which there is no right of appeal to the High Court.[8]

In an appeal against an order of acquittal, it is for the Government to show that the judgment appealed against is wrong.[9]

Section 417—Note 1.

1. (1869) 11 Suth W R Cr 29 (34) (F B), *In re Gorachand Ghose.*
   (1872) 9 Bom H C R Crown Cas 346 (354), *Reg.* v. *Narayan Babaji.*
   (1866) 5 Suth W R Cr 2 (3), *Empress* v. *Toyab.*
   (1866) 5 Suth W R Cri 45 (46), *Empress* v. *Gorachand Jope.*
   (1867) 8 Suth W R Cr 47 (49, 52), *Empress* v. *Sheikh Bazu.*
2. (1931) 1931 All 439 (441) : 1931 Cri Cas 711, *Emperor* v. *Ram Adhin Singh.*
   (1904) 1 Cri L Jour 781 (788) : 1904 Pun Re Cri No. 7, *Emperor* v. *Chattar Singh.*
   (1904) 1 Cri L Jour 674 (677, 678) : 17 C P L R 75, *Emperor* v. *Mussammat Gulbi.*
3. (1910) 11 Cri L Jour 66 (66) : 1909 Pun Re Cr No. 15, *Crown* v. *Harnaman.*
4. (1904) 1 Cri L Jour 674 (684, 685) : 17 C P L R 75, *Emperor* v. *Mussammat Gulbi.*
5. (1910) 11 Cri L Jour 65 (65) : 1909 Pun Re Cr No. 14, *Emperor* v. *Fateh Din.*
   (1911) 12 Cri L Jour 364 (371) : 1911 Pun Re Cr No. 10, *Emperor* v. *Kiru.*
6. (1934) 1934 All 842 (844) : 1934 Cri Cas 1028 : 35 Cri L Jour 1229, *Emperor* v. *Noor Ahmad.*
7. (1930) 1930 Lah 159 (160) : 31 Cri L Jour 584 : 1930 Cri Cas 167, *Nathumal* v. *Abdul Haq.*
8. (1933) 1933 Cal 776 (776) : 60 Cal 1482 : 1933 Cri Cas 1327 : 34 Cri L Jour 1070, *Superintendent and Remembrancer of Legal Affairs* v. *Luchmi Narain Sarman.*
9. (1932) 33 Cri L Jour 929 (930) : 139 Ind Cas 756 (Oudh), *Emperor* v. *Paragi.*
   (1934) 1934 Pesh 129 (132) : 1934 Cri Cas

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An order of acquittal made without jurisdiction may be set aside in appeal under this Section.[10]

See Sections:—

422, as to notices of appeal presented under this Section,

423, as to the powers of an appellate Court in disposing of an appeal presented under this Section,

427, as to the arrest of an accused person in appeal from acquittal, and

431, for abatement of appeal under this Section.

2. "The Local Government."

It is only the Local Government that can prefer an appeal under this Section.[1] The object of limiting the right of appeal against acquittals to the Local Government is to prevent personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal, and to ensure that such interference shall take place only in cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter.[2] Consequently a private person has no right of appeal under this Section.[3] But so far as the wording of this Section is concerned, there is nothing in it to show who can move the Local Government to direct an appeal under this Section. It is a matter of practice that the Local Government is and can be moved by private individuals or by the Police through the District Magistrate or by the latter himself as the head of the criminal administration in his district.[4]

1402 : 36 Cri L Jour 443, *Government Advocate, North-West Frontier Province* v. *Amir Hamza.* Where two opinions can be formed on the evidence and one of them has been formed by the trial Court, appellate Court will not disagree even if the balance of probabilities be in favour of the opposite opinion. [See (1935) 1935 Nag 69 (75) : 1935 Cri Cas 339, *Local Government* v. *Guji.* When appellate Court does not consider the judgment of acquittal a perverse one, appellate Court will not interfere.
(1935) 36 Cri L Jour 1243 (1245) : 157 Ind Cas 691 (Lah), *Sultan* v. *Emperor.*]

10. (1928) 1928 Rang 49 (49) : 5 Rang 710 : 29 Cri L Jour 115, *Emperor* v. *Nga Lu Gale.* Appellate order of acquittal in appeal prohibited by S. 412.
(1907) 6 Cri L Jour 287 (288, 289) : 4 Low Bur Rul 49, *Emperor* v. *Yena.* Acquittal in incompetent appeal —Acquittal may be set aside — But in particular circumstances of case High Court did not consider it necessary to do so.

Note 2.

1. (1916) 1916 Low Bur 16 (17) : 8 Low Bur Rul 356 : 17 Cri L Jour 91, *Graham & Co.* v. *Elsey.*
(1914) 1914 Mad 628 (631) : 38 Mad 1028: 15 Cri L Jour 236, *In re Sinnu Goundan.*
(1915) 1915 Cal 388 (388) : 42 Cal 612 : 16 Cri L Jour 122, *Faujdar Thakur* v. *Kasi Choudhuri.*
(1896) 23 Cal 975 (980), *Empress* v. *Jabanulla.*
2. (1894) 22 Cal 164 (170), *Deputy Legal Remembrancer* v. *Karuna Baistobi.*
(1914) 1914 Mad 628 (631) : 38 Mad 1028 : 15 Cri L Jour 236, *In re Sinnu Goundan.*
(1916) 1916 Low Bur 16 (17) : 8 Low Bur Rul 356 : 17 Cri L Jour 91, *Graham & Co.* v. *Elsey.*
3. (1927) 1927 Nag 170 (173) : 23 Nag L R 40: 28 Cri L Jour 523, *Sher Khan* v. *Anwar Khan.*
(1931) 1931 Rang 86 (86) : 8 Rang 671 : 1931 Cri Cas 374 : 32 Cri L Jour 929, *Emperor* v. *Maung Tun Nyan.*
4. (1923) 1923 Lah 163 (166) : 24 Cri L Jour 433, *Mul Singh* v. *Emperor.*
(1922) 1922 Mad 502 (503) : 45 Mad 913 : 23 Cri L Jour 583, *Sankaralinga Mudaliar* v. *Narayana Mudali.* Private individual.
(1925) 1925 Pat 321 (322) : 26 Cri L Jour 516, *Anant Singh* v. *Hari Charan.* (Do.)
(1928) 1928 Sind 176 (176) : 30 Cri L Jour 251, *Emperor* v. *Dito.* (Do.)
(1892-1895) 1 Upp Bur Rul 47 (47), *Empress* v. *Nga Tun Win.* District Magistrate.

3. "May direct."

The power given to the Local Government by this Section, is of an exceptional and unusual character. It should be sparingly used[1] and with circumspection,[2] care and caution.[2a] It is a special weapon intended for exceptional occasions and which is to be only used after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved; it cannot be expected that the Government will dull the edge of that statutory provision by utilizing it freely in cases, which are of no or little general interest.[3] The making of a direction under this Section should be limited to those instances in which there is a grave miscarriage of justice[4] or where it is required in the interests of justice and of the public.[5]

The exercise of the discretion is not subject to control by the High Court and cannot be questioned in dealing with such appeals.[6]

Can an appeal under this Section be preferred by the Local Government against an order of acquittal when an appeal preferred by the accused against his conviction has already been heard and decided by the High Court? This question can only arise in cases where an accused person is acquitted of a graver charge but convicted of a lesser charge on the same facts. In such a case, both the Local Government and the accused person have a right of appeal. If both the appeals are preferred they should ordinarily be heard together; but if the appeal of the accused person is heard and decided by a High Court before the Local Government has appealed, is the appeal of the Local Government barred? A Full Bench decision of the Nagpur Judicial Commissioner's Court[7] has held, overruling the view of the same Court in an earlier

Note 3.

1. (1881) 4 All 148 (149), *Empress* v. *Gayadin.*
   (1931) 1931 All 712 (716) : 1931 Cri Cas 1048 : 32 Cri L Jour 1073, *Emperor* v. *Baldeo Koeri.*
   (1920) 1920 Bom 217 (219) : 21 Cri L Jour 17, *Emperor* v. *Sakharam Manji.*
   (1924) 1924 Bom 335 (337) : 25 Cri L Jour 786, *Emperor* v. *Moti Khoda.*
   (1915) 1915 Sind 8 (9) : 9 Sind L R 17 : 16 Cri L Jour 604, *Crown* v. *Kadir Bux.*
2. (1933) 1933 Mad 230 (230) : 1933 Cri Cas 288 : 34 Cri L Jour 948, *Public Prosecutor* v. *Mayandi Nadar.*
2a (1898) 21 All 122 (126), *Empress* v. *Timmal.*
   (1904) 1 Cri L Jour 781 (788) : 1904 Pun Re Cri No. 7, *Emperor* v. *Chattar Singh.*
3. (1926) 1926 Pat 176 (179) : 5 Pat 25 : 27 Cri L Jour 235, *Siban Rai* v. *Emperor.*
   (1929) 1929 Pat 139 (140) : 7 Pat 579 : 30 Cri L Jour 673, *Wazir Kunjra* v. *Emperor.*
   (1898) 1898 Pun Re Cr No. 15, page 34 (35), *Empress* v. *Khushal Singh.*
   (1911) 12 Cri L Jour 364 (370) : 1911 Pun Re Cr No. 10, *Emperor* v. *Kiru.*
4. (1894) 22 Cal 164 (170), *Deputy Legal Remembrancer* v. *Karuna Baistobi.*
   (1931) 1931 All 712 (716) : 32 Cri L Jour 1073 : 1931 Cri Cas 1048, *Emperor* v. *Baldeo Koeri.*
5. (1881) 4 All 148 (149, 150), *Empress* v. *Gayadin.*
   (1894) 16 All 212 (214), *Empress* v. *Robinson.*
   (1882) 1882 All W N 64 (64), *Empress* v. *Wali Muhammed.*
   (1931) 1931 All 439 (442) : 1931 Cri Cas 711, *Emperor* v. *Ram Adhin Singh.*
   (1904) 1 Cri L Jour 674 (684) : 17 C P L R 75, *Emperor* v. *Mussammat Gulbi.*
   (1916) 1916 Low Bur 16 (17) : 8 Low Bur Rul 356 : 17 Cri L Jour 91, *Graham & Co.* v. *Elsey.*
   [See also (1923) 1923 Lah 601 (603) : 26 Cri L Jour 337, *Ganga Singh* v. *Ramzan.*]
6. (1904) 1 Cri L Jour 674 (686) : 17 C P L R 75, *Emperor* v. *Mussammat Gulbi.*
   (1920) 1920 Bom 217 (219) : 21 Cri L Jour 17, *Emperor* v. *Sakharam Manaji.*
   (1924) 1924 Bom 335 (337) : 25 Cri L Jour 786, *Emperor* v. *Moti Khoda.*
   (1918) 1918 Lah 41 (15) : 1917 Pun Re Cr No. 43 : 19 Cri L Jour 85, *Emperor* v. *Arjan.*
   (1915) 1915 Sind 8 (9) : 9 Sind L R 17 : 16 Cri L Jour 604, *Emperor* v. *Kadir Bux.*
7. (1932) 1932 Nag 121 (124, 125) : 1932 Cri Cas 672 : 28 Nag L R 233 : 33 Cri L

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case,[8] that an appeal against an acquittal for a major offence can be preferred by the Local Government although an appeal preferred by the accused against his conviction for a minor offence has been heard and decided by the High Court. But where the appeal by the accused is pending hearing, it should be postponed if in the opinion of the standing counsel for the Government, it is likely that the Government will appeal against the acquittal so that both may be heard together. But it need not be postponed if there is only a possibility that the Government may desire to appeal.

4. "Public Prosecutor."

Under this Section, it is the Public Prosecutor that is to be directed to present an appeal to the High Court. The term "Public Prosecutor" is defined in clause (*t*) of Section 4 of the Code. Section 492, *infra* provides for the appointment generally or in any case or for any specified class of cases, one or more officers called "Public Prosecutor."[1] Therefore an appeal against an acquittal presented to the High Court by the Superintendent and Remembrancer of Legal Affairs, Bengal, who by Notification, has been appoinetd by the Local Government to be, by virtue of his office, Public Prosecutor in all cases heard by the High Court of Bengal in the exercise of its appellate jurisdiction, is not incompetent.[2] But the Legal Remembrancer of Bengal cannot be deemed to be the Public Prosecutor for the Province of Behar, from the mere fact that he has been directed by the Government of Behar and Orissa, to present such an appeal without his being *appointed* as such and when there is already a Public Prosecutor for the Province of Behar.[3]

5. "High Court."

An appeal under this Section lies only to the High Court.[1a] So a District Magistrate[1] or a Deputy Magistrate[2] or a Sessions Judge[3] has no right to entertain an appeal against an order of acquittal.

6. Order of acquittal.

The words "conviction" and "acquittal" are not applied in the Code to an order under Section 118 and are inapplicable to it. Therefore an order of a Sessions Judge setting aside the order of a Magistrate calling upon a person to furnish security for good behaviour is not an order of acquittal within the meaning of this Section so as to enable the Local Government to

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Jour 849, *Mohammadigul Rohilla* v. *Emperor*. *Contra* Niyogi, A. J. C., agreeing with 1932 Nag 73.

8. (1932) 1932 Nag 73 (74) : 33 Cri L Jour 728: 1932 Cri Cas 346, *Emperor* v. *Modkia*. Overruled by 1932 Nag 121.

Note 4.

1. (1914) 1914 Cal 560 (560) : 41 Cal 425 : 15 Cri L Jour 46, *Emperor* v. *Gaya Prasad*.
2. (1919) 1919 Cal 203 (203) : 46 Cal 544 : 20 Cri L Jour 170, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Tularam Barodia*.
3. (1914) 1914 Cal 560 (560, 561) : 41 Cal 425 : 15 Cri L Jour 46, *Emperor* v. *Gaya Prasad*.

Note 5.

1a (1869) 4 Mad H C Rul App 60 (61). *High Court Proceedings, 26th July* 1869.

1. (1891) 1891 All W N 120 (120), *Empress* v. *Hardeo Singh*.
   (1903) 7 Cal W N 493 (494), *Bishun Das Ghose* v. *Emperor*.
   (1907) 11 Cal W N 91*n* (91*n*), *Dwarka Nath Shahu* v. *Emperor*.
   (1883) 7 Mad 213 (214), *Rangaswami Ayyangar* v. *Narasimhulu Nayak*.
2. (1902) 26 Mad 478 (480), *Sami Ayya* v. *Emperor*.
3. (1904) 1 Cri L Jour 700 (701) (All), *Sayid Khan* v. *Emperor*.
   (1898) 2 Cal W N 256*n* (257*n*), *Baroda Nath* v. *Karait Sheikh*.
   [See also (1911) 12 Cri L Jour 575 (576) : 12 Ind Cas 839 (All), *Darbari Mal* v. *Emperor*.]

prefer appeal under this Section.[1]

An order dismissing the complaint for the non-appearance of the complainant under Section 247 is an order of acquittal within the meaning of this Section.[2] So also an order allowing withdrawal of the complaint under Section 248, *ante*.[3]

The words 'appellate order of acquittal' mean and include all orders of an appellate Court by which a conviction is set aside.[4]

The 'acquittal' contemplated in the Section need not be on all the charges made against the accused. The Local Government is not deprived of its right to appeal in cases where an accused person has been acquitted of a serious charge merely because at the same trial, he was convicted of some other charge.[5] So where an accused charged with a serious charge is acquitted of that charge but is convicted of a less serious one, it is open to the Government to prefer an appeal so far as the charge on which he was acquitted is concerned.[6] The view held in the following cases[7] that an 'acquittal' means a complete acquittal on all the charges, is no longer correct since the decision of the Privy Council in *Kishan Singh* v. *Emperor*[8] referred to above.

7. Interlocutory orders.

There is no appeal provided against any *interlocutory orders*. So where a Sessions Judge declines to try a case on the ground of want of jurisdiction there is no order of acquittal and no appeal lies against such an order.[1] On the question whether it is open to the Government to prefer an appeal on an order of the Sessions Judge refusing to amend or add new charges, there is a difference of opinion. In *Queen Empress* v. *Vaji Ram*[2] Telang, J., held that "the appeal allowed was only from any original or appealable order of acquittal and the order refusing to allow additional charges is not an order which falls within those terms especially when it is not even an order which can be said to form the basis of the order of acquittal or a necessary condition of its tenability." In *Emperor* v. *Stewart*[3] however, while Rupchand Bilaram, A. J. C., agreed with the view of Telang, J., above, Kincaid, J. C., held that although the Section gives no power of appeal against an order refusing to

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Note 6.

1. (1928) 1928 All 1 (1, 2) : 29 Cri L Jour 92, *Emperor* v. *Baba Ram.*
   (1926) 1926 Oudh 329 (330) : 1 Luck 231 : 27 Cri L Jour 626, *Emperor* v. *Samai Deen.*
2. (1873) 19 Suth W R Cr 52 (52), *Queen* v. *Bagram.*
3. (1873) 19 Suth W R Cr 55 (55), *Luchi Behara* v. *Nityanand Doss.*
4. (1875) 24 Suth W R Cr 41 (41), *Government of Bengal* v. *Gokool Chunder Choudry.*
5. (1925) 1925 Oudh 723 (725) : 26 Cri L Jour 1364, *Sitaram* v. *Emperor.*
6. (1928) 1928 P C 254 (256) : 50 All 722 : 55 Ind App 390: 29 Cri L Jour 828 (PC), *Kishan Singh* v. *Emperor.* Ss. 302 and 304.
   (1877) 2 Cal 273 (276, 277), *Empress* v. *Judoonath Gangooly.* Ss. 302 and 304.
   (1930) 1930 Lah 338 (340) : 1930 Cri Cas 386 : 32 Cri L Jour 56, *Emperor* v. *Sada Singh.* S. 302 and Ss. 302/109.
   (1925) 1925 Oudh 723 (725) : 26 Cri L Jour 1364, *Sita Ram* v. *Emperor.* Ss. 396 and 395.
7. (1927) 1927 Lah 369 (370) : 8 Lah 136 : 28 Cri L Jour 508 (508), *Fazal Khan* v. *Emperor.* Ss. 302 and 304.
   (1928) 1928 Lah 230 (231) : 29 Cri L Jour, 905, *Emperor* v. *Giam Singh.* Ss. 353 and 352.
8. (1928) 1928 P C 254 (256) : 50 All 722 : 55 Ind App 390 : 29 Cri L Jour 828 (P C), *Kishan Singh* v. *Emperor.*

Note 7.

1. (1912) 13 Cri L Jour 169 (170) : 34 All 118, *Emperor* v. *Ram Naresh Singh.*
2. (1892) 16 Bom 414 (428), *Queen* v. *Vajiram.*
3. (1927) 1927 Sind 28 (29) : 21 Sind L R 55 : 27 Cri L Jour 1217, *Emperor* v. *Stewart.* But see Bilaram, A. J. C., page 39.

Sec. 417 Notes 7—8

amend charges, if such order *is followed by an original or appellate order of acquittal*, the Local Government may direct an appeal to be presented.

8. Limitation.

Under Section 272 of the Code of 1872 corresponding to this Section, when this provision was originally introduced, it was provided that the rules of limitation shall not apply to appeals under this Section. The Amending Act XI of 1874, however, prescribed six months as the period of limitation and it was held that this period was unaffected by anything contained in the Limitation Act.[1] The Codes of 1882 and 1898 omitted the portions relating to limitation as it was relegated to the Limitation Act itself. Under Act 157 of the Limitation Act the period is six months.[2] Though the law allows a period of six months for appeals from acquittals it was held advisable and necessary for such appeals being preferred with all reasonable expedition possible not only in the public interest but in justice to the persons whose acquittal is sought to be set aside.[3]

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418.* (1) An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

Appeal on what matters admissible.

(2) Notwithstanding anything contained in sub-section (1) or in Section 423, sub-section (2), when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.

Explanation.—The alleged severity of a sentence shall, for the purposes of this Section, be deemed to be a matter of law.

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*(Code of 1882—S. 418—Same as sub-section 1 and Explanation.)

(Code of 1872—S. 271, Paras. 2 and 3.)

271. * * * * *

The appeal may be on a matter of fact as well as on a matter of law.

If the conviction was in a trial by jury, the appeal shall be admissible on a matter of law only.

* * * *

(Code of 1861—S. 408.)

408. * * * *

Appeals in what cases in trials by jury or with assessors. If the conviction was on a trial by jury, the appeal shall be admissible on a matter of law only.

Note 8.

1. (1874) 11 Bom H C R Crown Cas 117 (118, 119), *Reg.* v. *Dorabji Balabhai.*
   (1877) 2 Cal 436 (438) (F B), *Empress* v. *Jyadulla.*
2. (1932) 1932 Nag 121 (122) : 28 Nag L R 233: 1932 Cri Cas 672 : 33 Cri L Jour 849 (F B), *Mohammadi Gul Rohilla* v. *Emperor.*
   (1934) 1934 Cal 610 (611) : 61 Cal 991 : 35 Cri L Jour 1367 : 1934 Cri Cas 908, *Emperor* v. *Bhagirath Mahato.*
3. (1883) 5 All 253 (255), *Empress* v. *Yakhub Khan.*
   (1933) 1933 Nag 121 (124) : 29 Nag L R 197, *Rajpal* v. *Parwatrao.*
   (1932) 1932 Rang 146 (147) : 10 Rang 312 : 33 Cri L Jour 701 : 1932 Cri Cas 709, *Emperor* v. *U San Win.*

Synopsis.

Other Topics.

Assessor case tried by jury. See Note 2, Pts. 2 and 3.
Inadmissible evidence or want of evidence—Question of law. See Note 3, Pts. 1 and 2.
Legislative changes. See Note 4.
Mis-direction—Non-direction—Matter of law. See Note 3.
One charge by jury and another as assessors. See Note 2, Pt. 4.
Petition to state illegalities. See Note 2, Pt. 5.
Questions of fact in a jury case—When considered by High Court. See Note 1, Pts. 5, 6 and 7.
Section inapplicable to assessor cases or to trial by Magistrates. See Note 1, Pts. 3 and 4.
Sufficiency of evidence—Question of fact. See Note 3, Pt. 3.
Verdict of jury—Final on facts. See Note 2, Pt. 1.

1. Scope and applicability of the Section.

This Section provides that an appeal will lie on a matter of *fact* as well as a matter of *law* except where the trial is by jury in which case an appeal will lie on a matter of *law* only.

The Section applies equally to all criminal appeals, whether made by the Local Government against an acquittal or made by accused person against a conviction.[1] Thus, where in a jury case, the Local Government preferred an appeal against an acquittal on questions of fact, it was held that the appeal was incompetent.[2] But in a case tried by a Judge with the help of assessors[3] or by a Magistrate[4] it is competent for the Local Government to appeal against an acquittal both on the question of law and on the question of fact. The Section does not, in any way, curtail the powers of the High Court to deal with questions of fact as well, in a jury case, in a reference under Section 307[5] or under Section 374[6] of the Code.

The Section does not apply to cases tried by a jury in a High Court or a Court of Session under the provisions of Chapter XXXIII of the Code. In those cases, under Section 449, *infra*, an appeal lies to the High Court on

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Section 418—Note 1.

1. (1933) 1933 All 535 (538) : 1933 Cri Cas 868 : 55 All 689 : 35 Cri L Jour 360, *Emperor* v. *Sheo Dayal.*
(1904) 1 Cri L Jour 674 (678, 679) : 17 C.P L R 75 (92), *Emperor* v. *Mt. Gulbi.*
(1936) 1936 Oudh 108 (110) : 36 Cri L Jour 1467 (1469) : 1936 Cri Cas 107, *Emperor* v. *Tehri.*
2. (1884) 10 Cal 1029 (1030), *Govt. of Bengal* v. *Parameshwar Mullick.*
[See (1936) 1936 Oudh 108 (110) : 36 Cri L Jour 1467 (1469) : 1936 Cri Cas 107, *Emperor* v. *Tehri.* No point other than one of law allowed to be raised on either side at hearing of appeal.]
3. (1933) 1933 All 535 (538) : 1933 Cri Cas 868 : 55 All 689 : 35 Cri L Jour 360, *Emperor* v. *Sheo Dayal.*
4. (1909) 10 Cri L Jour 499 (500) : 4 Ind Cas 124 (Cal), *Govt. of Bengal* v. *Gannoo.*
(1917) 1917 Cal 687 (687) : 17 Cri L Jour 9, *Deputy Legal Remembrancer, Behar* v. *Matukdhari Singh.*
5. (1887) 9 All 420 (424, 425), *Queen* v. *Macarthy.*
(1917) 1917 All 173 (175) : 39 All 348 : 18 Cri L Jour 491, *Ikrammuddin* v. *Emperor.*
(1928) 1928 All 207 (210, 211) : 50 All 625 : 29 CriL Jour 353, *Emperor* v. *Shera.*
(1873) 20 Suth W R Cr 1 (4), *Queen* v. *Koonjoseth.*
(1925) 1925 Lah 401 (402) : 6 Lah 98 : 26 Cri L Jour 1241, *Crown* v. *Bimal Parshad.*
6. (1897-98) 2 Cal W N 49 (50), *Queen* v. *Chairadhari Goala.*
(1873) 19 Suth W R Cr 57 (57), *Queen* v. *Jaffir Ali.*
(1924) 1924 Cal 625 (628) : 26 Cri L Jour 5, *Hassenullah Sheikh* v. *Emperor.*
(1921) 1921 Sind 84 (86, 87) : 15 Sind L R 103 : 23 Cri L Jour 33 (FB), *Gul* v. *Emperor.*

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a matter of fact as well as a matter of law. *See* Section 449 and the following cases.[7]

The Section does not confer a right of appeal from the verdict and judgment in a trial held at the Sessions of the High Court.[8]

2. Trial by jury.

An appeal, under this Section in cases tried by jury lies on matters of law only and the Appellate Court cannot go into the facts of the case.[1a] Where facts are in issue the verdict of a jury is absolutely final and must be given effect to. The Section jealously guards the right of the accused to the finality of the verdict of the jury; so that an Appellate Court, cannot, by going into a question of fact substitute its own opinion for the verdict of the jury.[1]

The words "where the trial was by jury" mean "where the trial was *in fact* held by jury" and not "where the trial ought to have been held by jury" and therefore where the accused was tried by a jury in a case which ought to have been tried with the aid of assessors, trial will be treated as one by a jury and no appeal lies except on a matter of law.[2] The contrary view

7. (1925) 1925 Lah 401 (402) : 6 Lah 98 : 26 Cri L Jour 1241, *Crown* v. *Bimal Parshad.*
(1925) 1925 Rang 239 (240) : 3 Rang 220 : 26 Cri L Jour 1371, *Zagriya* v. *Emperor.*
(1925) 1925 Sind 249 (252) : 19 Sind L R 309 : 26 Cri L Jour 562, *Haji Khudabux* v. *Emperor.*

8. (1935) 1935 Rang 67 (69) : 13 Rang 104 : 36 Cri L Jour 595 : 1935 Cri Cas 167 (FB), *H. W. Scott* v. *Emperor.*

Note 2.

1a (1866) 6 Suth W R Cr 1 (1), *Queen* v. *Girishchander Bundoo.* A person tried by a *jury* is entitled to an appeal *on the facts* if the offence committed before the passing of the Penal Code.

1. (1917) 1917 All 173 (175, 176) : 39 All 348 : 18 Cri L Jour 491, *Ikarammuddin* v. *Emperor.*
(1894) Ratanlal 730 (732), *Queen* v. *Balappa.*
(1901) 25 Bom 680 (689, 692), *Emperor* v. *Parbhusankar.*
(1919) 1919 Cal 514 (518) : 46 Cal 895 : 20 Cri L Jour 324, *Ramachandra Das* v. *Emperor.*
(1884) 10 Cal 1029 (1030), *Govt. of Bengal* v. *Parameshwar Mullick.*
(1894) 21 Cal 955 (976, 977), *Wafadar Khan* v. *Queen.*
(1897) 25 Cal 230 (231), *Ali Faker* v. *Queen.*
(1911) 12 Cri L Jour 193 (195) : 10 Ind Cas 684 (Cal), *Rashidazzaman* v. *Emperor.*
(1865) 2 Suth W R Cr 5 (5), *Queen* v. *Gopaul Dass.*
(1865) 3 Suth W R Cr 58 (58), *Queen* v. *Chukkun.*
(1866) 5 Suth W R Cr 40 (40), *Queen* v. *Hullodhun.*
(1867) 8 Suth W R Cr 3 (3), *Queen* v. *Mussammat Bhoodua.*
(1870) 13 Suth W R Cr 26 (26), *Queen* v. *Shuruffooddeen.*
(1871) 16 Suth W R Cr 19 (20), *Queen* v. *Rullon Dass.*
(1872) 18 Suth W R Cr 45 (46), *Queen* v. *Nidhuram Bagdee.*
(1890) 14 Mad 36 (37, 38), *Queen* v. *Chinna Tevan.*
(1884) 2 Weir 488 (488), *In re Govt. Pleader.*
(1931) 1931 Oudh 171 (171) : 1931 Cri Cas 443 : 6 Luck 705 : 32 Cri L Jour 858, *Mangal Singh* v. *Emperor.*
(1934) 1934 Oudh 122 (122) : 35 Cri L Jour 502 : 1934 Cri Cas 427, *Shubrati* v. *Emperor.*
(1931) 1931 Pat 379 (381) : 11 Pat 143 : 1931 Cri Cas 907 : 32 Cri L Jour 1197, *Aghore Dutta* v. *Emperor.*
[See also (1898) 2 Cal W N 702 (718), *Queen* v. *Bhairala Chunder.*
(1928) 1928 Mad 1186 (1189) : 51 Mad 30 Cri L Jour 317, *Veerappa Goundan* v. *Emperor.*]

2. (1901) 25 Bom 680 (688 to 694), *Emperor* v. *Parbhusankar.*
(1933) 1933 All 128 (129, 130) : 55 All 68 : 1933 Cri Cas 283 : 34 Cri L Jour 441, *Dakhni* v. *Emperor.*
(1899) 23 Bom 696 (697), *Queen* v. *Jeyram Haribhai.*
(1909) 10 Cri L Jour 30 (31) : 33 Bom 423, *Mavsing Bechar* v. *Emperor.*
(1926) 1926 Bom 134 (135) : 27 Cri L Jour 650, *Emperor* v. *Golalichand Dosaji.*
(1931) 1931 Mad W N 129 (130), *Ramanna* v. *Emperor.*
(1903) 26 Mad 243 (246, 248), *Pattikadan Ummaru* v. *Emperor.* (*Per* Bhashyam Ayyangar, J., *contra*, Benson, J.)
(1885) 9 Mad 42 (43, 44), *Queen* v. *Laksh-*

held in the undermentioned decisions[3] can no longer be considered to be good law.

Where an accused person is tried on one charge by a jury and another charge by the Judge, with the aid of the same jury as assessors, an appeal will lie against conviction on the latter charge on a question of *fact* as well as on a question of law.[4] As appeals in cases tried by a jury can only be on a point of law, every petition of appeal should state, distinctly, in what respect, the law has been contravened. It is not for the Court, to hunt through the records and find out any illegality that may arise.[5]

3. "On a matter of law only."

A misdirection or non-direction by the Judge to the jury is a matter of law. If the verdict has been influenced by evidence, which was inadmissible or proceeds on no evidence at all, this is again a matter of law.[1] But the misreception of inadmissible evidence which has not influenced the verdict, does not vitiate the trial.[2]

The *sufficiency or otherwise* of evidence is not a matter of law; whether the jury believes the evidence to be sufficient or not is a pure question of fact.[3]

The "explanation" to the Section recognises another matter of law, namely the alleged severity of a sentence.[4] *See also* the undermentioned cases.[5]

4. Sub-section 2.

This sub-section was added in 1923. Before that it was held in a series

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mana.

(1930) 1930 Mad W N 776 (776), *Karuppa Thevan* v. *Emperor.*

[See also (1898) 25 Cal 555 (557), *Surja Kumari* v. *Queen.*

(1879) 4 Cal L R 405 (408), *Bhoonath Dey, In re.*]

3. (1870) 14 Suth W R Cr 32 (32), *Queen* v. *Abdool Kurreem.*

(1872) 18 Suth W R Cr 59 (59), *Queen* v. *Narkoo.*

(1875) 24 Suth W R Cr 30 (30), *Queen* v. *Doorga Churn Shome.*

(1878) 3 Cal 765 (766), *Empress* v. *Mohim Chunder Rai.*

(1898) Ratanlal 961 (962), *Queen* v. *Lelbu.*

(1896) 26 Mad 243*n* (243*n*) : 6 Mad L Jour 14 (16), *Muthusamy Pillai* v. *Queen.*

(1888) 1888 Pun Re Cr No. 18 (p. 33), *Skilling* v. *Empress.*

4. (1918) 1918 Mad 821 (822) : 18 Cri L Jour 346, *Karuppa Goundan* v. *Emperor.*

5. (1864) 1 Suth W R Cr 21 (21), *Queen* v. *Gopaul Bhereewala.*

Note 3.

1. (1930) 1930 All 24 (26) : 31 Cri L Jour 33 : 1930 Cri Cas 40, *Emperor* v. *Mohammad.*

(1903) 27 Bom 626 (632), *Emperor* v. *Vaman Shivram Damle.*

(1867) 7 Suth W R Cr 6 (6), *Queen* v. *Chand Bagdee.*

(1871) 15 Suth W R Cr 46 (47), *Queen* v *Bahar Ali Kahar.*

(1890) 17 Cal 642 (667), *Queen* v. *O'Hara.*

(1932) 1932 Cal 295 (296) : 33 Cri L Jour 477 : 1932 Cri Cas 264, *Golam Asphia* v. *Emperor.*

(1916) 1916 Mad 851 (854) : 39 Mad 449 : 16 Cri L Jour 294, *Annavi Muthiriyan* v. *Emperor.*

2. (1914) 1914 P C 155 (164) : 15 Cri L Jour 326 (P C), *Ibrahim* v. *Emperor.*

(1930) 1930 Pat 247 (251) : 9 Pat 474 : 31 Cri L Jour 721 : 1930 Cri Cas 520, *Sohrai Sao* v. *Emperor.*

3. (1865) 2 Suth W R Cr 3 (3), *Queen* v. *Muddun Sirdar.*

4. (1931) 1931 Oudh 171 (171) : 6 Luck 705 : 1931 Cri Cas 443 : 32 Cri L Jour 858, *Mangal Singh* v. *Emperor.*

(1925) 1925 Rang 239 (240) : 3 Rang 220 : 26 Cri L Jour 1371, *Zagriya* v. *Emperor.*

5. (1928) 1928 Cal 827 (828) : 30 Cri L Jour 54, *Abdul Barik* v. *Emperor.* Jury practically abdicating their functions in favour of the Judge—Retrial ordered.

(1930) 1930 Cal 130 (131) : 1930 Cri Cas 130 : 31 Cri L Jour 771, *Osman Gain Mistry* v. *Emperor.* It is a question of fact whether a statement made to a police officer in the course of an investigation comes under S. 162 or is made by way of complaint to commence an investigation under S. 154.

Sec. 418 Note 4

of cases[1] that where in a trial by jury, of several accused, one of the accused was sentenced to death and others to lower punishments, and all of them appealed, the High Court, on a reference under Section 374 in respect of the person sentenced to death, could go into the facts, but in dealing with the appeals of other persons, they must be confined to matters of law and could not enter into the facts. This anomaly has been removed by the insertion of this sub-section which provides that when in the case of a trial by jury, one person is sentenced to death, and another to lower punishment, the second accused may appeal on a matter of fact as well as on a matter of law.[2]

Sec. 419

Petition of appeal.

419.* Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under Section 367.

Synopsis.

Other Topics.

Absence of completed judgment. See Note 2, Pt. 1.

Accused to be asked of their intention to appeal. See Note 9, Pt. 12.

Accused with conflict — No appeal by same pleader. See Note 3, Pt. 6.

Additional points by supplementary petition. See Note 6, Pt. 3.

Allegation against capacity of jurors—Affidavit in time to file counter-affidavit before hearing. See Note 7, Pt. 5.

Appeal out of time. See Note 9, Pts. 3 to 6.

Copy in prisoner's own language — Sufficient. See Note 2, F-N (1a).

Copy of diary orders—Time not excluded. See Note 9, Pt. 9.

Dispensation with copy of judgment. See Note 2, Pts. 3 to 5.

Eight annas stamp for judgment copy. See Note 10, F-N (2).

Extradition Act — Mysore Resident's Court appeal out of time admitted. See Note 9, Pt. 11.

* **(Code of 1882—S. 419—Same.)**

(Code of 1872—S. 275.)

Copy of judgment to accompany petition.

275. Every petition of appeal shall be accompanied by a copy of the judgment or order appealed against.

(Code of 1861—S. 416.)

Copy of judgment to accompany petition.

416. Every petition of appeal shall be accompanied by a copy of the sentence or order appealed against.

Note 4.

1. (1898) 2 Cal W N 49 (53), *Queen* v. *Chatradhari Goala.*
   (1873) 19 Suth W R Cr 57 (57), *Queen* v. *Jaffir Ali.*
   (1924) 1924 Cal 625 (628) : 26 Cri L Jour 5, *Hassenulla Sheikh* v. *Emperor.*
   (1921) 1921 Sind 84 (86, 87) : 15 Sind L R 103 : 23 Cri L Jour 33, *Gul* v. *Emperor.*
2. (1933) 1933 Cal 426 (429) : 34 Cri L Jour 533 : 1933 Cri Cas 624 (S B), *Emperor* v. *Asraf Ali.*
   (1932) 1932 Pat 302 (302, 303) : 34 Cri L Jour 83 : 1932 Cri Cas 774, *Emperor* v. *Rashbehari Lal.*

False statement in appeal petition — No offence. See Note 6, Pt. 4.
Form of appeal applicable to jail appeals also. See Note 1, Pt. 1.
Form even if no grounds. See Note 7, Pt. 1.
Illegalities in a trial by jury. See Note 6, Pt. 2.
Irrelevant or scandalous matters about trial Judge. See Note 6, Pt. 1.
Legislative changes. See Note 3.
Limitation in civil and criminal appeals. See Note 9.
Limitation Act Section 5 and Section 423 of Code. See Note 9, Pt. 10.
Memo of appearance. See Note 3, Pt. 7.
No verification of appeal petition needed. See Note 7, Pt. 2.
Non-mention of plea in memo of appeal — Allowed if whole trial vitiated. See Note 6, Pt. 5.
Putting in petition box—No presentation. See Note 4, Pt. 1.
Rejection of appeal for want of copy of judgment. See Note 2, Pt. 2.
Right of appeal—Privilege — Can be waived. See Note 8.
Section 12, Limitation Act. See Note 9, Pts. 7 to 9.
Section 29, Limitation Act, and special or local law. See Note 9, Pts. 5 and 6.
Sending by post. See Note 4, Pts 2 and 3.
Single judgment in joint trial of several accused — Single or separate appeals. See Note 7, Pts. 3 and 4.
Three accused — Appearance by a pleader — Presentation by another pleader for one accused only. See Note 3, Pt. 5.

1. Scope of the Section.

Section 420, *infra*, deals with the presentation of appeals from jail. This Section is general and prescribes the *form* in which a petition of appeal whether from jail or otherwise, is to be presented.[1]

Where an appeal is presented through the officer in charge of the jail under Section 420 below and is dismissed summarily under Section 421, no further appeal can be brought under this Section.[2] Nor does an appeal lie from the order of the High Court, dismissing the previous appeal under Section 421.[3]

2. Copy of judgment to accompany.

Every petition of appeal should normally be accompanied by a copy of the judgment.[1a] The absence of a complete judgment in the record is, however, not a ground for refusing to entertain the appeal.[1]

Where a petition of appeal is not accompanied by a copy of the judgment, the appeal may be rejected.[2]

The Court may, however, in its discretion in proper cases *dispense with* the copy of the judgment.[3] Where three accused preferred a joint appeal with a single copy of judgment but furnished stamps necessary for three separate copies of judgment, it was held that the Court should in exercise of the discretion dispense with separate copies of judgment and hear the appeal.[4] Similarly, where the full order appealed against was furnished along with one of the connected applications, it was held that the production of the judgment in the other applications, might be dispensed with.[5]

Section 419—Note 1.

1. (1891) 13 All 171 (179) (F B), *Empress* v. *Pohpi.*
2. (1935) 1935 Pat 426 (427) : 37 Cri L Jour 58: 14 Pat 392 : 1935 Cri Cas 1123, *Pem Mahton* v. *Emperor.*
3. (1935) 1935 Pat 426 (427) : 37 Cri L Jour 58: 14 Pat 392 : 1935 Cri Cas 1123, *Pem Mahton* v. *Emperor.*

Note 2.

1a [See (1874) Ratanlal 82 (82, 83), *Surat Sessions Judge's Letter No.* 1120. Copy in prisoner's own language is sufficient.]

1. (1879) 2 Weir 438 (439), *High Court Proceedings, 28th August* 1879, *No.* 1351.
2. (1934) 1934 All 206 (207) : 1934 Cri Cas 254: 56 All 299 : 35 Cri L Jour 441, *Bansgopal* v. *Emperor.*
3. (1929) 1929 Lah 614 (614, 615) : 30 Cri L Jour 235 : 1929 Cri Cas 183, *Parmanand* v. *Mohan Lal.*
4. (1903) 5 Bom L R 704 (704), *Emperor* v. *Sitaram.*
5. (1929) 1929 Lah 614 (614) : 30 Cri L Jour 235 : 1929 Cri Cas 183, *Parmanand* v. *Mohan Lal.*

Sec. 419 Notes 3—6

3. Who can present petition of appeal.

Under the Code of 1872, there was no specific provision as to who should present an appeal and it was held that any person authorised by the appellant can present it.[1] Under the Code of 1882 and the present Code only the *appellant* or his *pleader* can make such presentation. The word "pleader" includes a *mukhtear* appointed with the permission of the Court and he is entitled to present an appeal[2] on behalf of his party. Presentation by a pleader's clerk is considered equivalent to a presentation by the pleader and is valid.[3] But a person who is not a pleader's clerk and one over whose conduct and action, he has no control, has no power to present an appeal on behalf of the party.[4] Where a petition of appeal on behalf of three accused was signed under a vakalat by their pleader, but the presentation was made by another pleader who had a vakalat only from one of the accused, it was held that the appeal should be treated as properly presented.[5]

Where two accused have conflicting interests they should not appeal by the same pleader.[6]

It is not necessary that a vakalat should be filed. A memo of appearance is sufficient to validate a presentation.[7]

4. Presentation to be in person.

The presentation of a petition of appeal should be made *in person*. A petition put into a petition box kept for the convenience of the parties cannot be recognised for the reason that it could have been deposited there by a third party.[1] Nor can a petition be sent by *post*.[2] Where, however, the District Magistrate proceeded to treat a petition sent by post as if it was duly presented, it was held that it should not be dismissed without giving the petitioner an opportunity of being heard.[3]

5. To whom appeal should be presented.

No specific provision has been made by the Code as to the person to whom an appeal is to be presented, and the question therefore has been held to be merely one of administrative convenience and a presentation to an Officer of the Court, such as a bench clerk or to one of the Judges is not invalid.[1]

6. Contents of petition.

A petition of appeal should not contain irrelevant, defamatory and scandalous expressions concerning the trying Magistrate. If it does, it will be

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Note 3.

1. (1877) 1 Mad 304 (304), *In re Subba Aitala.*
2. (1881) 6 Bom 14 (15), *Imperatrix* v. *Shivram Gundo.*
   (1911) 12 Cri L Jour 118 (118) : 4 Sind L R 195, *Topanmal Sethmal* v. *Emperor.*
3. (1896) 20 Mad 87 (87), *Empress* v. *Karuppa Udayan.*
   (1894) 2 Weir 469 (469), *In re Gudiyati Samuel.*
4. (1897) 21 Mad 114 (115), *Empress* v. *Ramaswami.*
5. (1897) 2 Weir 470 (471), *In re Muthu, Mera Levai.*
6. (1890) 1890 Pun Re Cri 13, page 25 (26), *Hira* v. *Empress.*
7. (1924) 1924 Mad 192 (192) : 25 Cri L Jour 73, *In re Manikonda Lingayya.*
   (1926) 1926 Pat 296 (297, 298) : 27 Cri L Jour 666, *Subda Santal* v. *Emperor.*

Note 4.

1. (1896) 19 Mad 354 (355), *Empress* v. *Vasudevayya.*
2. (1891) 15 Mad 137 (137), *Empress* v. *Arlappa.*
   (1884) 2 Weir 467 (468), *In re Venkata Konda Reddi.*
3. (1889) Ratanlal 464 (464, 465), *Empress* v. *Bhagwan.*

Note 5.

1. (1916) 1916 Mad 110 (111) : 39 Mad 527 : 16 Cri L Jour 593 (F B), *Public Prosecutor* v. *Kottaparambath.*

returned for expunging the objectionable matter.[1]

In cases of trial by jury, the appeal can only be on a point of law and the appeal petition should state clearly what points of law have been contravened.[2]

Where an appellant who has not got all necessary copies when presenting an appeal reserves to himself liberty to bring forward additional points of appeal afterwards, it is perfectly regular under such circumstances to raise such additional points by a supplemental petition.[3]

A false statement made in a petition of appeal will not render the appellant liable for prosecution for making such false statement.[4]

When it is contended that an alleged illegality or error vitiates the whole trial, such a plea, though not taken in the memorandum of appeal, will be allowed to be raised at the hearing of the appeal.[5]

7. Form of petition.

Even if the prisoners wish to state no grounds for their appeal, still their appeal, must, according to law, be in the form of a petition.[1] There is no provision of law which requires the petitioner to verify the petition of appeal.[2]

Where appeals are filed by several persons convicted by a single judgment in a joint trial, they should, according to the Judicial Commissioner's Court of Nagpur, be made separately.[3] The practice in the Chief Court of Oudh seems to be that such persons can file a single appeal with a single copy of judgment.[4]

Where the memorandum of appeal alleges that one of the jurors was hard of hearing, another ignorant of English and unable to follow the arguments in Court, such facts should be supported by an affidavit before the appeal comes on for hearing in time so that the Crown could make the necessary enquires and file counter affidavit.[5]

8. Withdrawal of appeals.

Every privilege given to a party by the law may be waived at the option of that party. A right of appeal is a privilege given by law and the party concerned is at liberty to insist on, or to abstain from, the exercise of that right. So the appellate Court ought not to refuse to allow the withdrawal of an appeal before it is admitted if the party so desires,[1] but it cannot be said

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Note 6.

1. (1889) 15 Bom 488 (489, 491), *In re Clive Durant.*
   (1906) 3 Cri L Jour 376 (379) : 29 Mad 100, *Suryanarayana* v. *Emperor.*
2. (1864) 1 Suth W R Cri 21 (21), *Empress* v. *Gopaul Bhereewalla.*
3. (1871) 8 Bom H C R Crown Cas 126 (136), *Reg.* v. *Kashinath.*
4. (1879) 1879 Pun Re Cri No. 17 (p. 46), *Ghanaya* v. *Empress.*
   (1881) 1881 Pun Re Cri No. 41 (p. 103), *Empress* v. *Sunt Lal.*
   (1899) 12 Mad 451 (453), *Empress* v. *Subbayya.*
   (1928) 1928 Pat 574 (577) : 29 Cri L Jour 613, *Amir Ali* v. *Dukhan Momin.*
5. (1931) 1931 Oudh 113 (113) : 6 Luck 386 : 1931 Cri Cas 273 : 32 Cri L Jour 91, *Ram Lantan* v. *Emperor.*

Note 7.

1. (1870) 13 Suth W R Cri 69 (69), *Empress* v. *Notto Gopal Daulit.*
2. (1879) 1879 Pun Re Cri No. 17 (p. 46), *Ghanaya* v. *Empress.*
   (1889) 12 Mad 451 (453), *Empress* v. *Subbayya.*
3. (1927) 1927 Nag 48 (48) : 27 Cri L Jour 1062, *Maharaj Singh Gond* v. *Emperor.*
4. (1917) 1917 Oudh 329 (330) : 18 Cri L Jour 512, *Mt. Batasha* v. *Emperor.*
5. (1932) 1932 Pat 302 (303) : 1932 Cri Cas 774 : 34 Cri L Jour 83, *Emperor* v. *Rashbehari Lal.*

Note 8.

1. (1879) 5 Cal L R 372 (373), *In re Chundernath Deb.*

Sec. 419 Notes 8—9

that the appellate Court has no right to decide on the merits where the petition to withdraw was made at the last moment after the appellate Court had perused or had heard the evidence read.[2]

9. Limitation.

All the convicts have a right of appeal once, but such right of appeal is subject to the law of limitation.[1] The law of limitation is to be applied strictly and as strictly to criminal appeals as to civil appeals. No distinction is drawn in the Limitation Act between criminal appeals and civil appeals except in the period within which the appeals have to be presented. Art. 155 of the Limitation Act provides 60 days for appeal to the High Court against an order of the Sessions Judge.[2] An appeal preferred out of time without any explanation for the delay may be rejected at once.[3] The fact, that one of several persons convicted jointly was acquitted on appeal, is sufficient cause for admitting the appeals of others out of time.[4]

Where the conviction is under a special or local law such as the Ordinance of 1931 which prescribes a special period of limitation for appeals against conviction by a special Magistrate, in view of Section 29 of the Limitation Act, Section 5 thereof cannot be applied to extend the time prescribed by the Ordinance.[5] By reason of Act X of 1922 which became law on 5th March 1922, Sections 4, 9 to 18 and 22 of the Limitation Act are applicable to proceedings under any special or local law in so far as, and to the extent to which they are not expressly excluded by such law. So the time requisite for obtaining a copy of judgment can be deducted even in an appeal from a conviction under an Ordinance. But Section 5 of the Limitation Act is not one of the provisions the application of which is extended by Act X of 1922 to proceedings under a local or special law. Therefore Section 5 of the Limitation Act cannot be applied to such cases.[6]

The time requisite for obtaining a copy of the judgment or order appealed against should be deducted under Section 12 of the Limitation Act.[7] In the case of appeals from jail, the time taken in forwarding applications for copies on behalf of intending appellants in jail and in transmission of such copies to the jail as well as the time taken for the actual preparation of copies in the office of the Court by which the judgment or order was passed is to be included in "the time requisite for obtaining the copy of the judgment.[8]" But time for obtaining copy of the Diary orders is not to be excluded.[9]

The power to excuse delay in presenting an appeal is not one of the

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2. (1880) 6 Cal L R 427 (428), *Dwarka Manjhee, In re.*

Note 9.

1. (1879) 2 All 336 (338), *Empress* v. *Murli.*
2. (1891) 1891 All W N 10 (10), *Empress* v. *Bhoni Ram.*
3. (1866) 5 Suth W R Cri 40 (40), *Empress* v. *Hullodhur* v. *Ghose.*
   (1925) 1925 Mad 709 (709) : 26 Cri L Jour 1110, *Janikaramayya* v. *Nimmagadda Brahmayya.* Criminal appellate Court can excuse delay and admit appeal after expiry of limitation but cannot do so if there are not sufficient reasons.
4. (1871) 1871 Pun Re Cri No. 7 (p. 9), *Crown* v. *Mohamed Bux.*
5. (1933) 1933 Cal 132 (133) : 1933 Cri Cas 193: 60 Cal 618 : 34 Cri L Jour 299, *Manmathanath Biswas* v. *Emperor.*
6. (1923) 1923 Mad 95 (95) : 24 Cri L Jour 89, *Mitloor Moideen Hajee, In re.*
7. (1884) 10 Cal 642 (643), *In re Jhabbu Singh.*
   1888) 1888 Pun Re Cri No. 5 (p. 9), *Ghamman* v. *Empress.*
   (1871) 6 Mad H C R 349 (350), *In re Toli Chengan.*
8. (1886) 9 Mad 258 (259), *Empress* v. *Lingaya.*
9. (1925) 1925 Rang 239 (240) : 3 Rang 220 : 26 Cri L Jour 1371, *Zagriya* v. *Emperor.*

powers conferred by Section 423, *infra*, on the appellate Court.[10] Where the Code does not apply to an appeal (as where it is made to the High Court from the Resident's Court of Mysore under the Extradition Act—*vide* Gazette of India Notification No. 2252, dated 7th August 1883, and No. 178-J, dated 23rd September 1874) an appeal can be admitted even though made beyond the time prescribed.[11]

In order to prevent delay in furnishing a copy of a judgment due to remoteness of the Court from jail, the Magistrate should ascertain from the convicted prisoners whether they desire to appeal or not, and, if they do, should transmit a copy of the judgment along with them to jail.[12]

10. Stamp.

The appeal petition presented by a pleader on behalf of an appellant in *duress* need not bear a Court-fee stamp as per Clause 17 of Section 19 of the Court-fees Act.[1] The appellants, who are not in custody, cannot take advantage of the unstamped copy of the judgment of the lower Court which the appellants who were in prison were entitled to use. Those appellants, who were not in custody, must affix the necessary stamp.[2]

11. Petition in non-appealable cases.

Though a petition has been filed as an appeal, where no appeal lies, the High Court can deal with it as in revision.[1]

12. Territorial jurisdiction.

Appellate jurisdiction existing at the time of presentation of an appeal is not lost by the subsequent transfer of territory.[1]

420.* If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper appellate Court.

Procedure when appellant in jail.

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* **(Code of 1882—S. 420**—Same.)

(Code of 1872—S. 277.)

277. If the party appealing be in jail, he shall be at liberty to present his petition of appeal and the copy of the judgment or order appealed against, to the Magistrate or other officer in charge of the Jail, who shall thereupon forward the petition to the proper appellate authority.

Procedure when appellant in jail.

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10. (1923) 1923 Mad 95 (96) : 24 Cri L Jour 89, *Mittoor Moideen Hajee, In re.*
11. (1892) 15 Mad 414 (415), *Hayes* v. *Christian.*
12. (1892-1896) 1 Upp Bur Rul 129 (129), *Nga Po Thaung* v. *Empress.*

Note 10.

1. (1918) 1918 Nag 125 (126) : 14 Nag L R 77 : 19 Cri L Jour 494, *Emperor* v. *Maroti Teli.*
   (1924) 1924 Rang 160 (160) : 1 Rang 510 : 25 Cri L Jour 277, *In re Court-fees Act, S.* 19.
2. (1882) 2 Weir 467 (467), *In re Venkata Konda Reddi.* Vide Notification G. O. dated 6th June 1873 stamp of 8 annas necessary.

Note 11.

1. (1905) 2 Cri L Jour 105 (106) (All), *Gajju* v. *Emperor.*

Note 12.

1. (1912) 13 Cri L Jour 169 (170) : 34 All 118, *Emperor* v. *Naresh Singh.*
   (1911) 12 Cri L Jour 401 (401) : 33 All 578, *Mahabir* v. *Emperor.* Transfer of territory from British India after presenting appeal, jurisdiction of appellate Court to hear appeal not gone.

Sec. 420 Notes 1—3

Synopsis.

Other Topics.

Appeal presented to Jail officer—Good despite delay in transmission. See Note 2, Pt. 1.

Appeal to High Court from appeals against orders of Sessions Judges—Procedure. See Note 3, Pt. 3.

Appeals from jail—Not accompanied by copies to be returned. See Note 1, Pt. 1.

Application for copies by prisoner in jail — Duty of Magistrate to grant. See Note 1, Pt. 2.

Calcutta High Court Criminal Circular — Appeal to High Court by pleader direct from appeals against appellate orders. See Note 3, Pt. 2.

Communications of appeals to Sessions Judges —Direct and not through District Magistrate. See Note 3, Pt. 4.

Delay in filing appeal— Sufficient cause. See Note 4, Pt. 2.

Facilities for preparation for jail appeals. See Note 2, Pt. 2.

Vacation Judge can hear jail appeals. See Note 3, Pt. 1.

1. Copies accompanying the same.

See Notes to Section 419.

A copy of the judgment should accompany appeals presented to jail officers under this Section in the same manner as an appeal under Section 419. Appeals not accompanied by such copies should not be forwarded to the Appellate Court, but should be returned to the appellant.[1] When a prisoner in jail applies through the Superintendent of the jail for a copy of judgment in order to prefer an appeal, it is the Magistrate's business to procure and forward the copy applied for, or to arrange that this should be done.[2]

2. Presentation to the officer in charge of the Jail.

The presentation to the officer in charge of the jail is good and sufficient whatever delay there may be in forwarding the petition to the appellate Court.[1] Every facility such as pen, paper and ink should be given to the prisoner in jail to enable him to prepare his petition.[2]

3. "Forward such petition and copies to the proper appellate Court."

A vacation Judge can hear and dispose of an appeal from jail.[1] According to the Criminal Circulars issued by the Calcutta High Court the officers in charge of the jail should not forward petitions of appeal from prisoners to the High Court in cases in which sentences or orders have already been passed by an appellate Court on appeal. In such cases parties should apply to the High Court by motion made by a pleader in open Court.[2]

(Code of 1861—S. 418—Materially the same as that of 1872 Code.)

Section 420—Note 1.

1. (1867) 8 Suth W R Cri Cir 7 (7), *Criminal Circular No.* 9.
2. (1892-1896) 1 Upp Bur Rul 5 (5, 6), *Maung Za Kye* v. *Empress.*

Note 2.

1. (1890) 1890 Pun Re Cri No. 29 (p. 97), *Muhammad* v. *Empress.*
   (1892-1896) 1 Upp Bur Rul 129 (129), *Nga Po Thaung* v. *Empress.*
   (1892-1896) 1 Upp Bur Rul 130 (130), *Bagawati* v. *Empress.*
2. (1870) 13 Suth W R Cri 69 (69), *Nitto Gopal Paulit, In re.*

Note 3.

1. (1923) 1923 Mad 426 (428) : 46 Mad 382 : 24 Cri L Jour 439, *K. Kunhammad* v. *Emperor.*
2. (1869) 12 Suth W R Cri Cir 5 (5), *Criminal Circular Memo. No.* 8 *of* 1869.

According to the said circulars, the petition of appeal against sentences or orders passed by the Sessions Judge presented to officers in charge of jails should be forwarded by such officers direct to the High Court, intimation of the fact being at once given to the Sessions Judge whose sentence or order is appealed against.[3] All communications from the officer in charge of the jail to the Sessions Judge relative to appeals of the prisoners to him should be made to the Judge direct and not through the District Magistrate who has no concern with the decision of the Sessions Judge in appeal and the appellate Court should certify its decision to the Magistrate from whose decision the appeal has been preferred and such Magistrate should inform the appellant in writing through the officer in charge of the jail, of the result of the appeal.[4]

4. Limitation.

The petition of appeal should be presented within the time allowed by law.[1] If there is sufficient cause for delay in filing an appeal by prisoner in jail it should be allowed.[2]

5. Stamp.—*See* Notes to Section 419.

6. Appointment of counsel in appeals from jail.

See the undermentioned case.[1]

421.* (1) On receiving the petition and copy under Section 419 or Section 420, the appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Summary dismissal of appeal.

* **(Code of 1882—S. 421**—Same.)

(Code of 1872—S. 278.)

278. The appellate Court shall fix a reasonable time within which the appellant or his counsel or authorized agent may appear, and it may reject the appeal if, on a perusal of the petition of appeal and the copy of the judgment or order appealed against, and after hearing the appellant or his counsel or authorized agent if he appears it considers that there is no sufficient ground for questioning the correctness of the decision or for interfering with the sentence or order appealed against.

Rejection of appeal.

Before rejecting the appeal the Court may call for and peruse all or any part of the proceedings of the lower Court, but shall not be bound to do so.

(Code of 1861—S. 417.)

417. It shall be competent to the appellate Court to reject the appeal if, on a perusal of the petition of appeal and the copy of the sentence or order appealed against, and after hearing the appellant or his counsel or agent if they appear, the Court shall consider that there is no sufficient ground for questioning the correctness of the decision or for interfering with the sentence or order appealed against. Before rejecting the appeal, the Court may call for and peruse any part of the proceedings of the lower Court, but shall not be bound to do so.

Appellate Court may reject petition of appeal.

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3. (1867) 8 Suth W R Cri Cir 5 (5) *Criminal Circular No. 9 of* 1867.
4. (1869) 12 Suth W R Cri Cir 1 (1), *Criminal Circular No. 6 of* 1869.
(1869) 12 Suth W R Cri Cir (2).

Note 4.

1. (1867) 8 Suth W R Cri Cir 7 (7), *Criminal Circular No. 9.*
2. (1890) 1890 Pun Re Cri No. 29 (p. 97), *Muhammad v. Empress.*

Note 6.

1. (1927) 1927 Oudh 369 (375) : 2 Luck 631 : 29 Cri L Jour 129, *Ram Prasad v. Emperor.*

Sec. 421 Note 1

Provided that no appeal presented under Section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

Synopsis.

Other Topics.

Admission of appeal—No bar to consideration of appealability later. See Note 1, Pt. 3.

Appeal—Admission, as to one charge and rejection to other—Undesirable. See Note 1, Pt. 6.

Appellant to be heard before dismissal as barred. See Note 2, Pt. 3.

Appellant to show grounds for interference. See Note 4, Pt. 1.

Applicability to appeals under S. 476-B. See Note 1, Pt. 5.

Applicability to convictions and acquittals alike. See Note 1, Pt. 4.

Co-accused—Summary rejection though admission of appeal by the other. See Note 3, Pt. 5.

Dismissal for default—Review. See Note 9, Pt. 4.

Disposal of appeal on merits even in the absence of appellant. See Note 2, Pt. 1.

Dismissal under this Section and one under S. 423—Difference. See Note 1, Pt. 2.

Hearing before admission—If affects right of hearing after sending for records. See Note 5, Pts. 14 to 19.

Hearing includes right of reply and reference to copies of evidence. See Note 5, Pts. 20 and 21.

Immediate dismissal of barred appeal. See Note 2, Pt. 2.

No admission of appeal as to sentence only. See Note 1, Pt. 7.

No alteration of sentence in dismissing appeal summarily. See Note 1, Pts. 9 to 11.

No re-opening of whole appeal after considered decision of some points. See Note 1, Pt. 8.

No summary rejection after admission. See Note 1, Pt. 12.

Notice of hearing to be given. See Note 5, Pts. 12 and 13.

Review to be sparingly allowed. See Note 9, Pt. 5.

Right of hearing in jail appeals under S. 420. See Note 5, Pts. 1 to 5; Note 9, Pts. 2 and 3.

Sending for records—Not admission of appeal. See Note 6, Pt. 4.

Summary dismissal — Remand on appeal therefrom. See Note 7, Pt. 4.

What is not reasonable opportunity of hearing. See Note 5, Pts. 6 to 8, 11 and 12.

What is reasonable opportunity. See Note 6, Pts. 9 and 10.

1. Scope and applicability of the Section.

This Section gives an appellate Court, a summary power of dismissing an appeal, if after perusing the petition and the copy of judgment, and if necessary the records and if after hearing the appellant or his pleader, it considers there is no sufficient ground for interference.[1] The essential difference between the dismissal of an appeal under this Section and its dismissal under Section 423 is that, in the latter case the appeal is disposed of after *trial*, whereas in the former, the Court by summarily dismissing it, refuses to

Section 421—Note 1.

1. (1883) 5 All 386 (387), *Empress* v. *Sajiwan Lal.*
(1881) 1881 Pun Re Cri No. 31, page 81 (82, 83), *Budruddin* v. *Empress.*
(1920) 1920 Pat 663 (665) : 21 Cri L Jour 609, *Panchi Mandar* v. *Emperor.*

Sec. 421 Note 1

try it at all.[2] Even where an appeal has been admitted, the Court is not precluded when it hears the appeal under Section 423 from deciding whether an appeal lies.[3]

The provisions of this Section apply both to appeals presented under Section 417 against orders of acquittal and to other appeals[4] including those under Section 476-B.[5]

The appellate Court while acting under this Section cannot dispose of the appeal piece-meal. So where an appellant was convicted at one trial on two separate charges, and the appellate Court admitted the appeal with regard to one charge and summarily dismissed the appeal with regard to the other, it was held that the procedure, though not illegal, was unusual and undesirable.[6]

Nor can the appellate Court admit an appeal with restrictions. Thus it cannot admit an appeal with regard to sentence only. The whole appeal will be open to consideration for the final hearing.[7]

But it has been held that where the other points, have been specifically considered and a definite order of dismissal on other points has been passed, the whole appeal cannot be re-opened again.[8]

While summarily dismissing an appeal under this Section, an appellate Court cannot alter[9] or enhance[10] or reduce[11] the sentence.

An appeal once admitted under this Section, cannot be dismissed summarily.[12]

Unless an appeal is dismissed summarily, the appellate Court is bound to issue notice under Section 422 and to send for the record of the case under Section 423.[13]

The dismissal of an appeal *temporarily*, as for instance, the dismissal of an appeal till the decision of a civil suit is unknown to law. If necessary the appellate Court can postpone the decision of an appeal in a proper case.[14]

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2. (1892) 6 C P L R Cri 24 (26), *Empress* v. *Patiram.*
3. (1913) 14 Cri L Jour 254 (254) : 40 Cal 631, *Aziz Sheikh* v. *Emperor.*
4. (1875) 1 All 1 (5), *Queen* v. *U. Gholam.*
5. (1931) 1931 Cal 3 (4) : 58 Cal 402 : 1931 Cri Cas 35 : 32 Cri L Jour 325, *Mahomed Boyetulla* v. *Emperor.*
   (1934) 1934 Mad 473 (474) : 57 Mad 1101 : 1934 Cri Cas 799 : 35 Cri L Jour 1134, *Nagu Servai* v. *Emperor.*
   (1931) 1931 Pat 144 (144) : 32 Cri L Jour 735 : 1931 Cri Cas 360, *Bydinath Giri* v. *Emperor.*
6. (1927) 1927 Rang 239 (240) : 5 Rang 274 : 28 Cri L Jour 765, *L. M. Ismail* v. *King-Emperor.*
7. (1914) 1914 Cal 276 (277) : 14 Cri L Jour 485 (486) : 41 Cal 406, *Nafar Sheikh* v. *Emperor.*
   (1925) 1925 Pat 453 (454, 455) : 4 Pat 254 : 26 Cri L Jour 862, *Gaya Singh* v. *Emperor.*
   (1931) 1931 Pat 351 (351) : 32 Cri L Jour 1017 : 1931 Cri Cas 799, *Rijhu* v. *Emperor.*
8. (1933) 1933 Pat 38 (39) : 11 Pat 697 : 1933 Cri Cas 54 : 34 Cri L Jour 118, *Kuldip Das* v. *Emperor.*
9. (1901) 2 Weir 475 (475), *In re Naga.*
   (1893-1900) 1893-1900 Low Bur Rul 606 (607), *Ngo Po Kin* v. *Empress.*
10. (1873) Ratanlal 74 (74), *Reg.* v. *Mathur Laldass.*
    (1875) 24 Suth W R Cri 29 (29), *Akool Sircar* v. *Partama.*
    (1877) 1877 Pun Re Cri No. 14 (page 31) *Ganda Singh* v. *Dhana.*
11. (1886) Ratanlal 304 (305), *Queen-Empress* v. *Govind Rao.*
    (1888) Ratanlal 384 (385), *Queen-Empress* v. *Bana.*
    (1893-1900) 1893-1900 Low Bur Rul 606 (607), *Ngo Po Kin* v. *Empress.*
12. (1924) 1924 Cal 642 (643) : 23 Cri L Jour 733, *Ram Hari Chakravarthy* v. *Santosh Kumar Manna.*
    (1923) 1923 Pat 368 (368) : 24 Cri L Jour 453, *Newa Lal Rai* v. *Emperor.*
    (1924) 1924 Rang 294 (295) : 25 Cri L Jour 933, *Ta Pu* v. *Emperor.*
13. (1935) 1935 P C 89 (92) : 1935 Cri Cas 551 : 36 Cri L Jour 838 : 62 Ind App 129 (P C), *King-Emperor* v. *Dahu Raut.*
14. (1918) 1918 All 247 (248) : 19 Cri L Jour 358, *Lachhmi Narain* v. *Bindraban.*

Sec. 421 Notes 2—3

2. "Shall peruse the same."

There is no provision in the Code for the dismissal of an appeal on account of the non-appearance of the appellant or his pleader. The appellate Court is bound even in the absence of the appellant or his pleader to peruse the judgment and the record, if it had been sent for, and decide the appeal judicially.[1]

The Section contemplates an appeal that can be properly put upon the file of the Court. Therefore an appeal preferred out of time and without any explanation of the delay may be dismissed at once,[2] but if the appellant is represented by a pleader, he should be given an opportunity of being heard in the matter of determining whether the delay should be excused and the appeal admitted.[3]

3. "May dismiss the appeal summarily."

The powers conferred by this Section, on the appellate Court, should be exercised sparingly and with great caution[1] and with judicial discretion.[2] Where important or complicated questions of fact and law are involved or where disputed questions of title to immoveable property are involved, the Court should not summarily dismiss an appeal but should send for the record and hear the appeal fully and decide.[3] It is, however, not *illegal* to do so.[4]

The fact that the appeal of one co-accused has been admitted, does not take away the power of the Court to dispose of the appeal of another accused summarily.[5]

Note 2.

1. (1923) 1923 All 175 (175): 24 Cri L Jour 662, *Ramchandar* v. *Emperor.*
   (1892) Ratanlal 593 (594), *Queen-Empress* v. *Deoshanker.*
   (1895) Ratanlal 739 (740), *Queen-Empress* v. *Vali Mahomed.*
   (1895) 1895 Pun Re Cri No. 21 page 59 (59), *Koura* v. *Empress.*
   (1929) 1929 Lah 849 (849): 30 Cri L Jour 902: 1929 Cri Cas 512, *Nihal* v. *Emperor.*
   (1930) 1930 Lah 659 (659): 1930 Cri Cas 803: 11 Lah 242: 31 Cri L Jour 979, *Roora* v. *Emperor.*
   (1909) 9 Cri L Jour 553 (554): 5 Nag L R 76, *Ratanchand* v. *Emperor.*
   (1919) 1919 Pat 54 (56): 20 Cri L Jour 271, *Shambehari Singh* v. *Emperor.*
   (1924) 1924 Pat 376 (376): 24 Cri L Jour 475, *Baldeo Dubey* v. *King-Emperor.*
   (1911) 12 Cri L Jour 481 (481): 12 Ind Cas 89, (Ajmer—Merwara), *Sheoji* v. *Emror.*
2. (1875) Ratanlal 90 (90), *Reg.* v. *Gulal Karim.*
3. (1927) 1927 Bom 445 (446): 28 Cri L Jour 653, *Emperor* v. *Nurudin.*

Note 3.

1. (1886) 8 All 514 (515), *Queen-Empress* v. *Ram Narain.*
   (1922) 1922 Pat 552 (552): 24 Cri L Jour 477, *Padarath Kurmi* v. *Emperor.*
   (1933) 1933 Pat 160 (160): 34 Cri L Jour 1017: 1933 Cri Cas 402, *Mt. Jhakuri* v. *Emperor.*
2. (1918) 1918 Cal 106 (106): 19 Cri L Jour 228, *Kailash Chandra Chakrabarthy v. Emperor.*
   (1910) 11 Cri L Jour 631 (632): 13 Oudh Cas 309, *Aman Ali* v. *Emperor.*
   (1882) 1882 Pun Re Cri No. 35 page 45 (46), *Lal Khan* v. *Empress.*
3. (1897) Ratanlal 916 (917), *Queen-Empress* v. *Adam Isaq.*
   (1918) 1918 Cal 106 (106): 19 Cri L Jour 228, *Kailash Chandra Chakrabarthy* v. *Emperor.*
   (1920) 1920 Cal 891 (892): 22 Cri L Jour 349, *Rahimaddi* v. *Emperor.*
   (1906) 4 Cri L Jour 57 (57), 29 Mad 236, *Rangacharlu* v. *Emperor.*
   (1924) 1924 Mad 895 (895): 26 Cri L Jour 411: 48 Mad 385, *Turka Hussain Sahib, In re.*
   (1918) 1918 Pat 653 (654): 19 Cri L Jour 209: 3 Pat L Jour 389, *Sukhdeo Pathik* v. *Emperor.*
   (1922) 1922 Pat 552 (552): 24 Cri L Jour 477, *Badarath Kurmi* v. *Emperor.*
   (1933) 1933 Cal 515 (516): 34 Cri L Jour 812: 1933 Cri Cas 859, *Abdul Latif Munshi* v. *Ahamad.*
   (1906) 10 Cal W N 135*n* (136*n*), *Dhamri* v. *Emperor.*
4. (1931) 1931 Cal 264 (264): 32 Cri L Jour 568: 1931 Cri Cas 296, *Safar Ali* v. *Emperor.*
5. (1901) 5 Cal W N 332 (334), *Jogal Chandra Sarma* v. *Lal Chand Das.*

4. "No sufficient ground for interfering."

The appellant should satisfy the Court that there is sufficient ground for interfering with the conviction and if no sufficient ground is shown, it is the duty of the appellate Court not to interfere.[1] But unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal, the appeal cannot be dismissed *summarily* under this Section.[2]

5. Right of appellant to be heard—Proviso.

The proviso gives an appellant or his pleader, in cases of appeals filed under Section 419, a reasonable opportunity of being heard in support of the appeal.[1a] The proviso by its words restricts this right only to cases coming under Section 419 and therefore does not apply to appeals presented under Section 420, from jail. Therefore the Court can summarily dismiss the appeal on perusal of the papers without calling upon the appellant to appear,[1] as there is no provision in the Code to authorise a Court to cause an appellant in jail, to be brought before him.[2] An old Madras decision, on the other hand held that Section 419 being a general Section, embracing the case of all appellants whether in jail or outside, there is nothing to indicate that this proviso does not apply to appeals under Section 420 and notice should be given to him, so that he may have a reasonable opportunity of being heard on his appeal,[3] especially as, even though the Code does not contemplate it, the appellate Court has power to direct, for the purpose of disposing of the appeal, the prisoner to be brought before it.[4]

Where, however, the appellant from jail has also preferred an appeal through a pleader, the appellate Court is not competent to dismiss the appeal, without giving the pleader an opportunity of being heard.[5]

Under the proviso the opportunity that is to be given, of being heard should be reasonable. Reasonable opportunity cannot be said to have been given to the appellant or his pleader in the following cases, *viz.*:—

1. Where the appellate Court calls upon the pleader to argue the

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Note 4.

1. (1883) 5 All 386 (387), *Empress* v. *Sajiwan Lal.*
   [See also (1894) 16 All 212 (218), *Queen-Empress* v. *Robinson.*]
2. (1935) 1935 P C 89 (92) : 1935 Cri Cas 551 : 36 Cri L Jour 838 : 62 Ind App 129 (P C), *King-Emperor* v. *Dahu Raut.*

Note 5.

1a (1925) 1925 Lah 355 (356) : 26 Cri L Jour 1169, *Muhammad Sadiq* v. *Emperor.*
(1870) Ratanlal 29 (30), *Reg.* v. *Beehar Pitamber.*
(1881) 6 Bom 14 (15), *Imperatrix* v. *Shivaram Gundo.*
(1894) Ratanlal 703 (703), *Queen-Empress* v. *Fakira.*
(1897) Ratanlal 914 (914), *Queen-Empress* v. *Chunia*
(1909) 9 Cri L Jour 189 (190) (Cal), *Rajkumar Singh* v. *Tincowri Mazumdar.*
(1924) 1924 Rang 294 (295) : 25 Cri L Jour 933, *Ta Pu* v. *Emperor.*
(1906) 4 Cri L Jour 57 (57) : 29 Mad 236 *Rangacharlu* v. *Emperor.* Memorandum of appeal signed by pleader and presented by appellant—Reasonable opportunity to pleader to appear and argue should be given.
1. (1891) 13 All 171 (180, 187), *Queen-Empress* v. *Pohpi.*
(1927) 1927 Sind 223 (223) : 20 Sind L R 189 : 27 Cri L Jour 933, *Loung* v. *Emperor.*
(1923) 1923 Mad 426 (432) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhammad Haji* v. *Emperor.*
2. (1869) Ratanlal 22 (22), *Reg.* v. *Autona Jose.*
3. (1883) 2 Weir 472 (472), *In re Kotina Butchiya.*
4. (1883) 2 Weir 473 (473), *In re Bala Subbanna.*
5. (1906) 4 Cri L Jour 373 (373) (All), *Bhawani Dehal* v. *King-Emperor.*
(1926) 1926 All 178 (179) : 48 All 208 : 26 Cri L Jour 1621, *Emperor* v. *Mena Ram.*

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appeal on the same day that it was presented, and refuses to grant him time to acquaint himself with the evidence in the case.[6]

2. Where on the presentation of a petition by a pleader, time was wanted for some other pleader to argue the case but the Court calls on him to argue it himself then and there.[7]
3. Where an appeal signed by a pleader, is presented in person by the appellant and the Court without giving time for the pleader to come and argue the case, forthwith calls upon the appellant himself to argue.[8]

But there is nothing in the Section to prevent the appellate Court from hearing the appellant's pleader at the time of presentation, if the pleader himself desires to do so. No further opportunity need be given in such a case.[9]

As to what is reasonable time, it has been held that at least a week's time should be given.[10] Where an appeal was filed in the head-quarters of an appellate Court on 26th July 1875 and notice was given for hearing on the 28th July 1875 at a place many miles from the head-quarters, it was held that the appellant was not given a reasonable opportunity.[11] So also where a general notice was posted in the Court house stating that appeals will be heard for admission only on the first Court day next after presentation, it was held that it was not in compliance with the Section and a time required by law should be fixed in each case and notice to be given to the appellant or his pleader.[12]

Where no notice at all is given to the appellant or pleader, of the date to which the appeal is posted, it is a clear case where no opportunity has been given to be heard.[13]

The further question arises whether, after the appellant or his pleader has been heard, and the Court then sends for the records of the case, the Court is bound to give opportunity to the appellant or his pleader to be heard again on the records. All that the Section requires is that the pleader shall have a reasonable opportunity of being heard, before there is a summary dismissal and once having heard him, it is not obligatory on the Court to hear him

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6. (1905) 2 Cri L Jour 58 (59) (Bom), *Emperor* v. *Gurshida Balapa Jati.*
   (1909) 9 Cri L Jour 401 (402) : 36 Cal 385, *Ramtohal Dusad* v. *Emperor.*
7. (1909) 10 Cri L Jour 491 (492) : 4 Ind Cas 37 (Mad), *In re Machi Reddi Chinnappa Reddi.*
   (1924) 1924 Mad 895 (895) : 48 Mad 385 : 26 Cri L Jour 411, *Turka Hussain* v. *Crown.*
   (1930) 1930 Mad 863 (864) : 53 Mad 865 : 1930 Cri Cas 1039 : 32 Cri L Jour 40, *Kolapalli Narasimhamurthi* v. *Emperor.*
   (1927) 1927 Bom 361 (361) : 28 Cri L Jour 467, *Emperor* v. *Basavanappa Basava.*
   (1929) 1929 Nag 150 (151) : 30 Cri L Jour 791 : 1929 Cri Cas 19, *Chandra Shekar* v. *Rajaram.*
   (1915) 1915 Upr Bur 11 (12) : 2 Upp Bur Rul 52 : 16 Cri L Jour 538, *Nga Shwe Hmun* v. *Emperor.*
8. (1906) 4 Cri L Jour 57 (57) : 29 Mad 236, *Rangacharlu* v. *Emperor.*
9. (1927) 1927 Bom 361 (361) : 28 Cri L Jour 467, *Emperor* v. *Basavanappa Basava.*
   (1930) 1930 Mad 863 (864) : 53 Mad 865 : 1930 Cri Cas 1039 : 32 Cri L Jour 40, *Kolapalli Narasimhamurthi* v. *Emperor.*
10. (1924) 1924 Mad 895 (895) : 48 Mad 385 : 26 Cri L Jour 411, *Turka Hussain Sahib* v. *Crown.*
    (1909) 9 Cri L Jour 401 (402) : 36 Cal 385, *Ramtohal Dusadh* v. *Emperor.*
11. (1875) 24 Suth W R Cr 60 (60), *In re Huri.*
12. (1882) 5 Mad 11 (12), *Malan* v. *Queen.*
13. (1919) 1919 Pat 54 (55, 56) : 20 Cri L Jour 271, *Shamluhari Singh* v. *Emperor.*

again when it sends for the record, though it *may* do so if the Court, or the pleader desires it.[14] A contrary view namely that the Court is bound to hear the pleader a second time after the record was sent for seems to have been taken in *Surandranath Ghose* v. *Emperor*,[15] *Lalit Kumar Sen* v. *Emperor*[16] and *Hateem Ali* v. *Emperor*[17] in the Calcutta High Court and in *Jagdeo Rai* v. *Hali Rai*[18] of the Patna High Court. The first two of the above decisions do not show that the pleader had been already heard; the third case followed the first two on the ground of *stare decisis* and in fact was disinclined to take that view; the fourth case was expressly dissented from in a Division Bench of the Patna High Court.[19]

The right of being heard in support, will include the right of reply[20] as well as the right to refer to certified copies of the evidence.[21]

6. "May call for the record of the case"—Sub-section 2.

Under this sub-section, the Court may, before dismissing an appeal, call for the record of the case but it is not bound to do so.[1] Although a Judge would be acting within his powers in rejecting an appeal without calling for the records, such a course is ordinarily very inconvenient and should not be adopted.[2] A Court is not required to call for the records in an appeal in which the only question is a mere question of fact and the judgment of the Court below, is so plain and clear, that calling for the record would be a mere waste of time, but it is not right to reject an appeal summarily when a point of law which, on the face of it is not without substance, has been raised or when the judgment is a long and intricate one requiring, obviously, careful consideration.[3]

A mere sending for the record under this Seciton, is not tantamount to an admission of the appeal, as the Court has power to dismiss an appeal under this Section even after calling for the records.[4]

7. Judgment and record of reasons.

A Court when dismissing an appeal summarily under this Section, is not required to write a judgment in conformity with the provisions of Section 367.[1]

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14. (1930) 1930 Pat 499 (500, 501) : 9 Pat 768 : 1930 Cri Cas 927 : 31 Cri L Jour 1131, *Dewal Mahton* v. *Emperor*.
(1927) 1927 Bom 361 (361) : 28 Cri L Jour 467, *Emperor* v. *Basavanappa Basava*.
(1909) 10 Cri L Jour 204 (204, 205) : 2 Sind L R 39, *Emperor* v. *Jivayo*.
15. (1926) 1926 Cal 161 (161) : 27 Cri L Jour 412, *Surendra Nath Ghose* v. *Emperor*.
16. (1926) 1926 Cal 174 (175) : 27 Cri L Jour 382, *Lalit Kumar Sen* v. *Emperor*.
17. (1932) 1932 Cal 397 (398) : 33 Cri L Jour 602 : 1932 Cri Cas 344, *Hatem Ali Dafadar* v. *Emperor*.
18. (1917) 1917 Pat 331 (332) : 18 Cri L Jour 639, *Jagdeo Rai* v. *Kali Rai*.
19. (1930) 1930 Pat 499 (500, 501) : 9 Pat 768 : 1930 Cri Cas 927 : 31 Cri L Jour 1131, *Dewal Mahton* v. *Emperor*.
20. (1911) 12 Cri L Jour 9 (9, 10) : 38 Cal 307, *Amanat Sardar* v. *Nagendra Biswas*.
21. (1909) 9 Cri L Jour 55 (56) : 11 Oudh Cas 360, *Manga* v. *King-Emperor*.

Note 6.

1. (1931) 1931 All 555 (556) : 53 All 797 : 1931 Cri Cas 897 : 33 Cri L Jour 259, *Allah Baksh* v. *Emperor*.
(1930) 1930 Mad 863 (864) : 53 Mad 865 : 1930 Cri Cas 1039 : 32 Cri L Jour 40, *Narasimhamurthi* v. *Emperor*.
2. (1883) 1883 All W N 145 (145), *Empress* v. *Jugal Kishore*.
3. (1918) 1918 Pat 653 (654) : 19 Cri L Jour 209 : 3 Pat L Jour 389, *Sukhdeo Pathak* v. *Emperor*.
(1882) 1882 Pun Re Cri No 35, page 45 (46), *Lal Khan* v. *Empress*.
4. [See (1875) 1 All 1 (5), *Queen* v. *Gholam Ismail*.]

Note 7.

1. (1914) 1914 All 311 (312) : 36 All 496 : 15 Cri L Jour 512, *Kundan* v. *Emperor*.
(1916) 1916 All 197 (197) : 38 All 393 : 17

Sec. 421 Note 7

Although the law does not fetter the discretion of an appellate Court in dismissing appeals summarily and it can do so without recording any reasons for so doing,[2] it is advisable to record its reasons for summary dismissal, in view of the possibility of such an order being challenged by an application for revision, in which case, they will show that the Court had really considered the points raised in the appeal and that the appeal was without foundation.[3] Therefore, though the appellate Court has power to dismiss an appeal summarily without giving reasons, if the High Court finds that the Court has not applied

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Cri L Jour 309, *Lal Behari* v. *Emperor.*
(1926) 1926 All 318 (318) : 27 Cri L Jour 449, *Shanker* v. *Emperor.*
(1895) 17 All 241 (242, 243), *Queen-Empress* v. *Nannhu.*
(1895) 20 Bom 540 (541), *Queen-Empress* v. *Warubai.*
(1893) 21 Cal 92 (96), *Rash Behari Das* v. *Bal Gopal Singh.*
(1926) 1926 Lah 196 (197) : 27 Cri L Jour 23, *Nazar Md. Khan* v. *Hara Singh Bedi.*
(1902) 25 Mad 534 (534), *King-Emperor* v. *Krishnayya.*
(1917) 1917 Nag 203 (204) : 13 Nag L R : 169 : 18 Cri L Jour 993, *Ram Rao* v. *Emperor.*
(1910) 11 Cri L Jour 631 (632) : 13 Oudh Cas 309, *Aman Ali* v. *Emperor.*
(1918) 1918 Pat 597 (597) : 19 Cri L Jour 151 : 2 Pat L Jour 695, *Gurubari Behara* v. *Emperor.*
(1925) 1925 Pat 183 (189) : 25 Cri L Jour 1237, *Jagarnath Singh* v. *Emperor.*
(1930) 1930 Pat 331 (331) : 31 Cri L Jour 760 : 1930 Cri Cas 616, *Thakur Sahu* v. *Emperor.*
(1893-1900) 1893-1900 Low Bur Rul 606 (606), *Nga Po Kin* v. *Empress.*
(1900-1902) 1 Low Bur Rul 270 (271), *Nga Taung Bo* v. *Crown.*
(1906) 4 Cri L Jour 284 (284) : 1906 Upp Bur Rul 49, *King-Emperor* v. *Nga Sein Gyi.*
(1919) 1919 Low Bur 154 (156) : 19 Cri L Jour 316, *Nga Bamyit* v. *Emperor.*

2. (1931) 1931 All 555 (556) : 53 All 797 : 33 Cri L Jour 259 : 1931 Cri Cas 897, *Allah Bakhsh* v. *Emperor.*
(1894) 21 Cal 92 (96), *Ras Behari Doss* v. *Balgopal Singh.*
(1905) 2 Cri L Jour 344 (344) (Cal), *Nitya Pal* v. *Beni Madhab Ghose.*
(1929) 1929 Cal 773 (773) : 31 Cri L Jour 474 : 1929 Cri Cas 517, *Kaluchand Ghose* v. *Tatu.*
(1881) 1881 Pun Re Cri No, 31, page 81 (83), *Budruldin* v. *Empress.*
(1900-1902) 1 Low Bur Rul 270 (271), *Taung Vo* v. *Crown.*
(1926) 1926 Lah 196 (197) : 27 Cri L Jour 23, *Nazar Md. Khan* v. *Hara Singh Bedi.*

3. (1930) 1930 Pat 331 (331) : 31 Cri L Jour 760 : 1930 Cri Cas 616, *Thakur Sahu* v. *Emperor.*
(1921) 22 Cri L Jour 321 (321) : 61 Ind Cas 49 (49) (Pat), *Gobind Behari* v. *Emperor.*
(1886) 8 All 514 (515). *Queen-Empress* v. *Ram Narain.*
(1923) 1923 Mad 426 (428, 433) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhamad Haji* v. *Emperor.*
(1895) 17 All 241 (242, 243), *Queen-Empress* v. *Nannhu.*
(1906) 4 Cri L Jour 373 (373) (All), *Bhawani Dehal* v. *Emperor.*
(1914) 1914 All 311 (312) : 36 All 496 : 15 Cri L Jour 512, *Kundan* v. *Emperor.*
(1905) 9 Cal W N 229*n* (229*n*), *Kalka Khan* v. *Emperor.*
(1924) 1924 Cal 642 (643) : 23 Cri L Jour 733, *Ram Hari Chakaravarthy* v. *Santosh Kumar Manna.*
(1933) 1933 Cal 515 (515, 516) : 34 Cri L Jour 812 : 1933 Cri Cas 859, *Abdul Latif Munshi* v. *Ahamad.*
(1893) 6 C P L R Cri 24 (26), *Empress* v. *Patiram.*
(1917) 1917 Nag 203 (204, 205) : 13 Nag L R 169 : 18 Cri L Jour 993, *Ram Rao* v. *Emperor.*
(1927) 1927 Nag 88 (88) : 27 Cri L Jour 1404, *Maroti* v. *Kasabai.*
(1929) 1929 Nag 150 (151, 152) : 30 Cri L Jour 791 : 1929 Cri Cas 19, *Chandra Sekhar* v. *Rajaram.*
(1925) 1925 Oudh 290 (291) : 26 Cri L Jour 4, *Brij Mohan Lal* v. *Emperor.*
(1918) 1918 Pat 597 (597) : 19 Cri L Jour 151 : 2 Pat L Jour 695, *Gurubari Behara* v. *Emperor.*
(1918) 1918 Pat 660 (660) : 19 Cri L Jour 304, *Ramkant Pandit* v. *Emperor.*
(1919) 1919 Pat 54 (56) : 20 Cri L Jour 271, *Shambehari Singh* v. *Emperor.*
(1920) 1920 Pat 522 (523) : 21 Cri L Jour 139, *Ganesh Ram* v. *Gyan Chand.*
(1922) 1922 Pat 552 (552) : 24 Cri L Jour 477, *Padarath Kurmi* v. *Emperor.*
(1925) 1925 Pat 183 (184) : 25 Cri L Jour 1237, *Jagarnath Singh* v. *Emperor.*
(1935) 1935 Pat 32 (33) : 36 Cri L Jour 191 : 1935 Cri Cas 76, *Jagnarain Dubey* v. *Ghinhu Dubey.*
(1935) 1935 Pat 37 (38) : 36 Cri L Jour 261 : 1935 Cri Cas 77, *Barjoo Mahto* v. *Emperor.*

its mind to the consideration of the facts of the case, it will remand the case back to be heard on the merits.[4]

8. Withdrawal of appeal.

A petition of appeal presented for admission may be withdrawn,[1] but not after it was admitted and the appellate Court has decided to hear it on the merits.[2]

9. Review.

An order dismissing an appeal under this Section is a final order and not open to review by the Court which passed the same.[1] So where an appeal, filed from jail under Section 420, was summarily dismissed under this Section, another appeal through a pleader under Section 419 is not competent and the case cannot be re-opened.[2] But where two appeals have been filed one from the jail and another through a pleader, the dismissal of the jail appeal, while the other is pending, is no bar to the Court hearing the pleader again on the appeal.[3]

Where a case, however, is disposed of merely for default of appearance or where an order is passed to the prejudice of the accused person and by mistake or inadvertence, opportunity had not been given to him to be heard, there can be a review[4] though this power of review should be sparingly used.[5]

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4. (1930) 1930 Pat 520 (520) : 32 Cri L Jour 86: 1930 Cri Cas 1016, *Krishna Pati* v. *Emperor.*
(1935) 1935 Pat 37 (38) : 36 Cri L Jour 261 : 1935 Cri Cas 77, *Barjoo Mahto* v. *Emperor.*
(1935) 1935 Pat 32 (33) : 36 Cri L Jour 191: 1935 Cri Cas 76, *Jagnarain Dubey* v. *Ghinhu Dubey.*

Note 8.

1. (1879) 5 Cal L R 372 (373), *In re Chundernath Deb.*
2. (1880) 6 Cal L R 427 (428), *In re Dwarakanath Manjhee.*

Note 9.

1. (1926) 1926 All 178 (179) : 48 All 208 : 26 Cri L Jour 1621, *Emperor* v. *Mewa Ram.*
(1894) 19 Bom 732 (734), *Queen-Empress* v. *Bhimappa.*
(1904) 1 Cri L Jour 329 (330) (Bom), *Emperor* v. *Raghunath Ramchandra.*
(1919) 1919 Cal 409 (410) : 46 Cal 60 : 20 Cri L Jour 265, *Rajab Ali* v. *Emperor.*
(1909) 10 Cri L Jour 287 (288) : 3 Ind Cas 393 (Cal), *Bibuty Mohun Roy* v. *Dasimoni Dassi.*
(1887) 1887 Pun Re Cri No. 24, page 47 (48), *Nihala* v. *Empress.*
(1926) 1926 Lah 196 (197) : 27 Cri L Jour 23, *Nazar Muhammad Khan* v. *Hara Singh Bedi.*
(1923) 1923 Mad 426 (433) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhammad Haji* v. *Emperor.*
(1923) 1923 Pat 297 (298) : 26 Cri L Jour 419, *Kabir Shan* v. *Emperor.*
(1935) 1935 Sind 84 (85) : 1935 Cri Cas 370 : 36 Cri L Jour 831 (F B), *Shahu* v. *Emperor.*
2. (1879) 4 Bom 101 (103), *Empress* v. *Mahomed Yashin*
(1922) 1922 All 480 (481) : 44 All 759 : 23 Cri L Jour 505, *Khilal* v. *Emperor.*
(1923) 1923 Oudh 56 (56) : 24 Oudh Cas 304 : 23 Cri L Jour 148, *Ganga Din* v. *Emperor.*
(1924) 1924 Oudh 425 (425) : 25 Cri L Jour 1313, *Ram Autar* v. *Emperor.*
(1935) 1935 Pat 426 (427) : 1935 Cri Cas 1123 : 14 Pat 392, *Pem Mahton* v. *Emperor.*
3. (1916) 1916 Oudh 85 (86) : 17 Cri L Jour 453, *Har* v. *Emperor.*
(1906) 4 Cri L Jour 373 (373) (All), *Bhawani Dehal* v. *Emperor.*
(1934) 1934 All 988 (988) : 36 Cri L Jour 300, *Lachhman Chamar* v. *Emperor.*
4. (1919) 1919 Cal 409 (410) : 46 Cal 60 : 20 Cri L Jour 265, *Rajab Ali* v. *Emperor.*
(1909) 10 Cri L Jour 287 (289) : 3 Ind Cas 393 (Cal), *Bibhuty Mohun Roy* v. *Dasimoni Dassi.*
(1909) 9 Cri L Jour 553 (554) : 5 Nag L R 76, *Ratanchand* v. *Emperor.*
(1873) 7 Mad H C Rul App 29 (29), *High Court Proceedings, 7th November* 1873, *No* 1875.
(1923) 1923 Mad 426 (428 433) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhammad Haji* v. *Emperor.*
(1912) 13 Cri L Jour 710 (711) : 16 Ind Cas 518 (Mad), *Ranga Raw* v. *Emperor.*
5. (1873) 7 Mad H C Rul App 29 (29), *High Court Proceedings, 7th November* 1873, *No.* 1875.
(1912) 13 Cri L Jour 710 (711) : 16 Ind Cas 518 (Mad), *Ranga Raw* v. *Emperor.*

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10. Revision.

It is within the power of the High Court, in revision, to say after having regard to the facts of each particular case, whether or not the appellate Court has exercised a proper discretion in acting under this Section and either remand the appeal to the lower appellate Court to be heard on its merits[1] or to go into the case itself and dispose of it.[2]

11. Appeal.

A judgment by a Judge of a High Court dismissing an appeal under this Section is an order made in a criminal trial in appeal and therefore no appeal lies from such an order.[1]

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422.* If the appellate Court, does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

Notice of appeal.

and, in cases of appeals under Section 417, the appellate Court shall cause a like notice to be given to the accused.

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* (Code of 1882—S. 422—Same.)

(Code of 1872—Ss. 62 ; 269, Para. 2 and 279.)

62. If an appeal is brought in any case in which any person prosecuted by the Public Prosecutor has been convicted, notice of such appeal and a copy of the grounds of appeal shall be given to such Public Prosecutor by the appellate Court, and the Court shall also give him due notice of the time and place at which such appeal is to be heard.

Notice to Public Prosecutor of appeal in cases proseuted by him.

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269. The appellant shall, in every case, give notice of appeal to the Magistrate of the District, who shall, if necessary, instruct the Public Prosecutor, Government Pleader or other officer empowered by Government or the Magistrate of the District to prosecute the case.

279. If the appellate Court decide to hear the appeal, it shall cause notice to be given to the appellant, and, if the appeal be to the Sessions or High Court, shall also give notice to the Magistrate of the District, who shall inform, if necessary, the Public Prosecutor, Government Pleader or other officer empowered by Government in that behalf, of the day on which such appeal will be heard.

Notice of Appeal.

(Code of 1861—Nil.)

Note 10.

1. (1918) 1918 Pat 660 (660) : 19 Cri L Jour 304, *Ram Kant Pandit* v. *Emperor.*
   (1919) 1919 Low Bur 154 (156) : 19 Cri L Jour 316, *Nga Ba Myit* v. *Emperor.*
   (1881) 1881 Pun Re Cri No 31, page 81 (82), *Budruddin* v. *Empress.*
   (1882) 1882 Pun Re Cri No. 35, page 45 (46), *Lal Khan* v. *Empress.*
2. (1906) 3 Cri L Jour 385 (387) (Cal), *Isswar Chandra Das* v. *Emperor.*
   (1910) 11 Cri L Jour 631 (632) : 13 Oudh Cas 309, *Aman Ali* v. *Emperor.*

Note 11.

1. (1903) 1 Weir 788 (788), *In re Chinna Karuppan.*

Synopsis.

Other Topics.

Change of time or place of hearing. See Note 6, Pts. 3 and 4.
Dismissal without fixing date or place. See Note 6, Pts. 1 and 2.
Legislative changes. See Note 2.
No admission of appeal for limited purposes only See S. 421, Note 1, Pt. 7.
No dismissal of appeal for default of appearance. See S. 421, Note 2, Pt. 1.
Notice to accused to whom compensation awarded under S. 250. See Note 3, Pts. 1 and 2.
Notice to appellant in spite of presence of his pleader. See Note 2, Pt. 1.
Notice to complainant in appeal against order under S. 545. See Note 4, Pts. 2 and 3.
Officers appointed in several provinces. See Note 5, Pts. 1 to 7.
Want of notice to officer—Vitiates. See Note 5, Pt. 8.

1. Notice—General.

Where an appeal has been admitted, notice under this Section must be served on the persons mentioned therein, before the appeal could be finally disposed of under Section 423, *infra*.[1a]

The notice must be served personally on the person to be served and only if after due diligence it cannot be served personally, can it be served on any adult male member of the family. (*See* Sections 69 and 70). So where the notice of an appeal was served on an accused person's father it was held that the officer who was entrusted with the service, should swear to an affidavit that he made his best endeavours to effect personal service but that he could not do so.[1]

Where it is not possible to serve the notice as under Sections 69 and 70, the notice or a copy of it should under Section 71 be left at the address given in the appeal. It is not competent to an appellate Court to hear and decide an appeal in the appellant's absence simply because he cannot be found at the address given by him.[2]

Where in spite of due notice having been given the parties or their pleaders fail to appear at the hearing of the appeal, but only appear on the date fixed for delivery of the judgment, the appellate Court is not bound to hear them.[3]

2. Notice to appellant or pleader.

Notice under this Section must be given to the appellant or his pleader. Under Section 279 the corresponding Section of the Code of 1872, notice had to be given only to the appellant, the words "or his pleader" being absent. It was, therefore, held that the fact that the pleader of the accused was present in Court when an order was made admitting an appeal did not relieve the Court from the necessity of giving notice to the appellant, of the day fixed

Section 422—Note 1.

1a (1935) 1935 P C 89 (92) : 1935 Cri Cas 551 : 36 Cri L Jour 838 : 62 Ind App 129 (P C), *King-Emperor* v. *Dahu Raut*.

1. (1882) 1882 All W N 170 (170, 171), *Empress* v. *Sundar*.
2. (1896) Ratanlal 869 (869), *Empress* v. *Hari Narayan*.
3. (1923) 1923 Nag 208 (208) : 23 Cri L Jour 752, *Nyajukhan* v. *Emperor*.

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for the hearing of the appeal.[1]

Under the present Section it is enough if notice is given to the appellant *or* his pleader.

3. Notice to accused.

Under this Section notice is necessary to the accused only in cases where there is an appeal against acquittal under Section 417. A notice to the accused person therefore, to whom compensation is ordered to be paid under Section 250, is unnecessary. But seeing that he is the only person interested in upholding the order, it is desirable that notice should be given to him.[1] But the High Court will not interfere in revision on the ground of want of notice unless there is some illegality in the order.[2]

4. Notice to complainants.

Under this Section a complainant cannot claim as of right to be heard in the appeal. The matter is one which is left in each case to the discretion of the Court.[1] Though there is no provision in case of an order under Section 545 of the Code, with regard to notice to the *complainant* to whom compensation has been awarded, one of the fundamental principles of law is that no order should be passed to the detriment or prejudice of a party without giving him an opportunity of being heard in defence. In that view notice should be given to a complainant in an appeal against an order under Section 545 of the Code.[2] But the fact that notice of appeal was not served on the complainant, is no ground for interference where no injustice has been occasioned thereby.[3]

5. Officer appointed by the Local Government.

Under this Section notice should go to the officer appointed by the Local Government in this behalf.

The officer appointed by the Local Government in Bombay is the District Magistrate.[1] In Bengal the officer appointed by the Local Government is the District Magistrate except where the order of a Sessions Judge is in appeal

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Note 2.

1. (1881) 10 Cal L R 57 (59, 60), *In re Gopal Chunder Mondul.*
   (1883) 1883 Pun Re Cr No. 7 p. 9 (9), *Miran Baksh* v. *Empress.*

Note 3.

(1932) 1932 Bom 177 (178) : 1932 Cri Cas 236 : 33 Cri L Jour 392, *Dinshahji Hirji Bhai, In re.*
(1926) 1926 Cal 1054 (1055) : 53 Cal 969 : 27 Cri L Jour 1086, *Bharasa Now* v. *Sukdeo.*
(1924) 1924 Lah 675 (676) : 25 Cri L Jour 209, *Ramchand* v. *Jesa Ram.*
(1927) 1927 Lah 357 (357) : 8 Lah 568 : 28 Cri L Jour 416, *Rashid Muhammad Khan* v. *Crown.*
(1906) 3 Cri L Jour 459 (459) : 29 Mad 187, *Emperor* v. *Palaniappavelu.*
(1915) 1915 Mad 940 (940, 942) : 38 Mad 1091 : 16 Cri L Jour 128, *Venkatarama Iyer* v. *Krishna Iyer.*
(1933) 1933 Mad 277 (278) : 33 Cri L Jour 596 : 1933 Cri Cas 378, *Periakalathi* v. *Venkatesa.*
(1917) 1917 Nag 122 (123) : 14 Nag L R 131 : 19 Cri L Jour 927, *Mangalchand* v. *Mohan.*
(1926) 1926 Sind 143 (144) : 20 Sind L R 41 : 27 Cri L Jour 248, *Momoom* v. *Ibrahim.*

2. (1909) 9 Cri L Jour 150 (150, 151) : 33 Mad 89, *Ambakkagari Nagi* v. *Basappa.*
   (1915) 1915 Mad 236 (237) : 15 Cri L Jour 648, *Guruswami Naicken* v. *Tirumurthi Chetti.*
   (1921) 1921 Mad 281 (281) : 22 Cri L Jour 583, *Krishna Kone* v. *Narayana Dass.*

Note 4.

1. (1874) 7 Mad H C Rul App 42 (42), *High Court Proceedings, 6th Nov.* 1874, *No.* 1719.
2. (1926) 1926 Cal 1054 (1055, 1056) : 53 Cal 969 : 27 Cri L Jour 1086, *Bharasa Now* v. *Sukdeo.*
3. (1933) 1933 Mad 277 (277, 278) : 1933 Cri Cas 378 : 33 Cri L Jour 596, *Peria Kalathi Mudali* v. *Venkatesa Mudali.*

Note 5.

1. (1923) 1923 Bom 74 (74) : 24 Cri L Jour 700, *Emperor* v. *Shivlingappa.*

in which case the Sessions Judge is such officer.[2] In the Punjab also it is the District Magistrate.[3] In Madras the officer is the District Magistrate in cases other than Sessions cases and the Public Prosecutor in the case of the High Court and in Sessions cases.[4]

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2. (1903) 7 Cal W N 80 (81), *Bepin Behari De* v. *Nendi Hariani.*

3. (1924) 1924 Lah 675 (675) : 25 Cri L Jour 209, *Ramchand* v. *Jesa Ram.*

[See also : *Rules and orders of the High Court of Judicature at Lahore* (1931) :—

PART D—NOTICE OF APPEAL.

The following notifications under S. 422 of the Code of Criminal Procedure, prescribing the officers to whom notice is to be given of an appeal which is not summarily rejected, are re-printed for information and guidance.

I. Punjab Government Notification No. 172, *dated the* 28*th January* 1891.

With reference to S. 422 of the Code of Criminal Procedure, 1882, prescribing that any appellate Court which does not reject an appeal summarily shall cause notice to be given to such officer as the Local Government may appoint in this behalf, the Hon'ble the Lieutenant-Governor is pleased to direct that, in the case of an appeal preferred by a Railway employee in a case in which he has been convicted of an offence committed in his capacity of Railway servant, the appellate Court shall cause notice to be given of the time and place of hearing of such appeal to the Head of the Railway Administration concerned as well as to the District Magistrate, as directed in Punjab Government Notification No. 108-597, dated 8th February 1883.

II. Punjab Government Notification No. 1764, *dated the 7th December* 1898.

With reference to S. 422 of Act 5 of 1898, the Code of Criminal Procedure, prescribing that any appellate Court which does not reject an appeal summarily shall cause notice to be given to such officer as the Local Government may appoint in this behalf of the time and place at which such appeal will be heard, the Hon'ble the Lieutenant-Governor is pleased to direct, in supersession of notification No. 108, dated 8th February 1883, that in the case of appeals other than those which lie to the District, or specially empowered Magistrate, the appellate Court shall cause notice of the time and place of the hearing of such appeal to be given :

(1) to the Government Advocate, in all cases in which the sentence is one of death, transportation for life, or transportation or imprisonment for a term of not less than ten years;

(2) to the Magistrate of the District, in other cases.

III. Punjab Government Notification No. 206, *dated the* 10*th February* 1905.

With reference to S. 422 of the Code of Criminal Procedure, 1898, prescribing that any appellate Court which does not reject an appeal summarily shall cause notice to be given to such officer as the Local Government may appoint in this behalf, the Hon'ble the Lieutenant-Governor is pleased to direct that in the case of an appeal preferred by a postal employee in a case in which he has been convicted of an offence committed in his capacity of postal servant, the appellate Court shall cause notice to be given of the time and place of hearing of such appeal to the Postmaster-General, Punjab and North-West Frontier Province, as well as the District Magistrate concerned as directed in Punjab Government Notification No. 108-597, dated 8th February 1883.]

4. (1915) 1915 Mad 236 (237) : 15 Cri L Jour 648, *Guruswami Naiken* v. *Tirumurthi Chetti.*

(1921) 1921 Mad 281 (282) : 22 Cri L Jour 583, *Krishna Kone* v. *Narayana Dass.*

(1925) 1925 Mad 375 (376) : 25 Cri L Jour 1389, *Mohamed Mustafa Rowther* v. *Shanmuga Thevan.*

[See also *the criminal rules of practice and orders of High Court of Judicature, Madras* (1931):—

Rule 240. The following officers are the officers to whom notices of appeal shall be given under S. 422, Code of Criminal Procedure :

(1) District Magistrates in appeals other than appeals to Court of Session ;

(2) The Public Prosecutor in appeals to Court of Session ;

(3) The Prosecuting Inspector of Police in mofussil districts other than the Nilgiris in appeals against convictions in cognizable cases in the Appellate Courts in those districts other than the Court of Session ;

(4) The Agent and Manager of the Madras and Southern Mahratta Railway and the Agent of the South Indian Railway in appeals against convictions for Railway offences in connexion with those railways respectively ;

(5) The District Forest Officer in appeals against convictions for forest offences, except in cases of offences relating to unreserved lands. In such cases notice shall be given to the Revenue Divisional Officer who ordered the prosecution ;

(6) Officers of the Salt and Excise Department in charge of circles in appeals against convictions for Salt and Excise offences in their circles; and in appeals to the High Court in Abkari cases, to the Inspector of Excise, Madras Town Circle ;

(7) The Crown Prosecutor for the Town of

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As to Oudh and Central Provinces, *see* below.[5]

Where the District Magistrate is the officer who is to receive the notice and the appeal is filed in his Court and heard by himself no notice to him is necessary.[6] But where the appeal is transferred to a joint Magistrate for hearing, the fact that it was originally filed before the District Magistrate does not relieve the joint Magistrate of his duty of giving notice to the District Magistrate.[7]

The Section is imperative and the omission to give notice of appeal to the officer concerned, cannot be treated merely as an irregularity. An order passed in appeal without such notice is an invalid order.[8]

6. Time and place of hearing.

Under this Section the notice should specify the time and place at which the appeal will be heard. The Court of appeal, should fix a date for hearing and determine it on that day. Where the appeal was directed to be heard "in January" without fixing a date and the appeal was taken up and dismissed on a particular day, without any information to the appellant as to the time of hearing, it was held that the dismissal was improper.[1] So also a notice to an appellant's pleader that his appeal would be heard next day wherever the Court happened to be encamped is not sufficient.[2] An appeal posted for hearing at one place cannot be heard and dismissed at another place, without

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Madras in appeals to the High Court from the judgments or orders of the Presidency Magistrate and the Public Prosecutor in other appeals to the High Court.]

5. *The Oudh Criminal Rules* (1928) :—

Rule 3. As soon as the date is fixed, the appellate Court shall cause notice to be given to the appellant as well as to the District Magistrate who shall inform the appellate Court whether any one will appear to support the conviction.

Rule 4. In all criminal appeals before Sessions Judges, notice shall be given to Government Pleaders, whether such appeals be presented by pleaders or agents or received through the Superintendent of jails.

Criminal Circulars of the Judicial Commissioner, Central Provinces (1929) :—

Rule 10. The following are the officers to whom notices of appeal shall be given under S. 422 of the Code:

(1) The District Magistrate in all appeals filed before the Court of Session of Judicial Commissioner;

(2) The Prosecuting Inspector or Sub-Inspector of Police in appeals to the District Magistrate's Court or to Courts of Magistrates subordinate to the District Magistrate.

6. (1923) 1923 Bom 74 (74) : 24 Cri L Jour 700, *Emperor* v. *Shivlingappa Basappa.*
(1924) 1924 Lah 675 (675) : 25 Cri L Jour 209, *Ramchand* v. *Jesa Ram.*
(1921) 1921 Mad 281 (282, 283) : 22 Cri L Jour 583, *Krishna Kone* v. *Narayana Dass.*

7. (1925) 1925 Mad 375 (376) : 25 Cri L Jour 1389, *Mahomed Mustafa Rowther* v. *Shanmuga Thevan.*

8. (1923) 1923 Bom 74 (74) : 24 Cri L Jour 700, *Emperor* v. *Shivalingappa Basappa.*
(1923) 1923 Bom 264 (265) : 26 Cri L Jour 751, *Devendra Marappa* v. *Shettappa Hooleppa.*
(1926) 1926 Cal 1054 (1056) : 53 Cal 969 : 27 Cri L Jour 1086, *Bharasa Now* v. *Sukdeo.*
(1901) 2 Weir 474 (475), *In re Virasami Naikan.*
(1916) 1916 Mad 1168 (1168) : 16 Cri L Jour 736, *Chemikala Chinna Bali, In re.*
(1925) 1925 Mad 375 (376) : 25 Cri L Jour 1389, *Mahomed Mustafa Rowther* v. *Shanmuga Thevan. Quaere*—Whether omission to give notice to the officer mentioned in the Section is an illegality or mere irregularity (Venkatasubba Rao, J.).
[But see (1924) 1924 Mad 837 (838) : 26 Cri L Jour 249, *Kana Khan* v. *Amir Bi.* The case is one of appeal against acquittal where the High Court will not interfere, unless it is in the interests of public justice.]
(1916) 1916 Mad 931 (933) : 39 Mad 505 : 16 Cri L Jour 600, *Vellayan Ambalam* v. *Solai Serval* (Do.)
(1933) 1933 Mad 277 (277, 278) : 33 Cr L Jour 596: 1933 Cri Cas 378, *Kalathi Mudali* v. *Venkatesa Mudali.* (Do.)]

Note 6.

1. (1881) 1881 All W N 46 (46), *Empress* v. *Wazir Khan.*
2. (1920) 1920 Bom 318 (318): 21 Cri L Jour 373, *Arjun Tathoo, In re.*

giving notice to the appellant or his pleader of the change of place.[3] So also an appeal posted for hearing on a particular date, cannot be heard on a date previous to that fixed.[4] **Sec. 422 Notes 6—7**

7. Burden of proof in criminal appeals.

See the undermentioned case.[1]

423.* (1) The appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under Section 417, the accused if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may— **Sec. 423**

Powers of appellate Court in disposing of appeal.

*** (Code of 1882—S. 423.)**

The words "subject to the provisions of S. 106 sub-section 3" were added in Cl. (b) (3) and Cl. (d) was newly inserted ; otherwise the Section was the same.

(Code of 1872—Ss. 280, 284 and 272, Para. 3.)

280. The appellate Court, after perusing the proceedings of the lower Court and after hearing the appellant, his counsel or agent, if they appear, and the Public Prosecutor, Government Pleader or other officer empowered by Government or by the Magistrate of the district in that behalf, if he appears may alter or reverse the finding and sentence or order of such Court, and may, if it see reason to do so enhance any punishment that has been awarded :

Appellate Court may alter or reverse finding and sentence, or enhance a sentence.

Provided that, if the appeal is from the sentence of a Magistrate of any class, the appellate Court shall not inflict a greater punishment than might have been inflicted by a Magistrate of the First Class.

284. When any Court has convicted a person of an offence not triable by such Court the appellate Court shall annul the conviction and sentence of such Court and direct the trial of the case by a Court of competent jurisdiction.

Procedure in case of conviction by Court not having jurisdiction.

272. * * * * *

The High Court may, in any case so appealed, direct a new trial by another Court, or may pass such judgment, sentence, or order as may be warranted by law.

(Code of 1861—Ss. 419 and 427.)

419 The appellate Court, after perusing the proceedings of the lower Court, and after hearing the plaintiff or his counsel or agent if they appear, may alter or reverse the finding and sentence or order of such Court, but not so as to enhance any punishment that shall have been awarded.

Appellate Court may call for the proceedings of lower Court.

427. When a Court subordinate to a Court of Session shall have convicted a person of an offence not triable by such Court, it shall be competent to the appellate Court to annul the conviction and sentence of such Court, and to direct the trial of the case by a Court of competent jurisdiction.

Court of appeal how to proceed in case of conviction by a Court not having jurisdiction.

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3. (1891) 1891 Pun Re Cri No. 7, p. 16 (17), *Bahawal* v. *Empress.*
   (1905) 2 Cri L Jour 66 (66) : 1905 Pun Re Cri No. 11, *Nihal Singh* v. *Emperor.*
4. (1882) 2 Weir 475 (475), *Shanmugam Chettiar* v. *Alagia Numbia Pillai.*

Note 7.

1. (1895) 23 Cal 347 (349), *Milan Khan* v. *Sagai Bepari.* Rule in civil appeals that burden lies on appellant to prove decision of lower Court is wrong does not apply to criminal appeals by convicted person—In such cases, if appellate Court feels a reasonable doubt as to the guilt of the accused, it must acquit him.

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(*a*) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(*b*) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of Section 106, sub-section 3, not so as to enhance the same;

(*c*) in an appeal from any other order, alter or reverse such order;

(*d*) make any amendment or any consequential or incidental order that may be just or proper.

(2) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

Synopsis.

Abetment of offence—Conviction for, by appellate Court—When can be passed and when not. See Note 31, Pts. 12 to 15, and F-N (7).

Abetment of offence—Not minor offence and cannot come under S. 238. See Note 31, Pt. 11.

Accused not given notice of date—Disposal on such date illegal. See Note 9, F-N (3).

Accused represented by pleader—Appeal disposed in chambers without being aware of fact—Judgment set aside. See Note 9, F-N (2).

Acquittal—Interference by Appellate Court. See Note 15 Pts. 3 to 8.

Act 37 of 1855—All sentences in criminal cases are final—No appeal lies. See Note 1, F-N (5).

Adjourned hearing—Appellant to be given notice. See Note 3, F-N (2).

Admission—Objection as to absence of sufficient cause for delay or as to non-appealability of sentence can be taken. See Note 6, Pts. 1, 2.

"Alter"—In Cl. (c)—Meaning. See Note 34, Pt. 8.

Appeal—No admission for reviewing sentence only—If admitted, appellant to be heard on merits. See Note 7.

Appeal—No dismissal on ground of sentence being without jurisdiction. See Note 3.

Appeal—No summary dismissal. See Note 9, Pt. 1.

Appeal—To be heard at time and place specified in notice. See Note 10.

Appeal from acquittal—Grounds not contained in objections not to be considered. See Note 15, Pt. 20.

Appeal from acquittal—Ordinarily no capital sentence. See Note 19, Pt. 6.

Appeal from acquittal—Power to order re-trial is discretionary. See Note 17, Pt. 1; Note 23, Pt. 3.

Appeal from acquittal—Onus on Crown to establish judgment to be erroneous. See Note 15, F-N (18).

Appeal from acquittal— Unless manifestly wrong or perverse, appellate Court not to weigh evidence. See Note 15, F-N (14).

Appeal from acquittal—Correctness of judgment open to doubt—That merely not sufficient to reverse acquittal order. See Note 15, F-N (13).

Appeal from conviction—Appellate Court cannot remand simply for examination afresh of certain witnesses. See Note 20, Pt. 1.

Appeal from conviction and appeal from acquittal—Distinction. See Note 15, Pts. 9 to 17, F-N (9), (10).

Appeal from conviction—Mere reversal is acquittal. See Note 21, Pt. 1.

Appeal from conviction—No further enquiry. See Note 16, Pt. 3; Note 20, Pt. 2.

Appeal from trial by jury and appeal from trial with assessors — Difference. See Note 40, F-N (5).

Appeal on doubtful weighing of facts—High Court will not interfere. See Note 15, F-N (4).

Appeal transferred—Appellant not aware of it —Transferee Court disposing on merits—No mistake. See Note 9, F-N (5).

Appellate Court—To give benefit of doubt to accused. See Note 14, F-N (2).

Appellate Court—Can alter conviction into one of graver offence, if no prejudice to accused. See Note 19, F-N (2).

Appellate Court—Not to travel outside record. See Note 17, F-N (7).

Appellate Court—No power to make order which would make entire proceeding infructuous and absurd. See Note 39, Pt. 1.

Appellate Court—No power to remit any sentence. See Note 32, Pt. 4.

Appellate Court—Not to report to High Court without deciding appeal. See Note 38, Pts. 1, 2.

Appellate Court—Powers of. See Note 1, Pt. 1 and Note 9, Pts. 2 to 7.

Appellant in jail—Not represented by pleader —Entitled to appear in person. See Note 9, Pt. 9.

Case under Cantonments Act, S. 28—No appeal from decision thereon. See Note 1, F-N (5).

Clause (d)—No application to matters arising *pending* appeal or to matters at stage of *admission*. See Note 39, Pts. 2, 3.

Clause (d) — Orders not falling within—Examples. See Note 39, Pts. 23 to 29.

Co-accused—Appeal by one alone—Appellate Court can reduce sentence on other in the ends of justice. See Note 32, Pt. 5.

Code of 1872 and present Section—Difference. See Note 23, Pts. 1, 2.

Commitment—For commitment by appellate Court, offence need not be exclusively triable by Sessions Court. See Note 30, Pt. 7.

Commitment refused in view of considerable expense incurred already by accused and other circumstances. See Note 30, Pt. 9.

Complainant or private prosecutor cannot be heard as of right. See Note 9, Pts. 11, 11a and F-N (11), (11a).

"Consequential or incidental"—Meaning and examples. See Note 39, Pts. 4 to 18a.

Conviction—Not to be supported on evidence definitely disbelieved by trial Judge. See Note 14, F-N (5).

Conviction affirmed—Sentence cannot be reversed absolutely. See Note 32, Pt. 2.

Conviction for two offences—Whole prosecution evidence disbelieved—Whole conviction to be set aside. See Note 14, Pt 13.

Court-fees Act, S. 31—Order for costs under, is not enhancement. See Note 33, Pt. 24.

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Discharge on ground of misjoinder—Re-trial can be directed. See Note 25.
Dismissal for default—No "judgment." See Note 4, Pt. 1.
Disposal without hearing Mukhtyar—Set aside. See Note 9, F-N (10).
Duty of appellate Court to go through record. See Note 3, Pts. 1 to 4.
Entire record lost—Fresh trial ordered. See Note 2, Pt. 2.
Evidence—Taken before Magistrate but not used at trial—Not to be referred in appeal. See Note 3, F-N (4).
Evidence—Objection as to admissibility—Not to be allowed in appeal for first time. See Note 13, Pt. 6.
Evidence—Review by appellate Court—Independent judgment to be exercised. See Note 14, Pts. 1 to 3.
Evidence Act, S. 167—Not inapplicable to jury trials. See Note 40, F-N (13).
Expunging remarks in lower Court's judgment—Order is not "amendment." See Note 39, Pt. 23.
"Finding"—Is not limited to finding on law point. See Note 31, Pt. 9b.
"Find him guilty"—Words not limited to offences with which accused was charged in lower Court. See Note 19, Pts. 2, 3.
Finding of fact of trial Court—Power of appellate Court to interfere. See Note 14, Pts. 4 to 8.
Frontier Crimes Regulation (3 of 1901), Ss. 48, 49—Apply only to special tribunals. See Note 1 F-N (5).
Hearing without notice--Illegal. See Note 10, Pt. 1.
High Court—Power as appellate Court. See Note 1, Pts. 2, 3 ; Note 22, Pt. 4.
High Court—Power as revision Court. See Note 1, Pts. 2, 4; Note 22, Pts. 3, 5.
Improper evidence admitted by lower Court—Appellate Court should see whether there still remains sufficient evidence to sustain conviction. See Note 14, Pt. 14.
Inquiry under S. 517—Party not appearing after notice — Appeal against order—Notice. See Note 10, Pt. 2.
Jury—Objection to jury trial—Not to be allowed in appeal for first time. See Note 13, Pt. 7.
Jury verdict — On circumstantial evidence alone—No interference. See Note 40, F-N (3).
Jury verdict and conviction—Mis-direction or error of law—Whether appellate Court can go into evidence and see whether decision is right. See Note 40, Pts. 10 to 14a.
Juvenile offender—4 months' R. I. substituted by whipping. See Note 33, F-N (17).
Leave to compound—Order as to—Whether can be passed under Cl. (d). See Note 39, Pts. 19, 20.
Legislative changes. See Note 33.
Lower Court decision—Presumption as to correctness. See Note 14, Pts. 9 to 12.
New trial—Merely for enhancing punishment—To be used sparingly. See Note 27; Note 1.
No appeal by accused—Conviction not to be quashed on ground of loss of record. See Note 2, Pt. 3.
Non-appealable sentence—Illegally corrected into appealable one—Appeal lies. See Note 3, Pt. 5.
No summary dismissal—Records to be sent for. See Note 2, Pt. 1.
Offence requiring sanction—Appellate Court cannot convict of such offence. See Note 31, F-N (1).
Order for detention in Reformatory School—No interference in appeal or revision. See Note 1, F-N (5).
Parties to be heard in each other's presence. See Note 9, Pt. 12.
Petty matter or petty case—Re-trial not to be ordered. See Note 23, F-N (21).
Pleader appearing without vakalatnama—Time may be granted for production. See Note 9, Pt. 8.
Power to alter finding under S. 423 (1) (b)—Not qualified or restricted by Ss. 236, 237 and 238. See Note 31, F-N (8a).
Power under this Section—Large enough to invoke English rule that repugnancy in verdict is by itself sufficient for quashing conviction. See Note 40, Pt. 15.
Powers under this Section—Subject to other provisions of law. See Note 1, Pt. 5.
Presumption of innocence of accused—Effect of lower Court's decision on it. See Note 14, Pt. 10.
Previous conviction—Appellate Court cannot go into legality. See Note 37, Pt. 1.
Question of law—New plea in appeal. See Note 13, Pts. 3 to 5a.
Question of facts in issue—Difference between criminal and civil appeal. See Note 14, F-N (5).
Remand—No remand for passing legal sentence. See Note 28, Pt. 1.
Respondent heard--Right of appellant to reply, whether exists. See Note 9, Pts. 13 to 15, F-N (14).
Re-trial — Perfunctory cross-examination of prosecution witness is good ground. See Note 23, F-N (20).
Re-trial—Appellate Court can specify which Court to hold re-trial. See Note 24, Pt. 5.
Re-trial for graver offence—Order proper. See Note 23, F-N (20).
"Re-tried"—Includes re-trial on appeal. See Note 18.
Re-trial—Charges under Ss. 302 and 201, I.P.C.—S. 201 charge withdrawn—Conviction under S. 302—Re-trial even for charge under S. 201 can be ordered. See Note 26, Pt. 3.
Re-trial order can be passed even subsequent to setting aside conviction and sentence. See Note 17, Pt. 8.
Re-trial—No re-trial on particular point. See Note 23, Pt. 23.

Re-trial—When will not be ordered. See Note 23, Pts. 6 to 18, 21, 23, 28.

Re-trial—When can be ordered. See Note 17, Pts. 2 to 6a; Note 23, Pts. 4, 5, 20, 22.

Re-trial—Whether can be before appellate Court. See Note 24, Pts. 6, 7.

Section 106 (3)—Order as to additional security under, is not enhancement. See Note 33, Pt. 25.

Section 118—Appeal against order under—No re-trial or further enquiry can be ordered. See Note 34, Pts. 6, 7.

Section 250—Order under, cannot be passed under Cl. (d) by appellate Court. See Note 39, Pt. 22.

Section 418 and this Section. See Note 40, Pts. 1a, 1.

Section 439 and this Section— Distinction. See Note 1, Pt. 4a.

Sections 514, 476, 135 and 250 (3). See Note 34, Pts. 1 to 4.

Section 537 and this Section. See Note 40, Pts. 2 to 6a.

Sections 109, 211, 193, I. P. C.—Alteration of findings under Ss. 109, 211 to one under S. 193. See Note 31, F-N (6).

Sections 147, 323 and 149, I. P. C.—Conviction under Ss. 147 and 323 changed into one under Ss. 149 and 323. See Note 31, F-N (6).

Sections 147 and 323, I. P. C.—Whether conviction under S. 147 can be altered to one under S. 323. See Note 31, F-N (6), (8).

Sections 149, 326 and 34, I. P. C.—Conviction under S. 326/149 altered into one under S. 326/34. See Note 31, F-N (8).

Sections 335 and 323, I. P. C.—Conviction under S. 335—Alteration to one under S. 323. See Note 31, F-N (6).

Sections 376 and 323, I. P. C.—Conviction under S. 376—Alteration to one under S. 323. See Note 31, F-N (6).

Sections 376 and 366, I. P. C.—Alteration of conviction under S. 376 into one under S. 366—Illegal. See Note 31, F-N (6).

Sections 379, 447 and 352, I. P. C.—Conviction under Ss. 447 and 352 altered by appellate Court to one under S. 379. See Note 31, F-N (6).

Sections 380 and 403, I. P. C.—Person charged and tried for offence under S. 380 can be convicted under S. 403, if accused not taken by surprise. See Note 31, F-N (5).

Section 403, I. P. C.—Conviction under, set aside—Re-trial under S. 406 ordered. See Note 23, F-N (20).

Sections 411, 379, I. P. C.—Conviction under S. 411—Alteration on appeal to conviction either under S. 379 or S. 411—Illegal. See Note 31, F-N (6).

Sections 411 and 445, I. P. C.—Person charged under S. 445 can be convicted under S. 411. See Note 31, F-N (5).

Sections 411, 403, I. P. C.—Finding under S. 411 altered to one under S. 403. See Note 31, F-N (8).

Sections 420, 75, 379, I. P. C.—Finding of guilty under S. 420/75 changed into one under S. 379/75. See Note 317, F-N (8).

Sections 420 and 465, I. P. C.—Conviction under S. 420 and acquittal under S. 465—Appeal from conviction—Re-trial in respect of both offences not proper. See Note 26, F-N (2).

Sections 468 and 471, I. P. C.—Charge and conviction under S. 468—Change into one under S. 471 not proper. See Note 31, F-N (6).

Self-defence—New plea in appeal—When can be raised. See Note 13, Pts. 1, 2.

Sentence by appellate Court— Whether enhancement. See Note 33, Pts. 3 to 19.

Separate sentences in separate trials—High Court can direct them to run concurrently. See Note 36, Pt. 1.

Special procedure — Omission by Judge to follow—Re-trial order proper. See Note 23, F-N (20).

Subsequent discovery of jury having taken bribes—Verdict set aside. See Note 35, Pt. 3.

Subsequent discovery of evidence—No ground for setting aside acquittal or ordering re-trial. See Note 17, Pt. 7.

Subsequent events—Not to be looked into. See Note 35, Pts. 1, 2.

Summary rejection of appeal under S. 421—Sentence cannot be reduced. See Note 32, Pt. 1.

Technical offence—Re-trial not to be ordered. See Note 23, F-N (11), (21).

Trial Court competent to inflict maximum sentence—No new trial for enhancing sentence. See Note 27, Pt. 2.

Trial Court not writing judgment in conformity with S. 367—Appellate Court to remand case for re-hearing *de novo* and not merely to call for fresh judgment. See Note 28, Pt. 3.

Two appeals—To be kept and dealt with separately. See Note 11, Pt. 1.

Two appeals—Making cross-references to evidence and judgment irregular. See Note 11, Pt. 2.

Two cross-charges tried separately—But one judgment — No prejudice — Conviction valid. See Note 11, Pt. 3.

Verdict of jury—Set aside—New trial need not necessarily be directed. See Note 40, F-N (8).

Whipping— When may be substituted for imprisonment. See Note 33, Pt. 23.

Whipping—Sentence of fine—Alteration into one of whipping. See Note 33, F-N (8).

Withdrawal of appeal—At any time before judgment. See Note 8, Pt. 2.

Sec. 423 Note 1

1. Scope of the Section.

This Section prescribes the powers of the appellate Court in disposing of an appeal. The powers conferred on the appellate Court are as ample as the High Court could have on revision under Section 439 with the exception of the power to *enhance* the sentence.[1] Where the appellate Court is the High Court itself, it has not only the powers under this Section, but also those under Section 439. As an *appellate Court*, it can, under this Section, alter the conviction to one for an offence of which the accused was *acquitted* by the lower Court, but it has no such power in revision. As a *revision* Court it can *enhance* the sentence passed by the lower Court though as an appellate Court it has no such power. Thus by a combination of Sections 423 and 439, the High Court in appeal, can convict the accused of an offence of which he had been acquitted and also enhance the sentence.[2] Where an appeal is before the High Court, the accused may be warned, that, at the hearing of the petition, he may be called on to show cause why the sentence should not be enhanced.[3] But the stage at which the revisional powers can be exercised does not arise until the peremptory provisions of Sections 422 and 423 have been complied with; thus the High Court cannot, if it does not dismiss the appeal summarily under Section 421, act under Section 439 without notice under Section 422 and without sending for the record under Section 423.[4]

There is another distinction between this Section and Section 439. Under the latter Section findings of *fact* are not ordinarily open to review and a proviso against altering an acquittal into a conviction has been expressly added therein. On the other hand, this Section is concerned with the powers of a Court of appeal when the *facts* are before the Court, and in the absence of a proviso limiting the powers as to alteration of findings, such a proviso cannot be implied.[4a]

The powers of the Court under this Section must be read subject to other provisions of law limiting the right of interference to the extent specified by such provisions. *See* the following cases.[5]

Section 423—Note 1.

1. (1935) 1935 P C 89 (92) : 36 Cri L Jour 838: 1935 Cri Cas 551 : 62 Ind App 129 (P C), *King-Emperor* v. *Dahu Raut.*
2. (1914) 1914 Mad 258 (260) : 37 Mad 119 : 15 Cri L Jour 180, *Kambam Bali Reddy* v. *King-Emperor.*
   (1904) 1 Cri L Jour 942 (943) : 1904 Pun Re Cri No. Re 12, *Bhola* v. *Emperor.*
   (1884) 6 All 622 (622) (F B), *Queen-Empress* v. *Ram Kuria.*
   (1931) 1931 Cal 450 (451) : 32 Cri L Jour 890 : 1931 Cri Cas 602, *Kitabdi* v. *Emperor.*
3. (1935) 1935 P C 89 (92) : 36 Cri L Jour 838 : 1935 Cri Cas 551 : 62 Ind App 129 (P C), *King-Emperor* v. *Dahu Raut.*
4. (1935) 1935 P C 89 (92) : 1935 Cri Cas 551 : 36 Cri L Jour 838 : 62 Ind App 129 (P C), *King-Emperor* v. *Dahu Raut.*

4a (1932) 1932 Cal 723 (725) : 60 Cal 179 : 34 Cri L Jour 177 : 1932 Cri Cas 728, *Hanuman Sarma* v. *Emperor.*

5. *Reformatory Schools Act, S.* 16:—
   (1898) 20 All 159 (160), *Queen-Empress* v. *Gobinda.* Cannot interfere in appeal or revision with an order for detention in Reformatory School, passed in substitution for an order of transportation or imprisonment.
   (1907) 1907 Pun Re Cri No. 18, p. 58 (59), *Ram Singh* v. *King-Emperor.* (Do.)
   (1893-1900) 1893-1900 Low Bur Rul 441 (442), *Queen-Empress* v. *Nga Nyan Wun.* (Do.)
   (1901) 1 Low Bur Rul 68 (68), *Crown* v. *Dawood Sahib.* (Do.)
   (1912) 13 Cri L Jour 44 (44) : 5 Sind L R 173, *Imperator* v. *Rajabli.* (Do.)
   (1899) 3 Cal W N 576 (579), *Empress* v. *Harisdas Mukherjee.* (Do.)
   [See however (1901) 21 All 391 (401, 404) (F B), *Queen-Empress* v. *Hari.* Can interfere where the order is *without jurisdiction.*
   (1901) 28 Cal 423 (424), *Reasut* v. *Courtney.*
   (1931) 1931 Nag 179 (179) : 27 Nag L

2. "Shall then send for the record."

Where the appeal is not dismissed summarily under Section 421, the appellate Court is bound to send for the record, if such record is not already in Court.[1] Where the entire record was lost, the High Court set aside the conviction and ordered a fresh trial.[2] In *Kamakshamma* v. *Emperor*[3] it was held by the High Court of Madras that in the absence of any appeal by the person convicted, the conviction cannot, in revision, be quashed merely on the ground that some of the material records were lost at the time of the lower Court's judgment.

3. "After perusing the record."

An appeal cannot be dismissed for default of appearance. The words "after perusing the record . . . .if it *considers* that there is no sufficient ground for interfering" shows that it is the duty of the appellate Court to go through the record and dispose of the appeal on the *merits*.[1] This duty is irrespective of the question whether the appellant appears or does not appear; if he appears he is bound to be heard; if not, the record should be perused and the appeal disposed of on the merits.[2]

R 242 : 32 Cri L Jour 1268 : 1931 Cri Cas 920, *Muhammad Azimuddin* v. *Emperor*. Sessions Judge has power to alter sentence of imprisonment though order of detention falls to the ground thereby.]

Cantonments Act (3 *of* 1880), *Section* 28 :—

(1884) 1884 Pun Re Cr No. 40, p. 77 (84, 87), *Clarde* v. *Empress*. In a case tried under S. 28 of the Cantonments Act no appeal lies from any decision thereon.

Act XXXVII of 1855, *Section* 4 :—

(1872) 17 Suth W R Cri 11 (11), *Queen* v. *Boydonath Mukerjee*. Under S. 4, Cl. (1) of Act XXXVII of 1855 all sentences passed in criminal cases are final and no appeal lies to the High Court.

Frontier Crimes Regulation (3 *of* 1901), *Ss.* 48 and 49 :—

(1932) 1932 Lah 436 (437) : 13 Lah 585 : 33 Cri L Jour 333 : 1932 Cri Cas 582, *Mt. Sabhai* v. *Emperor*. Ss. 48 and 49 apply only to orders passed by Special Tribunals — They do not affect High Court's powers.

Borstal Schools Act (1926), *Section* 21 :—

(1932) 1932 Sind 175 (177) : 26 Sind L R 295 : 34 Cri L Jour 11 : 1932 Cri Cas 732, *Issa* v. *Emperor*.

Note 2.

1. (1935) 1935 P C 89 (92) : 36 Cri L Jour 838 : 62 Ind App 129 : 1935 Cri Cas 551 (P C), *Emperor* v. *Dahu Raut*.
2. (1889) 1889 All W N 55 (55), *Queen-Empress* v. *Khimat Singh*.
3. (1915) 1915 Mad 1038 (1039) : 38 Mad 498 : 14 Cri L Jour 497, *Kamakshamma* v. *Emperor*.

Note 3.

1. (1911) 12 Cri L Jour 481 (481) (All), *Sheoji* v. *Emperor*.
   (1909) 9 Cri L Jour 553 (555) : 5 Nag L R 76, *Ratanchand* v. *Emperor*.
   (1929) 1929 Lah 849 (849) : 30 Cri L Jour 902 : 1929 Cri Cas 512, *Nihal* v. *Emperor*.
   (1930) 1930 Lah 659 (659) : 1930 Cri Cas 803 : 11 Lah 242 : 31 Cri L Jour 979, *Roora* v. *Emperor*.
   (1919) 1919 Oudh 323 (324) : 20 Cri L Jour 744, *Balakaran Singh* v. *Emperor*.
   (1930) 1930 Oudh 334 (334) : 31 Cri L Jour 939: 1930 Cri Cas 460, *Tain* v. *Emperor*.
   (1927) 1927 Pat 176 (176) : 6 Pat 16 : 28 Cri L Jour 351, *Kuldip Singh* v. *King-Emperor*.
   (1934) 1934 Pesh 21 (21) : 35 Cri L Jour 963 : 1934 Cri Cas 522, *Din Mohammad* v. *Emperor*.
   (1895) 1895 Pun Re Cr No. 21, page 59 (59), *Koura* v. *Emperor*.
   (1905) 2 Cri L Jour 66 (66) : 1905 Pun Re Cr No. 11, *Nihal Singh* v. *King-Emperor*.
   (1924) 1924 Pat 376 (376) : 24 Cri L Jour 475, *Baldeo Dubey* v. *King-Emperor*.
   (1923) 1923 All 175 (176) : 24 Cri L Jour 662, *Ramachandar* v. *Emperor*.
   (1926) 1926 Bom 548 (548) : 50 Bom 673 : 27 Cri L Jour 1167, *Trimbak Balwant* v. *Emperor*.
   (1924) 1924 Cal 95 (95) : 50 Cal 972 : 25 Cri L Jour 1150, *Banshi Irdha* v. *Brojeswar*.
   (1907) 11 Cal W N 135n (136n), *Noai Sheikh* v. *The Emperor*.
2. (1919) 1919 Pat 54 (56) : 20 Cri L Jour 271, *Sham Behari Singh* v. *Emperor*. An appellant must be given a notice of the adjourned hearing.
   (192 1927 Pat 176 (176) : 6 Pat 16 : 28 Cri L Jour 351, *Kuldip Singh* v. *Emperor*.

Sec. 423 Notes 3—7

The whole record must be perused; it is not enough to merely go through the judgment.[3] But documents and evidence not forming part of the record of the proceedings of the lower Court cannot be referred to or considered in appeal.[4]

An appeal cannot be dismissed on the ground that the sentence of the Lower Court is without jurisdiction. Where a Magistrate first passed a non-appealable sentence and then illegally corrected it into an appealable sentence it was held that an appeal lay against the latter and could not be dismissed on the ground that the original sentence was non-appealable.[5]

4. Dismissal of appeal for default can be set aside.

Where an appeal is dismissed for default, of appearance of the appellant, there is no 'judgment' within the meaning of Section 369, *ante*, and the Court making the order can set aside the order and re-hear the appeal according to law.[1]

5. Refusal to entertain appeal on ground that conviction ought to have been on non-appealable Section.

Where a conviction is given under an appealable Section, the appeal cannot be refused to be entertained because the conviction, in the appellate Court's opinion, ought to have been under a non-appealable Section.[1]

6. Admission of appeal does not preclude objection as to its admissibility.

The mere fact that an appeal was admitted in the absence of the respondent does not preclude the appellate Court from entertaining and giving effect, at the hearing, of an objection as to the maintainability of the appeal. Thus the appellate Court can entertain an objection that there was no sufficient cause under Section 5 of the Limitation Act for excusing the delay in filing the appeal,[1] or an objection that no appeal lies against the particular sentence.[2]

7. Appeal cannot be admitted merely for reviewing sentence.

An appeal cannot be admitted merely for the purpose of reviewing the *sentence* only. If the appeal is admitted the appellant is entitled to be heard on the merits of the whole case. Where this is not done the High Court will order a re-hearing of the appeal.[1]

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3. (1913) 14 Cri L Jour 182 (183) : 19 Ind Cas 182 (Cal), *Abbash Ali* v. *Emperor*.
(1923) 1923 Pat 368 (368) : 24 Cri L Jour 453, *Newa Lal Rai* v. *Emperor*.

4. (1910) 11 Cri L Jour 221 (221) : 6 Ind Cas 12 (Mad), *In re Muthu Goundan*.
(1910) 11 Cri L Jour 734 (734) : 8 Ind Cas 943 (Mad), *Chinthalapudi, In re*.
(1872) 17 Suth W R Cr 5 (5), *Queen* v. *Wazira*. Evidence taken before a Magistrate but not used at the trial, cannot be referred to on appeal.

5. (1911) 12 Cri L Jour 431 (431) : 11 Ind Cas 615 (Bom), *Emperor* v. *Keshavlal Virchand*.
(1911) 12 Cri L Jour 402 (402, 403) : 35 Bom 418, *Emperor* v. *Keshalal Virchand*.

Note 4.

1. (1909) 9 Cri L Jour 553 (554) : 5 Nag L R 76, *Ratanchand* v. *Emperor*.

Note 5.

1. (1888) Ratanlal 363 (364), *In re Karunaram*.

Note 6.

1. (1914) 1914 Bom 111 (111) : 38 Bom 613, *Harchand Panaji* v. *Gulabchand Kanji*.
2. (1913) 14 Cri L Jour 254 (254) : 40 Cal 631, *Aziz Sheikh* v. *Emperor*.

Note 7.

1. (1895) Ratanlal 826 (827), *Queen-Empress* v. *Dagdu Gangaram*.
(1931) 1931 Pat 351 (351) : 32 Cri L Jour 1017 : 1931 Cri Cas 799, *Sheikh Rijhu* v. *Emperor*.
(1914) 1914 Cal 276 (277) : 41 Cal 406 : 14 Cri L Jour 485, *Nafar Sheikh* v. *Emperor*.
[See however (1933) 1933 Cal 124 (125) : 60 Cal 571 : 34 Cri L Jour 633 : 1933 Cri Cas 140, *Nil Ratan Ganguli* v. *Emperor*.]

8. Withdrawal of appeal.

A petition of appeal presented for admission may be withdrawn by the appellant. The reason is that a right of appeal is a privilege and the party concerned is at liberty to insist upon or abstain from the exercise of that right in accordance with the principle that every privilege given to a party by law may be waived at the option of that party.[1] According to the undermentioned case[2] a party can withdraw his appeal at any time before judgment. According to the High Court of Calcutta, it is doubtful if an appeal can be withdrawn as of right, after the appellate Court has perused the evidence.[3]

9. Parties must be given an opportunity of being heard.

An appeal cannot be dismissed summarily under this Section.[1] The stage at which the powers under this Section are to be exercised arises after the notice referred to, in Section 422, has been given to the parties specified therein. The appellate Court must give the appellant or his pleader, an opportunity of being heard.[2] It cannot dispose of the appeal immediately after sending for the record without giving any such opportunity.[3] Thus, it cannot dismiss the appeal without a hearing on the ground that "the matter is a mere trifle."[4]

On the other hand, where an opportunity has been given, but the appellant or his pleader is absent at the hearing,[5] or is not prepared to argue,[6] the Court is not bound to wait further but is competent to dispose of the appeal on the merits after perusing the record. Thus, the only limitation on the powers of the appellate Court is that, before disposing of the appeal, it must peruse the record and, if the appellant, having been given an opportunity of being heard, is present or is represented by a pleader, he must be heard.[7]

Where a pleader appears on behalf of the appellant but files no *vakalatnama* the appellate Court may grant him some time for producing the *vakalatnama* and then hear him; but the refusal to grant time, cannot be said to be wrong.[8] If the appellant is in jail and is unrepresented by a pleader, he

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Note 8.

1. (1879) 5 Cal L R 372 (373), *In the matter of Chander Nath Deb.*
2. (1904) 1 Cri L Jour 751 (752, 753) : 17 C P L R 97, *Emperor* v. *Sheikh Rasul.* Can be withdrawn.
3. (1880) 6 Cal L R 427 (428), *Dwaraka Manjhee, In re.*

Note 9.

1. (1899) 1 Bom L R 225 (225), *Queen-Empress* v. *Gopala bin Rama.*
   (1901) 2 Weir 474 (475), *Veeraswami Naicken, In re.*
2. (1870) 1870 Pun Re Cr No. 31, page 48 (49), *Fuzl* v. *Crown.* Time fixed for appearance so that it was physically impossible for the appellant to be present.
   (1897) Ratanlal 914 (914), *Queen-Empress* v. *Chunia.* Appeal disposed of in chambers without being aware of the fact that accused was represented by pleader — Judgment was set aside.
3. (1917) 1917 Pat 331 (332) : 18 Cri L Jour 639, *Jagdeo Rai* v. *Kali Rai.*
   (1919) 1919 Pat 54 (56) : 20 Cri L Jour 271, *Sham Behari Singh* v. *Emperor.*
   (1924) 1924 Rang 294 (295) : 25 Cri L Jour 933, *Ta Pu* v. *King-Emperor.*
   (1882) 2 Weir 475 (475), *Shunmugham Chettiar* v. *Alagia Numbiya Pillai.* Illegal disposal of appeal on a date of which no notice was given.
4. (1898) Ratanlal 978 (978), *Jivacharan* v. *Keshavram.*
5. (1891) 13 All 171 (187, 188) (F B), *Queen-Empress* v. *Pohpi.*
   (1923) 1923 Pat 297 (298) : 26 Cri L Jour 419, *Kabir Shah* v. *Emperor.* Appeal transferred—Appellant not aware of transfer — Transferee Court disposing of appeal on merits does not commit any mistake.
6. (1935) 1935 Pat 515 (518) : 36 Cri L Jour 1354 (1356, 1357) : 1935 Cri Cas 1273, *Kewalram* v. *Emperor.*
7. (1891) 13 All 171 (187, 188), *Queen-Empress* v. *Pohpi.* Mohammad, J. *contra.*
8. (1920) 1920 Cal 175 (175) : 21 Cri L Jour

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is entitled to appear and be heard in person[9] and, for this purpose, the appellate Court has power to direct him to be brought before it.[9a] A contrary view has however been taken by the Sind Judicial Commissioner's Court and by the Chief Court of Oudh, namely that an appellant in jail cannot appear in person in Court.[9b]

The only persons that are entitled to be heard are those mentioned in the Section. A mukhtyar is a pleader, and if he represents the appellant, he must be heard.[10] A complainant or a *private prosecutor* cannot claim, as of right, to be heard in appeal.[11] The Court may, however, in its discretion grant him permission to do so.[11a]

The parties who are to be heard, must be heard in each other's presence.[12] The Court cannot cut short the arguments so long as the parties are not guilty of unnecessary repetition or of irrelevant arguments; nor can it decline to hear them or cut short their arguments because it is expected by the superior Courts to turn out a certain amount of work within a certain time.

There is a difference of opinion as to whether, if the respondent is heard, the appellant has a *right of reply*. According to the High Court of Calcutta[13] the practice of the Court is that the appellant shall have a right of reply. According to the High Court of Lahore[14] there is nothing in the language of the Section to preclude the appellant or his pleader from replying, and as a matter of principle such right must be conceded to him. The Chief Court of Oudh has, on the other hand, held that the appellant's pleader has no *right* of reply but that it is a *privilege*, which should not ordinarily be refused by the Court.[15]

413, *Jasir Khan* v. *Emperor*.

9. (1928) 1928 All 84 (86) : 50 All 543: 29 Cri L Jour 334 (F B), *Lal Bahadur* v. *Emperor*. Overruling 13 All 171 and dissenting from.
(1883) 2 Weir 472 (473), *Kotina Butchaiya, In re*.
(1883) 2 Weir 473 (473), *High Court Proceedings, 12th November* 1883, *No.* 3541.

9a (1883) 2 Weir 473 (473), *High Court Proceedings, 12th November* 1883, *No.* 3541.

9b (1927) 1927 Oudh 312 (313) : 28 Cri L Jour 679, *Ram Prasad* v. *King-Emperor*.
(1929) 1929 Sind 5 (6) : 29 Cri L Jour 932 (933), *Allah Dito* v. *Emperor*.

10. (1881) 6 Bom 14 (15), *Imperatrix* v. *Shivram Gundo*. Disposal without hearing mukhtiar of accused set aside.

11. (1904) 9 Cal W N 60*n* (60*n*), *Dowlatram*. Was heard.
(1932) 1932 Cal 61 (61, 62) : 33 Cri L Jour 305 : 1932 Cri Cas 9, *Behari Majhi* v. *Hari Majhi*. No right to be heard but can be heard.
(1886) 1886 Pun Re Cri No. 29, page 71 (72), *Akbar* v. *Empress*. No right to be heard except by permission.

11a (1871-74) 7 Mad H C Rul App 42*n* (42*n*), *High Court's Proceedings, 6th November* 1874. There is nothing in S. 423 which prevents an appellate Court from hearing a vakil privately instructed to support the prosecution, and when the Public Prosecutor does not appear on behalf of the Government, it would generally be discreet on the part of the Court to do so.
[*See also cases in foot-notes* (11).]

12. (1932) 1932 Cal 856 (857) : 33 Cri L Jour 775 : 1932 Cri Cas 887, *Shaikh Bhotali* v. *Shaikh Kalu*.

13. (1932) 1932 Cal 856 (857) : 33 Cri L Jour 775 : 1932 Cri Cas 887, *Shaikh Bhotali* v. *Shaikh Kalu*.

14. (1916) 1916 Lah 74 (74, 75) : 1917 Pun Re Cri No. 21 : 18 Cri L Jour 3, *Bhuta Singh* v. *Emperor*. S 423 does not preclude an appellant or his pleader from replying to the arguments of the Public Prosecutor in an appeal. As a matter of principle such right of reply should be conceded to him.

15. (1925) 1925 Oudh 65 (66) : 25 Cri L Jour 1169, *Prag* v. *King-Emperor*.
(1925) 1925 Oudh 50 (50) : 25 Cri L Jour 1173, *Bahra* v. *Emperor*.

10. Notice of appeal.

See Notes to Section 422, *ante*.

Sections 422 and 423 read together show that it is imperative that the appellate Court should hear the appeal *at the time and place* specified in the notice. A hearing of which no notice is given is illegal.[1]

It has been held by the High Court of Madras that where, in an inquiry under Section 517, the party, after notice, does not choose to appear, he is not entitled to complain that he had no notice in the appeal against the order passed in such inquiry.[2]

11. Connected appeals—Hearing of.

An appellate Court should not hear two appeals together; each appeal must be kept absolutely separate and dealt with on the merits.[1] Further it is irregular for the Court, while dealing with connected criminal appeals, to make cross-references to the evidence and judgments in the several cases.[2] Where two parties were charged for their attacks against each other in the same occurrence, and the High Court, though trying the two charges separately, gave a single judgment, it was held by the Privy Council, that, although technically it would have been better to have kept the evidence entirely distinct and to have given two separate judgments, the irregularity was one which, in the absence of prejudice, would not affect the validity of the convictions.[3]

12. Appointment of assessors in appeal.

The appointment of assessors in appeal is not authorised by law.[1]

13. New plea.

A plea of self-defence can be raised for the first time in appeal and the appellate Court should examine the plea so raised,[1] if the facts on the record justify such plea.[2] Similarly a question of law such as that the prosecution is barred by limitation[3] or that the trial is vitiated by an illegality[4] (*e. g.* a misjoinder of charges[5] or the constitution of the Court being illegal or irregular[5a]) may be raised for the first time in appeal. As a general rule however, an objection as to the admissibility of evidence will not be enter-

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Note 10.

1. (1909) 9 Cri L Jour 553 (555) : 5 Nag L R 76, *Ratan Chand* v. *Emperor*.
2. (1928) 1928 Mad 194 (195) : 51 Mad 606 : 29 Cri L Jour 322, *Dawood* v. *Valayuda Semmanotti*.

Note 11.

1. (1928) 1928 Cal 230 (230, 231) : 29 Cri L Jour 512, *Doat Ali* v. *Mohammad Sayad Ali*.
2. (1916) 1916 Cal 912 (913) : 17 Cri L Jour 439, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Man Mohan Roy*.
   (1916) 1916 Mad 1021 (1022) : 16 Cri L Jour 542, *T. V. R. Indra Talavar* v. *R. Narasimha Rau*.
3. (1927) 1927 P C 26 (27) : 8 Lah 193 : 28 Cri L Jour 254 (P C), *Madat Khan* v. *Emperor*.

Note 12.

1. (1868) 1868 Pun Re Cri No. 17, page 42 (42), *The Crown* v. *Syed Ahmad*.

Note 13.

1. (1925) 1925 All 664 (666) : 26 Cri L Jour 997, *Ajudhia Prasad* v. *Emperor*.
   (1926) 1926 Nag 202 (202) : 26 Cri L Jour 1552, *Rahimanshah* v. *Emperor*.
2. (1932) 1932 Lah 606 (607) : 34 Cri L Jour 462 : 1932 Cri Cas 820, *Nur Dad* v. *Emperor*.
   (1934) 1934 Oudh 251 (254) : 35 Cri L Jour 943 : 1934 Cri Cas 710, *Mohammad Nabi Khan* v. *Emperor*.
3. (1903) 7 Cal W N 883 (889), *Bijoyendra Lall*.
4. (1931) 1931 Oudh 113 (113) : 32 Cri L Jour 91 : 1931 Cri Cas 273 : 6 Luck 386, *Ram Lautan* v. *Emperor*.
5. (1902) 26 Mad 125 (126, 127), *Krishnaswami Pillai* v. *The Emperor*.

5a (1929) 1929 Cal 92 (93) : 30 Cri L Jour 484, *Intaz Mandal* v. *Emperor*.
[But see (1930) 1930 Cal 291 (291, 294) : 1930 Cri Cas 379 : 57 Cal 1062, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Bhajoo*

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tained for the first time in appeal.[6] Similarly an objection that the trial ought to have been with the aid of assessors and not by jury will not be entertained for the first time in appeal.[7]

14. Appreciation of evidence by the appellate Court.

The appellate Court should exercise its own independent judgment in reviewing the evidence[1] and must form its own conclusions on the evidence.[2] A general agreement with the lower Court is not enough.[3]

A trial Court may give a finding of fact in two ways:—

(a) by drawing *inferences* from proved and admitted facts or

(b) by relying on the *credibility of the evidence.*

This credibility may again depend upon the demeanour of the witnesses or upon other factors. In case (a), the appellate Court is as good as the first Court. Even in case (b) where the credibility of the evidence depends upon factors other than the *demeanour* of witnesses, the appellate Court is free to come to its own conclusions as to the credibility of the evidence. Similarly when the trial Court convicts and the appellate Court acquits the accused, the High Court, on appeal by the Government against the acquittal, is not in any worse position than the first appellate Court, in the matter of weighing the evidence.[4] Where, however, a finding of fact is based upon the credibility of evidence involving the appreciation of the demeanour of witnesses, the view

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Majhi. Not entertained as there was no prejudice.]

6. (1933) 1933 Cal 190 (192) : 34 Cri L Jour 430 : 1933 Cri Cas 236, *Rusuf Ali* v. *Emperor.*

7. (1930) 1930 Mad W N 776 (776), *Karuppa Thevan* v. *Emperor.*

Note 14.

1. (1890) 1890 All W N 148 (148), *Queen-Empress* v. *Bishan.*
(1872-92) 1872-92 Low Bur Rul 516 (516, 517), *Kyan Zan* v. *Queen-Empress.*

2. (1868) 1868 Pun Re Cri No. 8, page 17 (23), *Sherali* v. *The Crown.*
(1896) 23 Cal 347 (349), *Milan Khan* v. *Saga Bepari.*
(1933) 1933 Pat 100 (102) : 1933 Cri Cas 253 : 11 Pat 807 : 34 Cri L Jour 427, *Masaddi Rai* v. *Emperor.* Admission of counsel does not relieve the appellate Court of this duty.
(1913) 14 Cri L Jour 419 (420) : 40 Cal 376, *Fidoi Hossein* v. *Emperor.* The fact that counsel did not refer to evidence does not absolve the Court from looking into it.
(1913) 14 Cri L Jour 182 (183) : 19 Ind Cas 182 (Cal), *Abbash Ali* v. *Emperor.* Where in a criminal appeal, no one appears on behalf of the appellant, the Court ought to peruse the evidence and come to a finding upon facts independently of the judgment. A decision on perusal of the judgment only is not legal.
(1921) 22 Cri L Jour 414 (414) : 61 Ind Cas 654 (Cal), *Nogendra Nath* v. *Emperor.*
(1924) 1924 Cal 618 (619) : 25 Cri L Jour 1044, *Inatulla Sircar* v. *Emperor.*
(1934) 1934 All 842 (843) : 35 Cri L Jour 1229 : 1934 Cri Cas 1028, *Emperor* v. *Noor Ahmed.* It must review the entire evidence.
(1876) 1876 Pun Re Cri No. 5, page 6 (7), *Turni* v. *Crown.* The law of appeal constitutes the appellate Court a Judge of the facts as completely as the Court of first instance, and the former Court should give the benefit of the doubt to the accused, if it feels any doubt about the guilt of the accused.

3. (1911) 12 Cri L Jour 43 (43) : 9 Ind Cas 261 (Cal), *Jatra Mohan* v. *Akhill Chandra.*
See the following cases :—
(1921) 1921 Pat 496 (497) : 22 Cri L Jour 485, *Mayadhar Mahanty* v. *Danardan Kund.* Where a prosecution case is disbelieved in essential particulars, it is not safe to convict the accused on the residue of the evidence that may be acceptable.
(1927) 1927 Mad 410 (411) : 28 Cri L Jour 238, *Venkataswami, In re.* Rejecting part of prosecution story—Conviction on the rest believed.
(1919) 1919 Pat 534 (536) : 20 Cri L Jour 375, *Ram Prasad Mahton* v. *Emperor.*

4. (1930) 1930 Lah 403 (405) : 32 Cri L Jour 348 : 1930 Cri Cas 463, *Emperor* v. *Mohammad Khan.*

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of the trial Court which has seen and heard the witnesses is entitled to great weight and should not be lightly disregarded.[5] In such cases the appellate Court will not interfere unless the indications of mistake are obvious or the evidence too strong to be rejected especially where the lower Court's finding is in favour of the accused's innocence.[6] Except in this respect there is no

5. (1915) 1915 P C 1 (2) : 39 Bom 386 : 42 Ind App 110 (PC), *Bombay Cotton Manufacturing Company* v. *Motilal Shivlal*. In a matter of appreciation of evidence the opinion of the trial Judge should not be lightly disturbed on appeal.
(1874) 21 Suth W R Cr 13 (14), *Queen* v. *Madhub Chunder Geri*.
(1928) 1928 Lah 319 (319, 320) : 29 Cri L Jour 279, *Muhammad Baksha* v. *Emperor*.
(1925) 1925 Oudh 715 (717) : 26 Cri L Jour 1317, *Sheo Narain Singh* v. *King-Emperor*. The High Court must be guided as regards the credibility of oral evidence mainly by the Court that heard it.
(1933) 1933 Lah 232 (233) : 34 Cri L Jour 318 : 1933 Cri Cas 352, *Banta Singh* v. *Emperor*. It is not desirable in most cases to rely upon the evidence which has been definitely disbelieved by the trial Judge for good reasons and to try to support the conviction of an accused person on such evidence.
(1935) 1935 Pat 95 (97) : 36 Cri L Jour 348 : 1935 Cri Cas 208, *Ibrahim* v. *Emperor*. Lower Court's opinion should be treated as almost conclusive.
(1932) 33 Cri L Jour 929 (930) : 139 Ind Cas 756 (Oudh), *Emperor* v. *Paragi*. The appellate Court must be slow to differ from the opinion of the trial Judge as regards the value of the testimony of witnesses unless there are good grounds.
(1929) 1929 Mad 846 (847) : 31 Cri L Jour 449 : 1929 Cri Cas 614, *Public Prosecutor* v. *Pakiriswami*. It is only in very exceptional circumstances that a Court dealing with an appeal against an acquittal should reverse that finding by accepting oral evidence which the trial Court after enjoying the advantage of hearing the witnesses has disbelieved.
(1931) 1931 Rang 86 (87) : 8 Rang 671 : 1931 Cri Cas 374 : 32 Cri L Jour 929, *Emperor* v. *Maung Tun Nyan*.
(1933) 1933 Sind 325 (326) : 35 Cri L Jour 129 : 1933 Cri Cas 1077, *Emperor* v. *Mohammad Oosman*.
(1933) 1933 Oudh 372 (373) : 35 Cri L Jour 66 : 1933 Cri Cas 1049, *Emperor* v. *Paramashar Dein*.
(1926) 1926 Oudh 245 (246) : 27 Cri L Jour 57, *Bhukan* v. *Emperor*.
(1909) 10 Cri L Jour 160 (163) : 2 Ind Cas 825 (Bom), *Mustafa Rahim* v. *Motilal Chunilal*.
(1882) 11 Cal L R 25 (29, 30), *Protap Chunder Mukerjee* v. *Empress*. The sound rule to apply in trying a criminal appeal where questions of facts are in issue is to consider whether the conviction is right and in this respect a criminal appeal differs from a civil one.
[See also (1874) 20 Suth W R Cr 13 (13), *Queen* v. *Kheraj Mullah*.]
6. (1904) 1 Cri L Jour 781 (787) : 1905 Pun Re Cr No. 7, *King-Emperor* v. *Chattar Singh*.
(1914) 1914 Lah 427 (431) : 15 Cri L Jour 203, *Emperor* v. *Bishen Singh*.
(1920) 1920 Lah 244 (245) : 22 Cri L Jour 172, *Emperor* v. *Samand*.
(1918) 1918 Lah 54 (55) : 19 Cri L Jour 275, *Emperor* v. *Mt. Jawai*.
(1918) 1918 Lah 105 (107) : 19 Cri L Jour 723 : 1918 Pun Re Cri No. 25, *Emperor* v. *Muhammad Shafi*.
(1918) 1918 Lah 286 (286) : 19 Cri L Jour 710, *Emperor* v. *Lachmandas*. Culpability of accused must be very clear and indubitable before appellate Court would interfere.
(1919) 1919 Lah 356 (359) : 20 Cri L Jour 188, *Pallia* v. *Emperor*.
(1919) 1919 Lah 440 (442) : 19 Cri L Jour 187, *Emperor* v. *Jagat Ram*.
(1935) 1935 Mad W N 105 (111, 112), *Public Prosecutor* v. *Pocha Sanjivi Reddy*. 1930 Mad 704 (705) dissented from as being too rigid.
(1934) 1934 Lah 710 (715) : 36 Cri L Jour 419 : 1934 Cri Cas 1020, *Emperor* v. *Muhammad Khan*.
(1933) 1933 Lah 871 (874) : 35 Cri L Jour 137 : 1933 Cri Cas 1116, *Emperor* v. *Rai Singh Narain Singh*.
(1933) 1933 Lah 388 (390) : 34 Cri L Jour 598 : 1933 Cri Cas 632, *Emperor* v. *Sher Singh*.
(1933) 1933 Lah 296 (298) : 35 Cri L Jour 626 : 1933 Cri Cas 396, *Muzaffar* v. *Emperor*.
(1927) 1927 Lah 549 (554) : 28 Cri L Jour 556, *Emperor* v. *Bakshtawar Lal*.
(1932) 1932 Sind 143 (143) : 33 Cri L Jour 900 : 1932 Cri Cas 587, *Udharam* v. *Emperor*. Courts are always reluctant to interfere with the findings of a trial Court unless strong grounds are made out for so doing.
(1933) 1933 Oudh 254 (255) : 34 Cri L Jour 858 : 1933 Cri Cas 560, *Emperor* v. *Hub Lal*.

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difference in the manner of appreciating evidence, between an appellate Court and the trial Court.[7] Where the evidence has been properly appreciated by the lower Court and its view cannot be said to be wrong, the appellate Court cannot interfere.[8]

There is a difference of opinion as to whether the appellant is bound to show that the decision of the lower Court is wrong. On the one hand it has been held that there is no such burden on the appellant. It is for the appellate Court as for the first Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the accused has been established beyond all reasonable doubt.[9] According to this view the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of appeal; this presumption is not strengthened by an acquittal or weakened by a conviction in the trial Court: the onus of proof is neither increased nor lightened by an order of conviction or acquittal.[10]

On the other hand, it has been held, in the undermentioned case,[11] that the *presumption* is that the lower Court's decision is correct. According to this view, an appellant is not in the same position before an appellate Court as he is before the Court trying him, but must satisfy the appellate Court that there is sufficient ground for interfering.[12] It is submitted that the former view is to be preferred to the latter.

Where the whole of the prosecution evidence is disbelieved, a conviction by the lower Court in respect of two offences cannot be set aside as regards one offence and confirmed as regards the other; the whole of the conviction should be set aside.[13] Where improper evidence is admitted the appellate Court should see whether, excluding it, there still remains sufficient evidence to sustain the conviction of the lower Court and if so it should not interfere.[14] *See also* Section 167 of the Evidence Act.

15. Appeal from acquittal—Clause (a).

Section 407 of the Code of 1861 specifically provided, that "there shall be no appeal from a judgment of acquittal passed in any criminal Court." This was in accordance with the old established principle of English Law that a man once tried and acquitted for an offence is *ipso facto* protected from any subsequent trial for that offence, whether the subsequent trial is by the appellate or revisional Court.

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7. (1872) 17 Suth W R Cr 59 (59), *Coomajee, In re.*
8. (1935) 1935 Cal 561 (562) : 36 Cri L Jour 1275 : 1935 Cri Cas 969 (SB), *Emperor* v. *Bhawani Prosad Bhattacharjee.*
   (1933) 1933 Oudh 62 (63) : 1933 Cri Cas 102 : 34 Cri L Jour 377, *Rameshwar Tewari* v. *Emperor.*
   (1933) 1933 Oudh 269 (271, 272) : 35 Cri L Jour 58: 1933 Cri Cas 596, *Chotte Lal* v. *Emperor.*
   (1931) 1931 Oudh 83 (84, 85) : 6 Luck 582 : 1931 Cri Cas 211 : 32 Cri L Jour 630, *Emperor* v. *Narain.*
9. (1915) 1915 Cal 187 (187) : 15 Cri L Jour 686 : 42 Cal 374, *Kanchan Mullick* v. *King-Emperor.*
10. (1934) 1934 All 842 (843) ; 35 Cri L Jour 1229 : 1934 Cri Cas 1028, *Emperor* v. *Nur Ahmad.*
11. (1872) 18 Suth W R Cr 15 (16), *Queen* v. *Ramlochan Singh.*
12. (1883) 5 All 386 (387), *Emperor* v. *Sajiwan Lal.*
    [See also (1898) 20 All 459 (464), *Queen-Empress* v. *Prag Dut.*
    (1926) 1926 Oudh 120 (124) : 27 Cri L Jour 529, *Sitla Bakhsh* v. *Emperor.*]
13. (1918) 1918 All 355 (355) : 19 Cri L Jour 37, *Sheobans Singh* v. *Emperor.*
    [See also (1902) 6 Cal W N 380 (382), *Motijan Bibi* v. *The Crown.*]
14. (1874) 11 Bom H C R 90 (98), *Reg.* v. *Parbhudas.*

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On grounds of public policy,[1] however, a right of appeal against an acquittal subject to certain limitations was for the first time recognised in this country by the Code of 1872.[2] Being thus a right of an exceptional and unusual character, an appellate Court will hesitate and feel great reluctance in interfering with the finding of the Court below and coming to a different conclusion.[3] Where two views are possible on the evidence, an appellate Court will not interfere merely because it would, sitting as a trial Court, have taken the other view[4] unless it is shown that there has been some irregularity in procedure or some other serious defect which necessitates the re-examination of the entire evidence and a fresh conclusion.[5] Again where the evidence against the accused is too scanty or insufficient[6] or where it is not established beyond all reasonable doubt that the respondent is guilty of the offence charged,[7] the appellate Court will not interfere with the acquittal. Nor will the finding of the trial Court be displaced merely because the Government's view of the case does not coincide with that of the trial Court.[8]

Except in regard to the points stated above, there is no distinction drawn, so far as the Sections of the Code themselves are concerned, between appeals from convictions and appeals from acquittals in regard to the rules and limitations applicable to them.[9] It was, however, held in several decisions,

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Note 15.

1. (1934) 1934 All 27 (31) : 56 All 354 : 1934 Cri Cas 59 : 35 Cri L Jour 364 (F B), *Emperor* v. *Sheo Janak Pande.*
2. (1931) 1931 All 439 (441) : 1931 Cri Cas 711, *Emperor* v. *Ram Adhen Singh.*
   (1882) 4 All 148 (149), *Empress of India* v. *Gayadu.*
   (1874) 7 Mad H C R 339 (341), *The Government Pleader, In re.*
3. (1934) 1934 All 27 (35) : 56 All 354 : 1934 Cri Cas 59 : 35 Cri L Jour 364 (F B), *Emperor* v. *Sheo Janak Pande.*
   (1925) 1925 Sind 295 (295) : 19 Sind L R 111 : 26 Cri L Jour 1028, *Emperor* v. *Sunder Das.*
   (1923) 1923 Oudh 217 (224) : 24 Cri L Jour 770, *Emperor* v. *Natoram.*
   (1916) 1916 Oudh 112 (114) : 17 Cri L Jour 540, *Emperor* v. *Durga Prasad.* Lower Court's decision should not be lightly set aside.
   (1927) 28 Cri L Jour 212 (212, 213) : 99 Ind Cas 1012 (Lah), *Emperor* v. *Ibrahim.*
4. (1934) 1934 All 27 (36) : 56 All 354 : 1934 Cri Cas 59 : 35 Cri L Jour 364 (F B), *Emperor* v. *Sheo Janak Pande.*
   (1931) 1931 All 712 (715) : 32 Cri L Jour 1073 : 1931 Cri Cas 1048, *Emperor* v. *Baldeo Koeri.*
   (1931) 1931 All 439 (442) 1931 Cri Cas 711, *Emperor* v. *Ram Adhen Singh.*
   (1918) 1918 Lah 54 (55) : 19 Cri L Jour 275, *Emperor* v. *Mt. Jawai.*
   (1916) 1916 Lah 380 (382) : 17 Cri L Jour 97, *Bachinta* v. *Emperor.* High Court will not interfere where appeal is based on doubtful weighing of facts.
   (1914) 1914 Lah 427 (431) : 15 Cri L Jour 203, *Emperor* v. *Bishen Singh.*
   (1903) 1903 Pun Re Cr No. 11, page 31 (32), *Empress of India* v. *Mangat.*
   (1934) 1934 Lah 212 (215) : 35 Cri L Jour 349 : 1934 Cri Cas 447, *Emperor* v. *Natha Singh.*
   (1934) 1934 Lah 523 (524) : 36 Cri L Jour 635 : 1934 Cri Cas 809, *Emperor* v. *Kura.*
   (1916) 1916 Oudh 112 (114) : 17 Cri L Jour 540, *Emperor* v. *Durga Prasad.*
   (1894) 16 All 212 (214), *Queen-Empress* v. *Robinson.*
   (1883) 4 All 148 (149), *Empress of India* v. *Gayadin.*
   (1882) 1882 All W N 64 (64), *Empress* v. *Wali Mohammad.* Following 4 All 148 (149).
5. (1934) 1934 All 27 (36) : 56 All 354 : 1934 Cri Cas 59 : 35 Cri L Jour 364 (FB), *Emperor* v. *Sheo Janak Pande.*
6. (1931) 1931 All 439 (442) : 1931 Cri Cas 711, *Emperor* v. *Ram Adhin Singh.*
   (1931) 1931 All 712 (715) : 32 Cri L Jour 1073 : 1931 Cri Cas 1048, *Emperor* v. *Baldeo Koeri.*
   [See also (1877) 1 Bom 610 (623), *Reg.* v. *Hanmanta.*]
7. (1931) 1931 Rang 86 (87) : 8 Rang 671 : 32 Cri L Jour 929 : 1931 Cri Cas 874, *Emperor* v. *Maung Tun Ngan.*
8. (1882) 4 All 148 (150), *Empress of India* v. *Gayadin.*
   (1894) 16 All 212 (214), *Queen-Empress* v. *Robinson.*
9. (1931) 1931 All 439 (441) : 1931 Cri Cas 711, *Emperor* v. *Ram Adhin Singh.*
   (1914) 1914 Mad 628 (631) : 38 Mad 1028 : 15 Cri L Jour 236, *In re Sinnai*

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that a distinction must be drawn as regards the powers of the appellate Court in dealing with an appeal from an acquittal and an appeal from a conviction.[10] Thus it was held that the appellate Court had no jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower Court had "obstinately blundered"[11] or had, through incompetence, stupidity or perversity reached distorted conclusions as to produce a positive miscarriage of justice,[12] or had in some other way so conducted itself as

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Goundan.

(1917) 1917 Cal 687 (687) : 17 Cri L Jour 9, *Deputy Legal Remembrancer, Behar* v. *Mutukdhari Singh.*

(1934) 1934 All 842 (843) : 35 Cri L Jour 1229 : 1934 Cri Cas 1028, *Emperor* v. *Nur Mohammad.*

(1885) 1885 Pun Re Cr No. 29, page 66 (67), *The Empress* v. *Uttam.*

(1890) 17 Cal 485 (487), *Queen-Empress* v. *Bibhuti Bhusan.*

(1925) 1925 All 315 (316) : 47 All 306 : 26 Cri L Jour 676, *Emperor* v. *Autar.*

(1934) 1934 All 27 (31) : 56 All 354 : 35 Cri L Jour 364 : 1934 Cri Cas 59 (F B), *Emperor* v. *Sheo Janak Pande.*

(1920) 1920 Bom 217 (219) : 21 Cri L Jour 17, *Emperor* v. *Sakaram Manaji.*

(1924) 1924 Bom 335 (337) : 25 Cri L Jour 786, *Emperor* v. *Moti Khoda.* As to appreciation of evidence, there is no difference.

(1931) 1931 All 712 (715) : 32 Cri L Jour 1073 : 1931 Cri Cas 1048, *Emperor* v. *Baldeo Kocri.*

(1904) 1 Cri L Jour 781 (789) : 1904 Pun Re Cr No. 7, *King-Emperor* v. *Chattar Singh.*

(1932) 1932 Lah 12 (13) : 32 Cri L Jour 1130 : 1932 Cri Cas 22, *Emperor* v. *Ramzan.*

(1931) 1931 Lah 18 (21, 23) : 32 Cri L Jour 485 : 1931 Cri Cas 82, *Bhai Khan* v. *Emperor.* There is no difference between the treatment by High Court of an appeal against a verdict of acquittal and that of an appeal from a conviction according to all High Courts, the inclination of the Lahore High Court being to attach more importance to it perhaps in the interest of the accused.

(1914) 1914 Mad 628 (631) : 15 Cri L Jour 236 : 38 Mad 1028, *In re Sinnu Goundan.*

(1934) 1934 Lah 710 (715) : 36 Cri L Jour 419 : 1934 Cri Cas 1020, *Emperor* v. *Mohammad Khan.*

(1931) 1931 Mad W N 729 (730), *The Public Prosecutor* v. *Thamada Ramudu.*

(1890) 2 Weir 462 (462, 463), *The Government Pleader* v. *Lakshmi Narasimha Chetty.* 4 All 148 dissented from.

(1904) 17 C P L R 75 (93), *Emperor* v. *Mt. Gulbi.*

(1910) 11 Cri L Jour 66 (66) : 1909 Pun Re Cr No. 15, *Emperor* v. *Harnama.*

But when an accused person has been acquitted by a Magistrate after hearing all the evidence against him the presumption is that there was at least reasonable doubt and the appellate Court must be positively convinced that there was no reasonable doubt, the benefit of all doubt shown to exist being against the appellant, whereas in an appeal from a conviction, the benefit of all reasonable doubt has been given in favour of the appellant. This appears to constitute the only distinction between an appeal from an acquittal and one from a conviction.

(1934) 1934 Sind 84 (88) : 35 Cri L Jour 1142 : 1934 Cri Cas 743, *Emperor* v. *Mt. Bhuro.*

(1898) 25 All 459 (464), *Queen-Empress* v. *Prag Dat.*

(1931) 1931 Rang 86 (87) : 8 Rang 671 : 1931 Cri Cas 374 : 32 Cri L Jour 929, *Emperor* v. *Maung Tun Nyan.*

(1893-1900) 1893-1900 Low Bur Rul 42 (46), *Queen-Empress* v. *Maung Baw.*

(1927) 1927 Sind 92 (94) : 27 Cri L Jour 1347 : 21 Sind L R 141, *Emperor* v. *Suleman.*

(1904) 1 Cri L Jour 1022 (1025) : 2 Low Bur Rul 303, *Emperor* v. *Po Saing Aung Pe.*

10. (1931) 1931 Lah 465 (466) : 32 Cri L Jour 1079 : 1931 Cri Cas 689, *Emperor* v. *Muzaffar.*

(1920) 1920 Lah 21 (23) : 21 Cri L Jour 349, *Emperor* v. *Turezi.* The indication of error in a judgment of acquittal ought to be more clear and palpable and the evidence more cogent and convincing, in order to justify its being set aside, than would be necessary in the case of conviction.

(1904) 1 Cri L Jour 781 (789) : 1904 Pun Re Cr No. 7, *Emperor* v. *Chattar Singh.*

11. (1882) 4 All 148 (149, 150), *Empress of India* v. *Gayadin.*

(1894) 16 All 212 (214), *Queen-Empress* v. *Robinson.*

(1929) 1929 Pat 491 (496) : 8 Pat 496 : 31 Cri L Jour 148 : 1929 Cri Cas 248, *Emperor* v. *Deboo Singh.*

(1923) 1923 Pat 119 (121) : 23 Cri L Jour 410, *Emperor* v. *Kunja Dusadh.*

12. See the cases cited in foot-note (11).

(1929) 1929 Pat 508 (508) : 30 Cri L Jour

to produce a miscarriage of justice,[13] or had obviously blundered,[14] or its judgment was wrong and perverse,[15] or was unreasonable.[15a] A contrary view was also expressed in other decisions namely, that there was no distinction as regards the powers of the appellate Court between an appeal from an acquittal and an appeal from a conviction, and that the only question in each case was whether the conclusions upon the evidence were proper and correct.[16]

1116 : 1929 Cri Cas 268, *Emperor* v. *Ram Prasad*. In order to interfere, the judgment must be such as no body of sensible men could arrive at.

13. (1933) 1933 Pesh 27 (28) : 34 Cri L Jour 384 : 1933 Cri Cas 327, *Emperor* v. *Chattar Singh*.
(1897) 1897 Pun Re Cri No. 10, page 25 (26), *Queen-Empress* v. *Gulam Mohammad*.
(1913) 14 Cri L Jour 525 (526) : 20 Ind Cas 1005 (Lah), *Emperor* v. *Mt. Bakhtawari*.
(1925) 1925 Lah 600 (602) : 26 Cri L Jour 1141, *Emperor* v. *Ram Karan*.
(1920) 1920 Lah 21 (23) : 21 Cri L Jour 349, *Emperor* v. *Tureze*.
(1916) 1916 Lah 143 (144) : 17 Cri L Jour 194 : 1916 Pun Re Cri No. 15, *Emperor* v. *Nawab*.
(1934) 1934 Lah 523 (524) : 36 Cri L Jour 635 : 1934 Cri Cas 809, *Emperor* v. *Kura*.
(1934) 1934 Lah 212 (215) : 35 Cri L Jour 349 : 1934 Cri Cas 447, *Emperor* v. *Natha Singh*.
(1934) 1934 Rang 44 (45, 47) : 35 Cri L Jour 855 : 1934 Cri Cas 267, *Emperor* v. *U Ba U*.
(1924) 1924 Cal 611 (614) : 26 Cri L Jour 71, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Purna Chandra Ghose*.
(1882) 4 All 148 (149), *Empress of India* v. *Gayadin*.
(1894) 16 All 212 (214), *Queen-Empress* v. *Robinson*.
(1875) 7 N W P H C R 196 (199), *Queen* v. *Dukaran*.
(1911) 12 Cri L Jour 364 (371) : 1911 Pun Re Cr No. 10 (F B), *Emperor* v. *Kiru*. Not merely on the ground that the correctness of the judgment is open to doubt.

14. (1931) 1931 All 439 (442) : 1931 Cri Cas 711, *Emperor* v. *Ram Adhin Singh*.
(1931) 1931 All 712 (715) : 32 Cri L Jour 1073 : 1931 Cri Cas 1048, *Emperor* v. *Baldeo Koeri*.
(1931) 1931 Mad W N 729 (730), *The Public Prosecutor* v. *Thamada Ramudu* alias *Ramanna*. Judgment must be manifestly wrong.
(1930) 1930 Lah 84 (85) : 31 Cri L Jour 141 : 1930 Cri Cas 100, *Emperor* v. *Sookh*. In an appeal from an acquittal the order of the Magistrate will be reversed only if it is palpably wrong or foolish.
(1927) 1927 Lah 178 (179) : 28 Cri L Jour 55, *Emperor* v. *Abdul Latif*. Unless manifestly wrong or perverse appellate Court cannot weigh evidence.
(1931) 1931 Oudh 116 (119) : 6 Luck 539 : 1931 Cri Cas 276 : 32 Cri L Jour 694, *Gafoor Khan* v. *Emperor*. 4 All 148, dissented from.
(1933) 1933 Oudh 372 (373) : 35 Cri L Jour 66 : 1933 Cri Cas 1049, *Emperor* v. *Parameshwar Din*.

15. (1915) 1915 Cal 287 (288) : 15 Cri L Jour 160, *Deputy Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Amulya Charan Awan*.
(1916) 1916 Mad 711 (712) : 16 Cri L Jour 529, *Public Prosecutor* v. *Narayana Naidu*.
(1930) 1930 Mad 704 (704, 705) : 31 Cri L Jour 897 : 1930 Cri Cas 761, *Public Prosecutor* v. *Lakshmamma*.
(1920) 1920 Bom 217 (219) : 21 Cri L Jour 17, *Emperor* v. *Sokharam Manaje*.
(1887) Ratanlal 344 (347), *Queen-Empress* v. *Sayad Surfuddin*. Decision of assessors.
(1933) 1933 Oudh 85 (85) : 34 Cri L Jour 545 : 1933 Cri Cas 113, *Emperor* v. *Sangaram*.

15a (1932) 33 Cri L Jour 932 (935) : 139 Ind Cas 740 (Oudh), *Emperor* v. *Bharat Singh*. It must be unreasonable.
(1934) 1934 Rang 44 (45) : 35 Cri L Jour 855 : 1934 Cri Cas 267, *Emperor* v. *U Ba U*.
(1904) 1 Cri L Jour 781 (789) : 1904 Pun Re Cri No. 7, *King-Emperor* v. *Chattar Singh*.
(1914) 1914 Lah 427 (431) : 15 Cri L Jour 203, *Emperor* v. *Bishen Singh*.

16. (1934) 1934 All 27 (36) : 56 All 354 : 1934 Cri Cas 59 : 35 Cri L Jour 864 (F B), *Emperor* v. *Sheo Janak Pande*.
(1924) 1924 Bom 335 (337) : 25 Cri L Jour 786, *Emperor* v. *Moti Khoda*
(1933) 1933 All 574 (578) : 34 Cri L Jour 1232 : 1933 Cri Cas 913, *Emperor* v. *Basant Rai*. Perversity not necessary.
(1894) 19 Bom 51 (68), *Queen-Empress* v. *Kari Gowda*.
(1934) 1934 Oudh 229 (231) : 35 Cri L Jour 843 : 1934 Cri Cas 680, *Emperor* v.

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The question has now been settled by the Privy Council in *Sheo Swarup* v. *King-Emperor*.[17] Lord Russel of Killowen, in delivering the judgment of the Board upholding the latter view observed as follows:—

"There is in their opinion no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court has 'obstinately blundered' or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice' or has, in some other way, so conducted itself as to produce glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result. Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion, that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless, it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters, as: (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakned by the fact that he has been acquitted at his trial,[18]

Sital.

(1904) 1 Cri L Jour 781 (789) : 1904 Pun Re Cr No. 7, *Emperor* v. *Chattar Singh.* Wrong and unreasonable finding can be reversed whether or not the unreasonableness amounts to perversity, stupidity or incompetence or whether the Court below can or cannot be said to have obstinately blundered.

(1931) 1931 Rang 86 (86, 87) : 8 Rang 671 : 1931 Cri Cas 374 : 32 Cri L Jour 929, *Emperor* v. *Maung Tun Nyan.*

(1904) 17 C P L R 75 (92), *Emperor* v. *Gulbi widow of Dost Mohammad.*

(1915) 1915 Sind 8 (8, 9) : 9 Sind L R 17 : 6 Cri L Jour 604, *Emperor* v. *Kadir Bux.*

17. (1934) 1934 P C 227 (229, 230) : 56 All 645 : 1934 Cri Cas 1134 : 61 Ind App 398 (P C), *Sheo Swarup* v. *Emperor.*

18. [See (1925) 1925 All 315 (315, 316) : 47 All 306 : 26 Cri L Jour 676, *Emperor* v. *Autar.* Onus on the crown of establishing judgment to be erroneous.]

(1931) 1931 All 712 (715): 32 Cri L Jour 1073 : 1931 Cri Cas 1048, *Emperor* v. *Baldeo Koeri.* (Do.)

(1933) 1933 Oudh 340 (342) : 34 Cri L Jour 538 : 1933 Cri Cas 775, *Emperor* v. *Ram Dat.*

(1930) 1930 All 490 (493) : 31 Cri L Jour 954 : 1930 Cri Cas 734 : 52 All 856, *Emperor* v. *Padam Singh.* In an appeal against an acquittal although the accused was not acquitted on the merits it is for the Crown to establish and to establish beyond reasonable doubt that the conviction of accused on the merits ought to have been sustained.

(1928) 1928 Pat 146 (150) : 6 Pat 768 : 29 Cri L Jour 301, *Emperor* v. *Gulam Nabi.* (Do.)

(1933) 1933 Pat 500 (503), *Emperor* v. *Wajid Sheikh.* The crown coming in appeal ought to show that the view taken by the first Court as to the reliability of the approvers is erroneous.

(1933) 1933 Oudh 254 (255) : 34 Cri L Jour 858 : 1933 Cri Cas 560, *Emperor* v. *Hub Lal.* Public Prosecutor must make out strong and cogent grounds to justify interference with the judgment of acquittal.

(1932) 33 Cri L Jour 932 (932, 933) : 139 Ind Cas 740 (Oudh), *Emperor* v. *Bharat Singh.* (Do.)

(1932) 1932 Oudh 317 (320) : 7 Luck 511 : 1932 Cri Cas 872 : 36 Cri L Jour 920, *Emperor* v. *Maybool Ahmad Khan.*

(1924) 1924 Mad 816 (817) : 25 Cri L Jour 1221, *Narayana, In re.*

(1933) 1933 Pesh 27 (28) : 34 Cri L Jour 384 : 1933 Cri Cas 827, *Emperor*

(3) the right of the accused to the benefit of any doubt[19] and, (4) the slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge, who had the advantage of seeing the witnesses. To state this however is only to say that the High Court, in its conduct of the appeal, should, and will act in accordance with the rules and principles well known and recognised in the administration of justice."

In exercising its jurisdiction in the matter of appeals against acquittals the High Court should confine its exercise to the particular acquittal complained of by the Government; it would not be proper to consider the appeal on grounds not contained in the objections urged on behalf of the Government.[20]

16. Appeal from acquittal—Order for further enquiry.

It is only in an appeal from an acquittal, that the appellate Court can direct a further inquiry.[1] There is no power to order further inquiry in an appeal from a conviction[2] or from any other order.[3] The appellate Court may, if necessary, take additional evidence under Section 428.

17. Appeal against acquittal—Power to order re-trial.

The power to order a re-trial, whether in an appeal from a conviction or from an acquittal, is a *discretionary* one.[1] A re-trial should be ordered only, where the trial is incurably defective so that even the taking of additional evidence under Section 428 will not put the appellate Court in a position to dispose satisfactorily of the case.[2] Thus where the lower Court had acquitted the accused on a misconception of the law and did not examine the defence witnesses, a re-trial was ordered on setting aside the acquittal.[3] Where the evidence disclosed some other offence than that of which the accused was acquitted, it was held that a re-trial might be ordered.[4]

The discretion to order a re-trial will not be exercised, where the case is not of sufficient consequence,[5] or where there is no evidence on the record sufficient for conviction,[6] or where no action was taken against the accused for a long time after the offence and the ordering of a re-trial would result in the accused labouring under great difficulties in the conduct of his case.[6a]

Chattar Singh.
(1934) 1934 All 27 (35) : 56 All 354 : 1934 Cri Cas 59 : 35 Cri L Jour 364 (F B), *Emperor* v. *Sheo Janak Pande.*
(1931) 1931 All 439 (441) : 1931 Cri Cas 711, *Emperor* v. *Ram Adhin Singh.*
(1917) 1917 Cal 687 (687) : 17 Cri L Jour 9, *Deputy Legal Remembrancer, Behar* v. *Mutukhadari Singh.*

19. [See (1933) 1933 Oudh 254 (255) : 34 Cri L Jour 858 : 1933 Cri Cas 560, *Emperor* v. *Hub Lal.*]
(1934) 1934 Sind 84 (88) : 35 Cri L Jour 1142 : 1934 Cri Cas 743, *Emperor* v. *Mt. Bhuro.*
(1927) 1927 Oudh 611 (611) : 28 Cri L Jour 688, *Gur Charan* v. *Emperor.*
(1932) 33 Cri L Jour 932 (932) : 139 Ind Cas 740 (Oudh), *Emperor* v. *Bharat Singh.*

20. (1894) 19 Bom 51 (68) : *Queen-Empress* v. *Kari Gowda.*

Note 16.

1. (1900) 27 Cal 126 (129), *Charoobala Dabee* v. *Barendra Nath Mozumdar.*
2. (1921) 1921 All 158 (158) : 23 Cri L Jour 402, *Mohammad Ata* v. *Emperor.*
3. See Notes on Clause (d).

Note 17.

1. (1871-74) 7 Mad H C R 339 (341), *In re Government Pleader.*
2. (1892) 6 C P L R 15 (16), *Empress* v. *Daiju Toli.*
3. (1933) 1933 Mad W N 242 (243), *Public Prosecutor* v. *Kandaswami Mudaliar.*
4. (1874) 7 N W P H C R 196 (199), *Queen* v. *Dukaran.*
5. (1871-74) 7 Mad H C R 339 (341), *In re Government Pleader.*
6. (1925) 1925 Lah 85 (85, 86) : 26 Cri L Jour 320 : 5 Lah 404, *Emperor* v. *Jaswant Rai and Co.*

6a (1916) 1916 Mad 110 (113, 115) : 39 Mad

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The fact that evidence had been discovered subsequent to the acquittal is not a ground for setting aside the acquittal or for ordering a re-trial.[7]

An order for re-trial can be passed even subsequent to the order setting aside the conviction and sentence.[8]

18. Re-trial of appeals.

An appeal is to all intents and purposes a trial,[1] and consequently the word "re-tried" will include the re-trial of an appeal also. Where *A* was acquitted in appeal by the Sessions Judge, the High Court, on an appeal therefrom by the Local Government, can after reversing the acquittal, order the appeal to be re-tried.[2]

19. "Find him guilty and pass sentence."

The appellate Court, setting aside an order of acquittal, may find the accused guilty of the *offence charged*, and pass sentence on him according to law.[1] The words "find him guilty" are, however, not limited to the offences of which the accused was accused in the lower Court; the appellate Court may find him guilty of all offences of which *the trial Court could have found him guilty* under the provisions of Sections 237 and 238 of the Code, provided, of course, the accused is not prejudiced by the course adopted.[2] The fact that the trial was with the aid of assessors will not affect the power of the appellate Court to convict the accused for another offence under Sections 237 and 238, even though the opinion of assessors could not be taken in respect of such offence.[3]

Where the accused has had no *legal trial*, he cannot be convicted and sentenced by the appellate Court. The only course open in such a case is to order a re-trial.[4]

Where the accused is convicted in appeal, the appellate Court may pass sentence according to law. Where the trial Court convicted the accused and awarded him one year's imprisonment, and on appeal the accused was

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527 : 16 Cri L Jour 593 (F B), *Public Prosecutor* v. *Kottaparambath Malayakkal.*

7. (1902-1903) 1902-1903 Upp Bur Rul 9 (12), *King-Emperor* v. *Nga Naing.*
(1906) 3 Cri L Jour 351 (352) : 3 Low Bur Rul 114, *Emperor* v. *Po Gyi.*
(1906) 3 Cri L Jour 234 (236) : 12 Bur L R 21, *Emperor* v. *Nga Po Gyi.* Appellate Court cannot travel outside the record.
[See however (1923) 1923 Rang 65 (65): 24 Cri L Jour 744, *Mrs. May Boudville* v. *King Emperor.*]

8. (1929) 1929 Lah 692 (692, 694) : 1929 Cri Cas 219 : 31 Cri L Jour 675, *Sikander Lal Puri* v. *Emperor.* 3 Mad 48 followed.

Note 18.

1. (1870) 1870 Pun Re Cri No. 31, p. 48 (49), *Fuzl* v. *The Crown.*

2. (1889) 13 Bom 506 (515), *Queen-Empress* v. *Ganesh Kanderao.*
[See also (1914) 1914 Mad 50 (51) : 15 Cri L Jour 409, *Public Prosecutor* v. *Raver Unnithiri. Quaere* "if re-trial" includes re-hearing of an appeal.]

Note 19.

1. See (1923) 1923 All 91 (109) : 45 All 226 : 25 Cri L Jour 497, *Emperor* v. *Har Prasad Bhargava.*
[See also (1925) 1925 All 165 (171) : 47 All 205 : 26 Cri L Jour 599, *Emperor* v. *Raghunath Venaik.*]

2. (1928) 1928 Bom 130 (132) : 52 Bom 385 : 29 Cri L Jour 403, *Emperor* v. *Ismail Khadirsab.*
(1925) 1925 Sind 105 (107) : 19 Sind L R 183 : 25 Cri L Jour 1057, *Faizullah* v. *Emperor.* In absence of prejudice to accused, appellate Court can alter conviction into one of graver offence than that charged and found but falling within S. 237.

3. (1928) 1928 Bom 130 (133) : 52 Bom 385 : 29 Cri L Jour 403, *Emperor* v. *Ismail Khadirsab.* 1924 Bom 246 held no longer good law.

4. (1916) 1916 Mad 110 (113, 115) : 39 Mad 527 : 16 Cri L Jour 593 (F B). *The Public Prosecutor* v. *Kotta Parambath.*

acquitted, it was held in an appeal against such acquittal, that the High Court, if it set aside the acquittal, had power to pass a *severer* sentence than that awarded by the trial Court, though it must be *within the powers* of the trying Magistrate.[5]

Ordinarily in an appeal against an acquittal the appellate Court convicting the accused refrains from passing a capital sentence.[6]

20. Appeal from conviction—General.

In an appeal from a conviction the appellate Court may adopt one of three courses according to the facts and circumstances of the case:—

1. It may *reverse the finding and sentence* and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court, or committed for trial.
2. It may *alter the finding*, maintaining the sentence or with or without altering the finding *reduce the sentence*.
3. It may *alter the nature of the sentence*, but subject to the provisions of Section 106 sub-section 3, not so as to *enhance* the same.

It cannot simply remand the case directing that the lower Court should examine certain witnesses afresh and re-submit the record to the appellate Court for decision of the appeal.[1] Nor can it direct a further inquiry to be made.[2]

Clause (b) cannot be taken to imply that, unless accompanied by a *sentence* a conviction such as that under Section 562 of the Code, is not open to appeal; it is unnecessary to regard the Section as an exhaustive statement of the powers of an appellate Court.[3]

21. "Reverse the finding and sentence."

Where an appellate Court reverses the finding and sentence of the lower Court it must adopt one of three courses:—

1. acquit or discharge the accused or
2. order his re-trial by a Court of competent jurisdiction or
3. order his commitment for trial.

A mere reversal of the conviction without adopting any of these courses amounts to an acquittal of the offence of which he was convicted in the trial Court.[1]

Before any of these courses is adopted, it is necessary that the findings of the lower Court should be *reversed*. This reversal, however, does not amount to an acquittal within the meaning of Section 403.[2]

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5. (1935) 1935 Nag 139 (140) : 1935 Cri Cas 667 : 31 Nag L R 312 : 36 Cri L Jour 867, *Emperor* v. *Abasalli Yusufalli Masalman.*
6. (1930) 1930 Lah 409 (414) : 1930 Cri Cas 469 : 32 Cri L Jour 51, *Niamat Khan* v. *Emperor.*

Note 20.

1. (1925) 1925 Cal 172 (172) : 26 Cri L Jour 313, *Abdus Samad* v. *Emperor.*
2. See note "Appeal from acquittal — Order for further enquiry."
3. (1935) 1935 Mad 157 (157) : 1935 Cri Cas 179 : 58 Mad 517 : 36 Cri L Jour 589, *Mayandi Nadar* v. *Pala Kudumban.*

Note 21.

1. (1933) 1933 Mad W N 224 (224), *Simlan* v. *Simlan.*
2. (1935) 36 Cri L Jour 1333 (1334) : 158 Ind Cas 200 (All), *Emperor* v. *Bahraichi.*

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It was, however, held in the undermentioned case[3] that where the accused had been convicted of offence *X* and the appellate Court considered him guilty not only of that offence but also of offence *Y*, it should *confirm* the conviction in respect of offence *X* and could direct him to be tried for the other offence also by a Court of competent jurisdiction.

22. "Acquit or discharge the accused."

As has been seen already, an appellate Court reversing the conviction of the accused, can acquit or discharge the accused.[1]

Where *A* and *B* are convicted by the trial Court and *B* appeals and is acquitted on the merits, it does not follow that *A* will necessarily have the benefit of the finding of the appellate Court.[2] Where, however, the grounds of acquittal of *B* are common to *A* also, the position is different. In such cases it has been held that the High Court as a *Court of revision* is entitled to set aside the conviction of *A* also although he had not appealed from his conviction.[3] As to whether the *appellate Court* itself has such a power, there is a difference of opinion, the cases cited below[4] holding that it has no such power, and the undermentioned decision[5] holding that the High Court in revision *as having all the powers of a Court of appeal*, can exercise such power.

Where *A* is acquitted and *B* is convicted by the trial Court and *B* appeals from his conviction, the appellate Court cannot interfere so as to affect the acquittal of *A*, when there is no appeal against such acquittal.[6]

23. "Order him to be re-tried."

Under the Code of 1872, where the trial Court was not one competent to try the case, the appellate Court was *bound* to order a re-trial.[1] Under the present Section where the appellate Court reverses the conviction of the accused, it *may* order him to be retried by a Court of competent jurisdiction.[2] The question whether there should be a re-trial, is thus a matter of *judicial*

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3. (1898) 2 Weir 482 (483), *In re Kannachampet Parangodan.*

Note 22.

1. See (1866) 5 Suth W R Cri 56 (56), *In re Puchanun Biswas.*
   (1881) 6 Bom 34 (38), *Imperatrix* v. *Pandharinath.*
2. (1918) 1918 Mad 918 (919) : 40 Mad 591 : 18 Cri L Jour 454, *In re Venkatakrishnayya.*
3. (1866) 1866 Pun Re Cri No. 71 page 76, (77), *Lal Khan* v. *Kureem Khan.*
   (1867) 1867 Pun Re Cri No. 6 page 11 (12), *Crown* v. *Achhur Singh.*
   (1934) 1934 Lah 346 (348) : 1934 Cri Cas 565 : 35 Cri L Jour 1046, *Mangal Singh* v. *Emperor.*
   (1900) 5 Cal W N 330 (331), *Broja Rahal Mozumdar* v. *The Empress.*
   (1931) 1931 Cal 618 (619) : 1931 Cri Cas 802 : 58 Cal 902 : 32 Cri L Jour 1003, *Rajani Kanta Barman* v. *Emperor.*
4. (1910) 11 Cri L Jour 99 (105) : 4 Ind Cas 980 (Lah), *Emperor* v. *Sada.*
   (1875) 2 Weir 570 (570), *High Court Proceedings, 19th April 1875, No. 924.* An appellate Court cannot on the appeal of one prisoner alter the sentence of another prisoner in the same case who has not appealed. When an appellate Court is of opinion that the sentence passed on a prisoner who has not appealed should be revised, the record must be submitted to the High Court.
5. (1893) 1893 All W N 51 (51), *Queen-Empress* v. *Ratan Singh.*
   [See also (1920) 1920 Pat 471 (481, 482) : 5 Pat L Jour 430 : 21 Cri L Jour 705, *Raghu Bhumiji* v. *Emperor.*]
6. (1911) 12 Cri L Jour 575 (576) : 12 Ind Cas 839 (All), *Darbari Mal* v. *Emperor.*

Note 23.

1. (1879) 1879 Pun Re Cri No. 1, page 1 (1), *Kishen Singh* v. *Khazan Singh.*
2. (1888) Ratanlal 367 (367), *Queen-Empress* v. *Kasthuribhai.*
   (1878) 2 Cal L R 511 (514), *In the matter of Sher Mohammad.*

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discretion of the Court.[3] As a general rule, an order for re-trial would be proper where the trial in the lower Court has been *illegal, irregular* or *otherwise defective*.[4] In all serious cases where the first trial, owing to a defect of jurisdiction or other similar cause, is rendered abortive, a new trial should be ordered unless it is quite clear that on the materials before the Court, there is no chance of conviction.[5]

It is not, however, in every case where there has been a defect in the trial, that the appellate Court will order a re-trial. A re-trial will not be ordered:—

1. Where the sentence is a small one, the offence not being a serious one, and the accused had sufficiently suffered in pocket.[6]
2. Where the evidence is unsatisfactory[7] and cannot in any proper view of the case support a conviction.[8]
3. Where there is no probability of a conviction even if a re-trial is ordered[9] and the accused has already been subjected to persecution for a long time.[10]
4. Where the accused has already undergone a considerable portion of the sentence.[11]

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3. (1908) 8 Cri L Jour 121 (125) (Cal), *Durga Charan Sanyal* v. *Emperor*.
(1912) 13 Cri L Jour 497 (498) : 40 Cal 163, *Nazimuddi* v. *Emperor*.
(1883) 1883 All W N 99 (99), *Empress* v. *Bhagwan*.

4. (1911) 12 Cri L Jour 585 (590) : 36 Mad 457, *Jerimiah* v. *Vas*.
(1923) 1923 Mad 32 (34) : 46 Mad 117 : 23 Cri L Jour 748, *Kolathingal Ummar Hajee, In re*.

5. (1908) 8 Cri L Jour 121 (124, 126) (Cal), *Durga Charan Sanyal* v. *The Emperor*.

6. (1925) 1925 All 301 (303) : 26 Cri L Jour 734, *Tufail Ahamad* v. *Emperor*.

7. (1927) 28 Cri L Jour 19 (22) : 99 Ind Cas 51 (Cal), *Mamat Ali* v. *Emperor*.
(1910) 11 Cri L Jour 258 (260, 261) : 33 Mad 502, *Choragudi Venkatadri* v. *Emperor*. Evidence not justifying conviction.
(1926) 1926 Nag 53 (54, 55) : 26 Cri L Jour 1090, *Ram Prasad* v. *Emperor*.
(1916) 1916 Mad 1108 (1108) : 17 Cri L Jour 193, *Nogambara Pattan, In re*.
(1932) 1932 Oudh 23 (25) : 1932 Cri Cas 55 : 33 Cri L Jour 167 : 7 Luck 390, *Sita Ram* v. *Emperor*.
(1913) 14 Cri L Jour 623 (624) : 21 Ind Cas 671 (Mad), *In re Subba Thevan*.

8. (1890) 14 Bom 115 (147), *Queen-Empress* v. *Maganlal and Moti Lal*.
(1924) 1924 Cal 975 (976) : 51 Cal 924 : 26 Cri L Jour 15, *Remembrancer of Legal Affairs, Bengal* v. *Satish Chandra Ray*.
(1913) 14 Cri L Jour 219 (223) : 19 Ind Cas 315 (Cal), *Promothanath Roy* v. *King-Emperor*.
(1882) 6 Bom 34 (37), *Imperatrix* v. *Phandharinath*.

9. (1921) 1921 Mad 687 (688) : 23 Cri L Jour 700, *Ramaswami Thevan* v. *Emperor*.

10. (1934) 1934 Bom 303 (305, 306) : 1934 Cri Cas 1036 : 35 Cri L Jour 1477, *Emperor* v. *Khim Chand*. 1934 Bom 48, followed.
(1926) 1926 Mad 638 (641) : 50 Mad 274 : 27 Cri L Jour 394, *Sogimuthu Padayachi, In re*.

11. (1899) 3 Cal W N 332 (333), *Abdul Biswas* v. *Khetar Mandal*.
(1911) 12 Cri L Jour 82 (82) : 9 Ind Cas 455 (Cal), *Kanta Neya* v. *Emperor*. Conviction under S. 323, I. P. C.
(1930) 1930 Nag 255 (259) : 1930 Cri Cas 831 : 31 Cri L Jour 705, *Girdhari* v. *Emperor*.
(1927) 1927 Lah 671 (672) : 8 Lah 496 : 29 Cri L Jour 6, *Sai* v. *Emperor*.
(1934) 1934 Lah 648 (648) : 1934 Cri Cas 972 : 36 Cri L Jour 468, *Kundal Lal* v. *Emperor*. Offence technical — Re-trial should not be ordered.
(1920) 1920 Pat 590 (591) : 21 Cri L Jour 496, *Raghu Singh* v. *Emperor*.
(1918) 1918 Pat 582 (583) : 19 Cri L Jour 77, *Bhaso Singh* v. *Emperor*.
(1931) 1931 Lah 767 (767) : 1931 Cri Cas 1071 : 33 Cri L Jour 145, *Nur Hussain* v. *Emperor*.
(1911) 12 Cri L Jour 19 (19) : 8 Ind Cas 1101 (Mad), *Mappillai Muthappa Nadar* v. *Mappillai Kula Sankara Nadar*. Accused having undergone

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5. Where the defective proceedings were taken a long time after the offence.[12]

6. Where the defect consists in the admission of irrelevant evidence, but there is other evidence on the record sufficient to enable the Judge to decide the case.[13]

7. Where the only defect is that certain evidence has not been brought on the record which ought to have been; the appellate Court may, in such a case, itself take evidence under Section 428, *infra*, and decide the case.[14]

Where there is no defect in the trial or irregularity in procedure, the mere fact that the appellate Court is unable to form an opinion as to whether the accused is to be convicted or acquitted[15] or that there is a chance that the prosecution may be able to produce better evidence[16] or that the prosecution, by its own negligence, failed to produce evidence which it was bound to do[17] or that the Judge and assessors differed in their views[18] is not a ground for ordering a re-trial.

Where the appellate Court ordered a new trial on the ground, that, although the accused were shown by the evidence to have committed some offence, it was clear that they had been convicted under a wrong Section, and all the facts on which a conviction for any offence could be sustained had been put in issue before the trying Magistrate, it was held that before quashing the sentence and ordering a re-trial the appellate Court should have come to a certain conclusion as to the offence which the accused were shown by the evidence to have committed, and that it should have considered whether if the evidence showed that the accused should properly have been convicted of another offence than that charged, they would be prejudiced by amending the conviction.[19]

See also the undermentioned cases[20] where a re-trial was ordered and

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punishment for more serious offence.

12. (1927) 1927 Mad 442 (443) : 28 Cri L Jour 295, *Venkita Sivayya* v. *Emperor*.
(1918) 1918 Pat 582 (583) : 19 Cri L Jour 77, *Bhaso Singh* v. *Emperor*.

13. (1923) 1923 Rang 65 (1) (65) : 24 Cri L Jour 744, *Mrs. May Boudville* v. *Emperor*.

14. (1918) 1918 All 133 (134) : 19 Cri L Jour 485, *Ishwar Prasad* v. *Emperor*.
(1883) 2 Weir 480 (480), *Iyachikone, In re*. [See however (1884) 1884 Pun Re Cr No. 28, page 48 (50), *Gohar* v. *The Empress*. Where the appellate Court does not want to act under S. 428 and the conviction cannot be sustained owing to the defect, the Court should order a re-trial and not dismiss the appeal.]

15. (1890) Ratanlal 530 (531), *Queen-Empress* v. *Manganlal*.

16. (1931) 1931 Mad W N 517 (520), *Subramanyam* v. *Emperor*. A Judge who takes this action constitutes himself as a sort of Public Prosecutor.
(1931) 1931 Mad 227 (227, 228) : 1931 Cri Cas 323 : 32 Cri L Jour 749, *Dara Lakshmi Narasimham* v. *Garine Satyanarayana*.
(1930) 1930 Mad 189 (190) : 31 Cri L Jour 422 : 1930 Cri Cas 189, *Ratnavelu Mudaliar* v. *Emperor*.

17. (1910) 11 Cri L Jour 684 (685) : 8 Ind Cas 594 (Rang), *Hamudu Meah* v. *Emperor*.

18. (1908) 8 Cri L Jour 121 (126) (Cal), *Durga Saran Sanyal* v. *Emperor*.

19. (1883) 2 Weir 480 (480, 481), *In re Iyachikone*.

20. (1924) 1924 Cal 257 (283) : 25 Cri L Jour 817 (F B), *Emperor* v. *Burendra Kumar Ghose*. Perfunctory cross-examination of prosecution witness is a good ground.
(1922) 1922 Pat 40 (42) : 23 Cri L Jour 218, *Lachmi Lad* v. *King-Emperor*.
(1923) 1923 Pat 62 (64) : 1 Pat 758 : 24 Cri L Jour 69, *Jagdeo Singh* v. *Emperor*. Where there is evidence but the Court is unable to test it.
(1928) 1928 Pat 50 (51) : 28 Cri L Jour 893, *Sheoparsan Singh* v. *Emperor*. Serious mistakes in charge—Failure to

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the cases cited below[21] where it was not ordered.

There is nothing preventing the appellate Court from directing a re-trial on a fresh charge framed on the evidence already recorded.[22] But a re-trial cannot be ordered from a *particular point*.[23] Nor can the appellate Court direct that the evidence already on the record should be treated as evidence in the case, as it savours as a sort of an order for further inquiry which cannot be passed in appeals from convictions.[24] An order for re-trial, again, cannot *restrict* the evidence to be taken to that mentioned in his order; the order should be for re-trial in view of the instructions contained in the order; the accused is entitled to let in such additional evidence as he may desire.[25]

Where a re-trial is ordered it is open to the prosecution either to proceed or not to proceed as it may be advised.[26]

Where the circumstances of the case warrant an order for re-trial, the appellate Court should not simply dismiss the appeal or report the case to the High Court.[27]

Where a Magistrate *tries* a case which is exclusively triable by a Court of Session, the trial is void; there being in such cases no trial, the appellate Court cannot order a *re-trial*.[28]

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consider important evidence--Order for re-trial from framing of charge proper.

(1896) 1 Cal W N 35 (36), *Bishnu Banwar* v. *The Empress.*

(1903) 30 Cal 822 (830), *Birendra Lal* v. *Emperor.* Misjoinder of charges and misjoinder of parties—Charge to the jury defective.

(1907) 11 Cal W N 100*n* (100*n*), *Dari Roy* v. *The Empress.* Re-trial for a graver offence may be ordered.

(1866) 5 Suth W R Cr 80 (93), *In re Elahee Buksh.*

(1866-67) 4 Bom H C R Crown Cas 3 (3), *Reg.* v. *Canu valad Ram Chandra.* Conviction under S. 403, I. P. C., set aside— Re-trial on charge under S. 406 ordered.

(1882) 1882 All W N 112 (112), *Empress* v. *Ram Prasad.*

(1929) 1929 All 710 (719) : 1929 Cri Cas 294 : 31 Cri L Jour 230, *Azam Ali* v. *Emperor.*

(1933) 1933 Cal 364 (366) : 1933 Cri Cas 500 : 60 Cal 814 : 34 Cri L Jour 320, *Amar Chandra* v. *Emperor.* Special procedure — Omission of Judge to follow.

(1897) Ratanlal 938 (939), *Queen-Empress* v. *Sadasiva Bala Krishna Vartak.*

21. (1928) 1928 Pat 293 (294) : 29 Cri L Jour 258, *P. K. Sen* v. *Emperor.* Where the prosecution came into Court with an incomplete case, which so far as it went confirmed the defence. *Held*, that they were not entitled to a re-trial.

(1927) 1927 Mad 142 (143) : 28 Cri L Jour 295, *Venkata Sivayya* v. *Emperor.* Technical offence.

(1927) 1927 Mad 177 (178) : 50 Mad 735 : 27 Cri L Jour 1381, *Samiullah* v. *King-Emperor.* Petty matter.

(1934) 1934 Lah 415 (415) : 1934 Cri Cas 642 : 35 Cri L Jour 1447, *Amir* v. *Emperor.* Petty case.

(1908) 7 Cri L Jour 215 (216) (Mad), *Narayana Naicken* v. *Tahsildar of Conjeevaram.* Interests of justice not requiring a re-trial.

22. (1913) 14 Cri L Jour 230 (231) : 9 Nag L R 42, *Manna* v. *Emperor.*
[But see (1932) 1932 Mad W N 114 (116), *Naganna* v. *Emperor.* Appellate Court cannot direct that a particular charge be framed.]

23. (1932) 1932 Mad W N 114 (116), *Naganna* v. *Emperor.*

24. (1918) 1918 Pat 582 (583) : 19 Cri L Jour 77, *Bhaso Singh* v. *Emperor.*

(1935) 1935 Nag 125 (127) : 1935 Cri Cas 565 : 36 Cri L Jour 740 : 31 Nag L R 246, *Potram* v. *Emperor.*

25. (1906) 3 Cri L Jour 304 (304) (Cal), *Mir Sarwarjan* v. *Emperor.*

26. (1921) 1921 Cal 257 (258) : 22 Cri L Jour 475, *Tenaram Kandal* v. *King-Emperor.*

27. (1893-1900) 1893-1900 Low Bur Rul 128 (128), *Queen-Empress* v. *Nga San Hla Baw.*

(1902) 2 Weir 484 (484, 485), *In re Chinna Mottayyan.* In this case the matter was referred by the trial Court to the District Magistrate.

28. (1902) 29 Cal 412 (414), *Abdul Ghani* v. *Emperor.*

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24. "By a Court of competent jurisdiction."

The words "order him to be re-tried by a Court of competent jurisdiction" do not imply that it is necessary before ordering a re-trial, that the original Court should have had *no jurisdiction* to try the case.[1] The re-trial may be ordered to be held by the original Court itself if it was competent to try the case,[2] or by *another* Court of competent jurisdiction even where the original Court was itself a Court of competent jurisdiction.[3]

The Court convicting the accused may be competent to *try* the case, but not competent to *adequately* punish the accused for the offence. In such a case the appellate Court, reversing the conviction, may order a re-trial to be held by a Court which can adequately punish the accused.[4]

There is nothing preventing the appellate Court from *specifying* the subordinate Court which should hold the re-trial.[5]

Can a re-trial be ordered before the appellate Court itself? There is a difference of opinion on the point. It was held by the High Court of Bombay in the undermentioned case[5] that the re-trial, if ordered, must be by a Court of competent jurisdiction *subordinate* to the appellate Court and that the appellate Court could not order the re-trial to proceed before itself. According to the High Court of Madras the words "order.....jurisdiction" are not words of limitation and do not exclude the appellate Court if the offence is one within its jurisdiction.[7]

Where in a case tried by jury in Court *X*, the appellate Court reversed the conviction and sentence, and ordered a re-trial by Court *Y* which was competent to try the case with the aid of assessors, it was held by the Privy Council, that there was no legal objection to the order made, but that the order was one which ought not to be made, unless justified by exceptional circumstances inasmuch as it was likely to have very serious effects upon the rights of the accused, and that his privilege which he had enjoyed of a trial by a jury, he ought, in general to retain.[8]

On the same principle it has been held by the Calcutta High Court that where a conviction by a jury is set aside on the ground of defective charge to the jury, but there is evidence on record, the sufficiency of which must be

Note 24.

1. (1911) 12 Cri L Jour 585 (590) : 36 Mad 457, *Jeremiah* v. *Vas.*
   (1903) 7 Cal W N 301 (304), *Sarat Chandra Shah Chowdhry* v. *Emperor.*
   (1891) 2 Weir 481 (482), *Pera Naicken, In re.*
   (1895) 1895 Pun Re Cri No. 16, page 50 (51), *Dani* v. *Queen--Empress.* 8 All 14, dissented from ; 16 Bom 580 and 15 All 205, followed.
   (1900) 27 Cal 172 (174), *Satish Chandra Das Bose* v. *Queen-Empress.*
   [See also (1902) 29 Cal 412 (414), *Abdul Ganni* v. *Emperor.* If lower Court not competent to try, appellate Court cannot order retrial.]
   [But see (1882) 1882 All W N 112 (112), *Empress* v. *Faiz Khan.*]
2. See cases cited in foot-note (1).
3. (1893-1900) 1893-1900 Low Bur Rul 238 (240), *Queen-Empress* v. *Shaik Ali.* Dissenting from 8 All 14.
4. (1895) 1895 Pun Re Cri No. 16, page 50 (51), *Dani* v. *Empress.*
   (1904) 1 Cri L Jour 751 (754, 755) (Nag), *Emperor* v. *Sheikh Rasul.*
5. (1888) Ratanlal 367 (367), *Queen-Empress* v. *Kasthuribai.*
   (1935) 1935 P C 122 (124) : 1935 Cri Cas 871 : 59 Bom 496 : 36 Cri L Jour 978 (P C), *Hari* v. *Emperor.*
6. (1898) Ratanlal 982 (982), *Queen-Empress* v. *Fakira.*
7. (1907) 5 Cri L Jour 104 (105) : 30 Mad 228, *The Public Prosecutor* v. *Manikka Gramani.*
   (1890) 2 Weir 481 (481), *In re Vedakadeth Kanaran.*
8. (1925) 1925 P C 122 (124) (P C), *Tilakdhari Singh* v. *Maharaja Kesho Prasad.*

considered by the jury, the proper course is to order a re-trial by jury.[9] In the undermentioned case,[10] the Judicial Commissioner's Court of Sind in an appeal against an acquittal in a case tried by jury, held that the High Court had jurisdiction to decide the case itself instead of ordering a new trial. Sec. 423 Notes 24—26

25. Discharge and retrial—If both can be ordered.

Where the appellate Court discharges an accused person on the ground, for example, of misjoinder of parties, it has power to add a direction that the accused should be re-tried. It is not obligatory on him to leave to the discretion of the Magistrate the course which should be taken in such matter.[1]

It was, however, held in the case noted below[2] that it is not ordinarily the duty of the appellate Court to order the re-trial of a person whose conviction is set aside, and that the prosecution may be left to take such proceedings against the accused as they may be advised to take.

26. Effect of re-trial on offences of which accused had been acquitted in trial Court.

Suppose *A* is charged with having committed offences *X* and *Y* but is convicted of offence *X* only and on appeal the conviction is reversed and a re-trial ordered. Is the whole case re-opened and is *A* to be re-tried on both charges *X* and *Y*? Yes, if the facts of the case are such that the offences *X* and *Y* fall within Section 236 of the Code.[1] Where the accused is charged at one trial with *distinct* offences constituted by distinct acts, such as the causing of death to *A* and of grevious hurt to *B*, and he is acquitted of one of such offences and convicted of the other, an order for re-trial in an appeal against the conviction will not re-open the whole case.[2]

Where *A* was charged in the trial Court with offences under Sections

9. (1906) 4 Cri L Jour 412 (414) (Cal), *Sheikh Fakir* v. *Emperor.*
   (1912) 13 Cri L Jour 715 (715) : 16 Ind Cas 523 (Cal), *Jamaruddi* v. *Emperor.*
   (1910) 11 Cri L Jour 96 (97) : 5 Ind Cas 315 (Cal), *Hazir Ali* v. *Emperor.*
   (1908) 7 Cri L Jour 315 (317) (Cal), *Kali Singh* v. *King-Emperor.* Practice of the Court is to order re-trial.
10. (1927) 1927 Sind 104 (108) : 21 Sind L R 356 : 28 Cri L Jour 66, *Emperor* v. *Saram.*

Note 25.

1. (1901) 28 Cal 104 (107, 108), *Kumudini Kanta Guha* v. *The Queen-Empress.*
   (1901) 24 Mad 523 (541), *King-Emperor* v. *Thirumal Reddy.*
2. (1908) 8 Cri L Jour 11 (17) : 4 Nag L R 71, *Emperor* v. *Balwant Singh.*

Note 26.

1. (1895) 22 Cal 377 (382, 383), *Krishna Dhan Mandal* v. *Queen-Empress.*
   (1927) 1927 Pat 13 (15) : 6 Pat 208 : 27 Cri L Jour 1100, *Abdul Hamid* v. *King-Emperor.* Case of trial by jury.
   [See also (1912) 13 Cri L J 497 (498) : 40 Cal 163, *Nazumuddi* v. *Emperor.*]
2. (1895) 22 Cal 377 (382, 383), *Krishna Dhan Mandal* v. *Queen-Empress.*
   (1927) 1927 Pat 13 (15) : 6 Pat 208 : 27 Cri L Jour 1100, *Abdul Hamid* v. *King-Emperor.* Case of trial by jury.

In the following cases it was held, without reference to S. 236 of the Code that the appellate Court could not order a re-trial in respect of an offence of which the accused was acquitted in the lower Court. It must be assumed that the offence in those cases were such as did not fall within S. 236 :—

(1935) 1935 Lah 945 (946) : 1935 Cri Cas 1284, *Ali Mohammad* v. *Crown.* Conviction under S. 420, Penal Code and acquittal under 465 — Appeal from conviction—Re-trial cannot be ordered in respect of both offences.
[See also (1903) 26 Mad 478 (479, 480), *Sami Ayya* v. *Emperor.*
(1906) 11 Cal W N 91*n* (91*n*), *Dwarka Nath Sahu* v. *The Emperor.*
(1935) 1935 Cal 120 (121) : 1935 Cri Cas 155 : 36 Cri L Jour 553, *Nitya Gopal Sadhu* v. *Emperor.*]
(1920) 1920 Cal 568 (569) : 21 Cri L Jour 689, *Kala Nath Barman* v. *Emperor.*
(1935) 36 Cri L Jour 1333 (1334) : 158 Ind Cas 200 (All), *Emperor* v. *Bahraichi.*
(1933) 1933 All 941 (948, 949) : 1933 Cri Cas 1561 : 35 Cri L Jour 668 : 56 All 210, *Lala* v. *Emperor.*

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302 and 201 of the Penal Code and was convicted under Section 302, the charge under Section 201 being withdrawn by the prosecution, it was held on appeal from the conviction that the appellate Court could order a re-trial even in respect of the offence under Section 201 since there was no *acquittal* on that charge.[3]

27. Ordering re-trial for enhancing sentence.

The power of ordering a new trial merely for the purpose of enhancing the punishment ought to be very sparingly used.[1] It ought not to be used at all where the trial Court was competent to inflict the maximum punishment for the offence.[2]

28. Remand for passing sentence or for writing proper judgment.

An appellate Court cannot remand the case to the lower Court for the purpose of passing a legal sentence; it must deal with the matter itself in accordance with law.[1] Similarly in *Tara Chand* v. *Emperor*,[2] it was held that an appellate Court had no power to remand a case for "rehearing the parties and writing out a proper judgment," but that it was its duty to go into the whole facts fully itself and dispose of the case. In *Karuppiah Pillai, in re*[3] where the trial Court had not written a judgment in conformity with the provisions of Section 367, it was held that the correct procedure for the appellate Court to adopt was to accept the appeal and remand the case for rehearing *de novo* and not to retain the case on file, merely calling for a fresh judgment from the lower Court.

29. Effect of order for re-trial in appeal.

Where the Sessions Judge as an appellate Court orders a re-trial in an appeal against the conviction of a First Class Magistrate, the District Magistrate has no authority to disregard the same and release the prisoner.[1]

30. "Or committed for trial."

An appellate Court reversing the conviction of the lower Court can order a commitment to be made in cases where they ought to be committed.[1] There was no such power before the Code of 1882.[2]

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3. (1905) 2 Cal L Jour 18*n* (18*n*), *Affiluddi* v. *Emperor*.

Note 27.

1. (1915) 1915 All 185 (186): 16 Cri L Jour 433, *Emperor* v. *Mohan Lal*.
2. (1893-1900) 1893-1900 Low Bur Rul 111 (111, 112), *Kazaw Rhi* v. *Queen-Empress*.

Note 28.

1. (1907) 11 Cal W N 254*n* (255*n*), *Mahabubali Khan* v. *Nikleswar Ghose*.
2. (1906) 3 Cri L Jour 119 (120): 32 Cal 1069, *Tara Chand Singh* v. *Emperor*.
3. (1920) 1920 Mad 171 (172): 21 Cri L Jour 52, *Karuppiah Pillai, In re*.

Note 29.

1. (1909) 10 Cri L Jour 77 (77): 5 Low Bur Rule 49, *King-Emperor* v. *Tun Lin*.

Note 30.

1. (1924) 1924 Mad 243 (245): 24 Cri L Jour 840, *Ayarvali Pokker, In re*.
   (1915) 1915 All 185 (186): 16 Cri L Jour 33, *Emperor* v. *Mohan Lal*.
   (1893) 15 All 205 (207, 208), *Queen-Empress* v. *Maula Baksh*. It is competent to a Sessions Judge having reversed the finding and sentence, to order the appellant to be committed for trial to the Court of Session.
2. (1882) 1882 All W N 112 (112), *Empress* v. *Ram Prasad*.
   (1868-1869) 5 Bom H C R Crown Cas 65 (66), *Reg* v. *Chenverava bin Chanbasaya*.
   (1875) 12 Bom H C R Crown Cas 234 (237), *Reg.* v. *Tukaram Ragho*.
   (1867) 8 Suth W R Cr 55 (55), *Queen* v. *Kasimuddin*.
   (1868) 10 Suth W R Cr 35 (36), *Hakim Sardar, In re*.
   (1875) 24 Suth W R Cr 24 (25), *Lucky Narain Nagory, In re*.
   (1882) 1882 All W N 47 (48), *Empress* v. *Shahamat*.
   (1881) 1881 All W N 62 (62), *Empress* v. *Ratan Sahai*.

Where a Magistrate convicts the accused of an offence which is exclusively triable by a Court of Session and the appellate Court reverses the finding and orders a commitment, it is not necessary that the Magistrate should commence a fresh inquiry and take evidence *de novo*. The inquiry and the evidence at the trial are sufficient for the purposes of commitment.[3] **Sec. 423 Note 30**

The words "order him to be . . . . . committed for trial" do not necessarily mean that the appellate Court cannot itself make the commitment, but should direct a *Magistrate* to do so. Both courses are open to the appellate Court.[4]

Where the appellate Court reverses the finding of the lower Court (Magistrate) on the ground that the offence is one exclusively triable by a Court of Session, the proper course to be adopted is to direct a commitment and not simply alter the charge into one for which the accused ought to have been committed and alter the sentences[5] or try the case itself on such charge. Thus where the appellate Court reversed a conviction for an offence under Section 376 on the ground that the act could not be said to be without the consent of the girl and was of opinion that the offence made out was one under Section 366, (offence triable exclusively by a Court of Session,) but instead of directing a commitment, framed a charge under Section 366 and tried the case itself, it was held that it had no power to do so.[6]

It is not necessary that, in order that the appellate Court may direct a committal, the offence should be one exclusively triable by a Court of Session.[7] Where *A* was convicted by a Magistrate under Section 326 of the Penal Code for having cut off his wife's nose and punished with imprisonment for 2 years, the High Court considered that the case was one which ought to have been committed, though the offence was not one exclusively triable by a Court of Session.[8]

Where a conviction was set aside on the ground that the case was one exclusively triable by a Court of Session and had been tried by the Magistrate without jurisdiction, the High Court refused to make an order for commitment in view of the considerable expense which the accused had been put to in the conduct of the case and other circumstances.[9]

(1866) 1866 Pun Re Cr No. 34, p. 35 (36), *Wazeer Singh* v. *Crown*.

3. (1880) 2 All 910 (912), *Empress of India* v. *Illahi Baksh*.
(1935) 1935 All 579 (583) : 1935 Cri Cas 598, *Emperor* v. *Sahadeo Ram*.
(1878) 2 Weir 479 (479), *High Court Proceedings, 7th February* 1878, *No.* 290.

4. (1935) 1935 All 579 (583) : 1935 Cri Cas 598, *Emperor* v. *Sahadeo Ram*. 31 Mad 40 ; 10 Bom 319 ; 27 Mad 54 ; 1922 All 345 ; 15 All 205 and 1915 All 185, relied upon. 6 Cri L Jour 7, dissented from.

5. (1922) 1922 All 345 (346) : 23 Cri L Jour 456, *Hazan Raza* v. *Emperor*.

6. (1925) 1925 Rang 230 (231) : 3 Rang 68 : 26 Cri L Jour 1119, *Sircar* v. *Emperor*. Following 8 Bom L R 120 : 3 Cri L Jour 240.
(1925) 1925 Rang 230 (231) : 3 Rang 68 : 26 Cri L Jour 119, *Y. C. Sircar* v. *Emperor*.

7. (1896) 23 Cal 350 (351), *Misri Lal* v. *Lachmi Narain Bajpie*.
(1933) 1933 Lah 128 (129) : 1933 Cri Cas 242 : 34 Cri L Jour 640, *Salihon* v. *Emperor*. Dissented from 8 All 14. [But see (1886) 8 All 14 (16), *Queen-Empress* v. *Sukha*.]

8. (1892) 16 Bom 580 (583, 584), *Queen-Empress* v. *Abdul Rahman*. Dissenting from 8 All 14 (17).

9. (1892) 16 Bom 580 (583, 584), *Queen-Empress* v. *Abdul Rahman*.
(1932) 1932 Cal 390 (394) : 1932 Cri Cas 337 : 59 Cal 1233 : 33 Cri L Jour 685, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Daulatram Mudi*.

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31. "Alter the finding."

The appellate Court may, under Clause (b) of the Section, alter the finding of the lower Court without ordering a re-trial. This power, however, must be taken to be limited by the general principle that the appellate Court cannot pass any finding which the lower Court could not have legally come to; the meaning of the Section must be taken to be that the appellate Court is given the power to correct any mistakes of finding which the first Court may have committed.[1] Thus an appellate Court cannot, in a case not falling within Section 237 of the Code, convict the accused of a *graver* offence than that charged.[2]

Where *A* is charged in the lower Court with having committed offences *X* and *Y* and is acquitted of *X*, the appellate Court may, in an appeal against the conviction for offence *Y*, alter the conviction to one for offence *X* of which *A* had been acquitted in the lower Court.[3] The same principle will apply with greater force, where *A* had not been expressly acquitted or convicted of offence *X*, but had simply been convicted of offence *Y*.[4] Where *A* was charged with having committed offence *X* only, but the lower Court could, under the provisions of Section 237 or Section 238, have convicted the accused without a charge of offence *Y* also, the appellate Court can, in an appeal against the conviction for offence *X*, alter the conviction to one for offence *Y*.[5] But

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Note 31.

1. (1917) 1917 Lah 233 (234) : 18 Cri L Jour 511 : 1917 Pun Re Cr No. 4, *Ahmad Din* v. *Emperor*. Dissented from 25 All 534.
   (1885) 7 All 414 (420, 424), *Queen-Empress* v. *Pershad*.
   (1906) 4 Cri L Jour 490 (491) : 3 Low Bur Rul 232, *Emperor* v. *Po Yin*.
   (1923) 1923 Lah 260 (261) : 3 Lah 440 : 23 Cri L Jour 709, *Arjan Mal* v. *Emperor*. Appellate Court cannot convict accused of offence requiring sanction.
2. (1921) 1921 Low Bur 36 (37) : 11 Low Bur Rul 45 : 23 Cri L Jour 740, *Nga Po Kyin* v. *Emperor*.
   (1905) 10 Cal W N 39*n* (39*n*), *Bhagabat Singh* v. *The King-Emperor*.
   (1880) 6 Cal L R 427 (428), *In the matter of Dwaraka Manjhee*.
   (1906) 4 Cri L Jour 490 (491) : 3 Low Bur Rul 232, *King-Emperor* v. *Po Yin*. [See however (1925) 1925 Sind 105 (107) : 25 Cri L Jour 1057 : 19 Sind L R 183, *Faizulla* v. *Emperor*. The case was however one falling within Ss. 236 and 237.]
3. (1911) 12 Cri L Jour 572 (572) : 34 All 115, *Sardara* v. *Emperor*.
   (1926) 1926 All 700 (701) : 27 Cri L Jour 901, *Janki Prasad* v. *Emperor*.
   (1918) 1918 All 65 (66) : 20 Cri L Jour 22, *Duli* v. *Emperor*.
   (1934) 1934 Oudh 200 (206) : 1934 Cri Cas 587 : 9 Luck 607 : 35 Cri L Jour 973, *Lakhan Singh* v. *Emperor*
   (1896) 23 Cal 975 (977, 978, 979), *Queen-Empress* v. *Jabanullah*.
   (1932) 1932 Cal 723 (726) : 1932 Cri Cas 728 60 Cal 179 : 34 Cri L Jour 177 *Hanuman Sarma* v. *Emperor*.
   (1917) 1917 Pat 625 (626) : 18 Cri L Jour 982, *Dhanpat Singh* v. *Emperor*.
   (1918) 1918 Pat 257 (258) : 19 Cri L Jour 735 : 3 Pat L Jour 565, *Mahangu Singh* v. *Emperor*.
   (1910) 11 Cri L Jour 534 (535) : 34 Mad 547, *Appanna* v. *Pethani Mahalakshmi*.
   (1914) 1914 Cal 456 (459) : 41 Cal 350 : 15 Cri L Jour 385, *Romesh Chandra Bannerjee* v. *Emperor*.
   (1904) 1 Cri L Jour 942 (943) : 1904 Pun Re Cr No. 4, *Bhola* v. *The Emperor*.
   (1932) 1932 Cal 723 (726, 727) : 1932 Cri Cas 728 : 60 Cal 179 : 34 Cri L Jour 177, *Hanuman Sarma* v. *Emperor*. [But see (1929) 1929 Nag 325 (327) ; 1929 Cri Cas 529 : 30 Cri L Jour 944, *Kisan Das* v. *Emperor*.]
4. (1933) 1933 All 565 (567, 568) : 1933 Cri Cas 897 : 55 All 834 : 34 Cri L Jour 1064, *Raghunath* v. *Emperor*.
   (1931) 1931 Sind 9 (12) : 1931 Cri Cas 57 : 25 Sind L R 1 : 32 Cri L Jour 517, *Sabjhatullah* v. *Emperor*.
   (1912) 13 Cri L Jour 457 (459) : (1911) 1 Upp Bur Rul 100, *Ali Muddin* v. *Meah Jan*.
5. (1886) Ratanlal 293 (294), *Queen-Empress* v. *Balu*.
   (1932) 1932 Nag 173 (173) : 1932 Cri Cas 908 : 28 Nag L R 218 : 34 Cri L Jour 66, *Deo Ram* v. *Emperor*. A person charged with house-breaking can be convicted of receiving stolen property in appeal.
   (1927) 1927 Cal 520 (521, 522) : 54 Cal 476 ;

can an appellate Court alter the finding in such a way that the altered offence was neither *charged* in the trial Court nor was one for which the accused could have been convicted under the provisions of Sections 237 and 238? The general trend of opinion is that it cannot do so[6] and this is in accord with the

28 Cri L Jour 404, *Debakar* v. *Saklidhar Kabiraj.*
[See also (1929) 1929 Lah 508 (509) : 1929 Cri Cas 61 : 30 Cri L Jour 413, *Biru* v. *Emperor*. Where a person has been charged and tried for an offence under S. 380, Penal Code, he can be legally convicted under S. 403 of the Code if he has not been taken by surprise by such a procedure.]

6. (1911) 12 Cri L Jour 269 (271) : 35 Mad 243, *Golla Hanumappa* v. *Emperor.*

(1911) 12 Cri L Jour 73 (74) : 9 Ind Cas 436 (Lah), *Emperor* v. *Mahna Singh.*

(1926) 1926 Cal 431 (432) : 26 Cri L Jour 1018, *Rakhal Chandra Biswas* v. *Jamini Kanta Banerjee.* The conviction under S. 147, Penal Code, cannot be altered to one under S. 323, Penal Code.

(1903) 30 Cal 288 (290), *Yakub* v. *Lethu.* Trial for offence of rioting — Appellate Court cannot convict under Ss. 448 and 323.

(1925) 1925 Mad 706 (706) : 26 Cri L Jour 1036, *Kadulnatha Pillai, In re.*

(1900) 27 Cal 990 (991), *Rahimuddi* v. *Asgar Ali.*

(1924) 1924 All 766 (767) : 25 Cri L Jour 1292, *Cheda Singh* v. *Emperor.*

(1927) 1927 All 35 (36) : 49 All 120 : 27 Cri L Jour 1118, *Mahabir Prasad* v. *Emperor.*

(1910) 11 Cri L Jour 49 (49) : 33 Mad 264, *Padmanaba Payi Kanniah* v. *Emperor.* 11 Bom H C R Crown Cas 240, followed.

(1926) 1926 All 33 (34) : 26 Cri L Jour 1494, *Mula* v. *Emperor.*

(1918) 1918 Mad 496 (496, 497) : 18 Cri L Jour 860, *In re Mangalu Aorodhono Hathi.*

(1924) 1924 Mad 375 (376) : 47 Mad 61 : 25 Cri L Jour 554, *Shreeramulu, In re.*

(1927) 1927 Rang 32 (32) : 4 Rang 355 : 27 Cri L Jour 1360, *Nga Shwa Zan* v. *Emperor.*

(1910) 11 Cri L Jour 340 (340) : 5 Ind Cas 974 (Mad), *In re Bomma Reddy.* Conviction by the appellate Court under S. 379 by altering the conviction of the original Court under Ss. 447 and 352.

(1900) 27 Cal 660 (662), *Jatusingh* v. *Mahabir Singh.*

(1933) 1933 Mad W N 910 (911), *Govinda Ravalu* v. *Emperor.* Conviction by first Court under Ss. 147 and 323. Conviction changed on appeal into one under Ss. 149 and 323.

(1925) 1925 Nag 294 (294, 295) : 26 Cri L Jour 1358, *Akbar Hussain* v. *Emperor.* Charge and conviction under S. 468, I. P. C., by trial Court — Change of conviction under S. 471 in appeal is not proper.

(1921) 1921 Pat 496 (497) : 22 Cri L Jour 485, *Moyadhar Mahanti* v. *Danardhana Kund.* No charge for the offence in the trial Court — Conviction by appellate Court.

(1920) 1920 Pat 590 (591) : 21 Cri L Jour 496, *Raghu Singh* v. *Emperor.*

(1899) 3 Cal W N 367 (368), *Monaranjan Chowdhary* v. *Queen-Empress.* Alteration of findings under Ss. 109 and 211, Penal Code to one under S. 193.

(1927) 1927 Lah 728 (728) : 28 Cri L Jour 405, *Harphul* v. *The Crown.*

(1923) 1923 Lah 260 (261) : 3 Lah 440 : 23 Cri L Jour 709, *Arjan Mal* v. *Emperor.*

(1934) 1934 Lah 178 (179) : 1934 Cri Cas 402 : 35 Cri L Jour 519, *Manque* v. *Emperor.* Conviction under S. 376, Penal Code — Alteration into one under S. 323.

(1899-1900) 5 Cal W N 296 (297), *Rameshwar* v. *Jogi Sahoo.* Cannot convict of any offence which did not form the subject-matter of the complaint.

(1924) 1924 Cal 532 (537) : 24 Cri L Jour 312, *Patal Ghosh* v. *Emperor.* Alteration of the conviction of the petitioners from S. 335 to S. 323.

(1915) 1915 Cal 219 (219) : 15 Cri L Jour 704, *Genu Manjhi* v. *Emperor.* Alteration from S. 147 to S. 323.

(1915) 1915 Cal 181 (182) : 16 Cri L Jour 42, *Har Naran Sardar* v. *The Emperor.*

(1906) 3 Cri L Jour 240 (242) (Bom), *Emperor* v. *Sakharam Ganu.* Alteration of conviction under S. 376 into S. 366 is illegal.

(1915) 1915 All 357 (358) : 16 Cri L Jour 599, *Debi Singh* v. *Emperor.* The powers conferred by the Code of Criminal Procedure upon a Court of appeal are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge which he has to meet.

(1935) 1935 Cal 561 (570) : 1935 Cri Cas 969 : 62 Cal 433 : 36 Cri L Jour 1275 (S B), *Emperor* v. *Bhawani Prosad*

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principle above stated, that an appellate Court cannot pass any finding which the trial Court could not have passed. If the appellate Court considers that the accused is guilty of another offence than that charged, it should direct a re-trial with directions to alter the charge.[6a] It is conceived that it may also frame a fresh charge itself on the analogy of Section 227, and proceed after notice to the accused to dispose of the case. This, however, should not be done if it is likely to prejudice the accused.[7]

In some cases, however, it has been held, that the appellate Court can, where the facts are the same, alter the conviction from one under a wrong Section to one under the proper Section, if it does not prejudice the accused.[8] It has also been held in the cases cited below,[8a] that the only restriction on the appellate Court's power is that the accused is not prejudiced by the alteration of the charge and that the appellate Court could alter the finding, even though

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Bhattarcharjee.

(1888) Ratanlal 368 (368), *Queen-Empress* v. *Krishna.* Conviction for an offence under, S. 411, I. P. C.—Alteration of conviction into one either under S. 379 or S. 411—*Held* that such alternative conviction in appeal was illegal.

(1887) Ratanlal 353 (353), *Queen-Empress* v. *Basappa.* Conviction under S. 323, Penal Code—Could not be convicted in appeal under S. 147 for which the accused was not tried.

6a (1932) 1932 Cal 723 (726, 727): 1932 Cri Cas 728 : 60 Cal 179 : 34 Cri L Jour 177, *Hanuman Sarma* v. *Emperor.*

(1907) 5 Cri L Jour 420 (421): 3 Low Bur Rul 283, *Mi Mo Dah* v. *King-Emperor.*

7. See (1916) 1916 Mad 1222 (1222) : 16 Cri L Jour 737, *In re Mukka Muthiriyan.*

(1928) 1928 Lah 382 (390) : 30 Cri L Jour 18, *Pritchand* v. *Emperor.* Altering the conviction on appeal to abetment of the offence is unfair.

(1934) 1934 Lah 833 (834) : 1934 Cri Cas 1180 : 36 Cri L Jour 274, *Ratan Singh* v. *Emperor.* Conviction for attempting to cheat *X*—Alteration into one for cheating *Y*.

8. (1927) 1927 Pat 199 (200): 6 Pat 217 : 28 Cri L Jour 529, *Ganpat Lal* v. *King-Emperor.*

(1913) 14 Cri L Jour 239 (239) : 19 Ind Cas 335 (Mad), *Kunhambu* v. *Emperor.*

(1922) 1922 All 143 (143) : 23 Cri L Jour 198, *Hanuman* v. *King-Emperor.*

(1932) 1932 Cal 865 (866) : 1932 Cri Cas 889: 33 Cri L Jour 828, *Raghubir Kahar* v. *Emperor.* Finding of guilt under S. 420/75 altered into one under S. 379/75.

(1928) 1928 Pat 359 (362) : 29 Cri L Jour 374, *Ulfat Khan* v. *Emperor.* Accused charged under S. 147 can be convicted under S. 323, I. P. C., in appeal.

(1929) 1929 Pat 11 (15): 7 Pat 758 : 30 Cri L Jour 205, *Bhondu Das* v. *Emperor.* Magistrate convicting for offence under S. 326 read with S. 149, I.P.C. —Appeal—Conviction altered to one under Ss. 326 and 34, I. P. C.

(1933) 1933 Pat 26 (27) : 1933 Cri Cas 241 : 34 Cri L Jour 419, *Jagannath Misra* v. *Emperor.*

(1903) 1 Upp Bur Rul, Penal Code, 9 (13), *Ko Sat Shewin* v. *King-Emperor.*

(1887) 1887 Pun Re Cri No. 59, page 156 (157), *Buta* v. *Empress.* Finding under S. 411 altered to one under S. 403 Penal Code.

(1903) 2 Weir 485 (486), *In re Veera Reddi.*

(1899) 26 Cal 863 (867, 868), *Lala Ojha* v. *Queen-Empress.*

(1904) 1 Cri L Jour 694 (696), *Mohammad Yasin* v. *King-Emperor.*

(1900) 13 C P L R Cri 125 (126), *Empress* v. *Ram Din.*

(1906) 3 Cri L Jour 348 (349) : 3 Low Bur Rul 112, *Emperor* v. *Kyaw Hla Aung.*

8a (1917) 1917 Mad 687 (688) : 17 Cri L Jour 384, *In re Manuar Krishna Chetty.*

(1933) 1933 Pesh 9 (12) : 1933 Cri Cas 151 : 34 Cri L Jour 266, *Sharif* v. *Emperor.* S. 423 (1) (b) lays down that in an appeal from conviction appellate Court may "alter the finding." This power is not in any way qualified or restricted by Ss. 236, 237 and 238.

(1919) 1919 Mad 188 (189) : 20 Cri L Jour 780, *Pullannavara Hanumantha, In re.*

(1899) 26 Cal 863 (867, 868), *Lala Ojha* v. *Queen-Empress.*

[See also (1903) 25 All 534 (535, 536), *Emperor* v. *Gur Narain Prasad.* The power of an appellate Court in altering a finding under S. 423, Criminal P. C., is not limited by any preliminaries imposed upon the first Court before it takes cognizance of the offence involved in the altered finding.]

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the case does not fall within Section 237 or Section 238. It is submitted that this view cannot be supported on principle. Section 233 of the Code provides that every distinct offence must be separately charged, though where a trial does take place without a charge, it is a curable *irregularity* under Section 535, *infra*. This principle applies equally to the appellate Court as well as the trial Court,[9] and there is nothing to show that the appellate Court can disregard the rule any more than the trial Court. Though the words "may alter the finding" in the Section are general, they must be construed in harmony with other provisions of the Code and not as overriding them.[9a]

The word "finding" is not limited to a finding upon a point of law as distinct upon a point of fact.[9b]

Where *X* was charged under Section 143 and also under Section 379 of the Penal Code, but was convicted only under Section 143 and acquitted of the offence under Section 379 of the Penal Code, and the appellate Court *confirmed* the conviction under Section 143, but set aside the acquittal under Section 379, it was held that the appellate Court had no jurisdiction to do so inasmuch as it was not a case of any *alteration of conviction*.[10]

Charge for substantive offence—Conviction by appellate Court for abetment.

As has been seen before, a conviction for offence *X* can be altered to one for offence *Y* if, on the facts of the case, the accused could have been convicted of offence *Y* without a charge by the lower Court under the provisions of Sections 237 and 238. The abetment of an offence is not a minor offence and cannot come under Section 238.[11] But it may come under Section 237, if there is no element in it which is not included in the charge for the substantive offence. In such a case the accused may be convicted in appeal for abetment of the offence.[12] Where it does not come under Section 237 also, the accused cannot be convicted of abetment.[13] It has been held in the undermentioned case,[14] that the appellate Court can alter the conviction to one of abetment independently of Sections 237 and 238, subject only to the question whether

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9. (1905) 2 Cri L Jour 694 (695) : 1905 Pun Re Cri No. 38, *Sahib Singh* v. *Emperor*. [See however (1915) 1915 Mad 302, (303) : 15 Cri L Jour 680, *Surya Narayana Rao, In re*. Where two persons are tried together and convicted of one offence, the appellate Court has power to convict one of two persons tried for a certain offence and the other of another offence found on the facts.]

9a (1910) 11 Cri L Jour 49 (49) : 33 Mad 264, *Padmanaba Payi Kanniah* v. *Emperor*.

9b (1918) 1918 Pat 257 (258) : 19 Cri L Jour 735 : 3 Pat L Jour 565, *Mahangu Singh* v. *Emperor*. Distinguishing 42 Ind Cas 598 and 1914 Cal 456.

10. (1923) 1923 Cal 658 (658) : 24 Cri L Jour 938, *Prasanna Chandra* v. *Upendra Nath*.

11. (1927) 1927 All 35 (36) : 49 All 120 : 27 Cri L Jour 1118, *Mahabir Prasad* v. *Emperor*.
(1927) 1927 Cal 63 (64) : 28 Cri L Jour 2, *Hulas Chand* v. *Emperor*.

12. (1927) 1927 All 35 (36) : 49 All 120 : 27 Cri L Jour 1118, *Mahabir Prasad* v. *Emperor*.
(1931) 1931 Oudh 274 (276, 277) : 1931 Cri Cas 634 : 7 Luck 102 : 32 Cri L Jour 905, *Khuman* v. *Emperor*.
(1935) 1935 Pesh 67 (68) : 1935 Cri Cas 451, *Suraj Bhan* v. *Emperor*.

13. (1915) 1915 Mad 538 (538) : 15 Cri L Jour 694, *In re Perumal Naidu*.
(1910) 11 Cri L Jour 49 (49) : 33 Mad 264, *Padmanaba Payi* v. *Emperor*.
(1912) 13 Cri L Jour 223 (223) : 14 Ind Cas 319 (Mad), *In re Varayal Krishnan Nair*.
(1912) 13 Cri L Jour 203 (203) : 14 Ind Cas 203 (Mad), *Singaravelu Pillai* v. *Emperor*.

14. (1928) 1928 Cal 466 (468) : 29 Cri L Jour 1093, *Kadira* v. *Emperor*.

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the accused is prejudiced by such alteration. The soundness of this view has already been discussed above. *See also* the undermentioned case.[15]

32. Reduction of sentence.

Where the appellate Court rejects the appeal summarily under Section 421, it cannot reduce the sentence.[1] Nor can it, while affirming the conviction, reverse the sentence absolutely inasmuch as every conviction must be followed by a sentence. If it thinks the sentence severe, it must pass at least a nominal sentence.[2]

An appellate Court has power to reduce the sentence,[3] but not to *remit* any sentence—a function which belongs to the Government.[4]

Where *A* and *B* are co-accused and *A* alone appeals, the appellate Court can in the ends of justice reduce the sentence awarded on *B*.[5]

33. "Alter the nature of the sentence but not so as to enhance the same."

Under the Code of 1861 the appellate Court had no power to enhance the sentence passed by the lower Court.[1] Under the Code of 1872 Section 280, as amended by Act XI of 1874, the appellate Court could enhance such sentence.[2] Under the Code of 1882 and the present Code, such power does not exist.

There is a great difference of opinion as to whether particular sentences passed by the Appellate Court are enhancements of the sentences passed by the first Court. Thus the following views have been expressed:—

1. A sentence of fine and in default *X* months' imprisonment is a lighter sentence than a sentence merely of *X* months' imprisonment.[3] A contrary view has been held in the undermentioned case[4] namely that it is really an enhancement inasmuch as even if the *X* months' imprisonment is fully served out, the fine nevertheless continues to be leviable in other ways from the accused.

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15. (1928) 1928 Lah 382 (390) : 30 Cri L Jour 18, *Pritchand* v. *Emperor*.

Note 32.

1. (1886) Ratanlal 304 (306), *Queen-Empress* v. *Govinda Rao*.
2. (1891) Ratanlal 545 (546), *Queen-Empress* v. *Lakshmibai*.
3. (1866) 1866 Pun Re Cri No. 1, page 1 (2), *Achar Putwaree* v. *Crown*.
   (1865) 3 Suth W R Cri 16 (17), *Queen* v. *Keeifa Singh*.
   (1867) 7 Suth W R Cri 41 (41), *Queen* v. *Bhamaour Doosadh*. Illegal sentence of 14 years reduced to legal sentence of 10 years.
4. (1869) 1869 Pun Re Cri No. 11 page 20 (21), *Crown* v. *Loodun*.
   (1905) 2 Cri L Jour 206 (207) (Lah), *Inam Din* v. *Emperor*.
5. (1932) 1932 Lah 615 (615) : 1932 Cri Cas 921 : 34 Cri L Jour 458, *Jalal* v. *Emperor*.

Note 33.

1. (1865) 4 Suth W R Cr 20 (20, 21), *Queen* v. *Buloram Doss*.
2. (1881) 1881 All W N 62 (62), *Empress* v. *Ratan Sahai*.
   (1877) Ratanlal 131 (131, 132), *Queen-Empress* v. *Tharekhan*.
   (1879-80) 4 Bom 239 (240), *Imperatrix* v. *Rama Prema*.
   (1875) 1875 Pun Re Cr No. 8, page 11 (11, 12), *Shambhu Lal* v. *The Crown*.
   (1876-78) 1 Mad 54 (54), *Anonymous*.
3. (1899) 23 Bom 439 (441), *Queen-Empress* v. *Jagannath*.
   (1907) 5 Cri L Jour 36 (38) : 30 Mad 103 (F B), *Bhathavatsalu Naidu* v. *The King-Emperor*.
   (1907) 6 Cri L Jour 100 (101, 102) : 3 Nag L R 90, *Shamlay* v. *Emperor*.
   (1931) 1931 Lah 159 (160) : 1931 Cri Cas 271 : 12 Lah 449 : 32 Cri L Jour 1217, *Mohammad Hussain* v. *Emperor*.
4. (1901) 23 All 497 (499), *King-Emperor* v. *Sagwa*.

2. A sentence of 6 months' imprisonment and a fine of Rs. 1000 and in default 3 months' imprisonment, in substitution of a sentence of 9 months' imprisonment is not an enhancement.[5] The case will be different if the imprisonment in default added to the substantive sentence of imprisonment *exceeds* the original imprisonment awarded.[6]

3. Where *X* is convicted of robbery, but the appellate Court rejects the *evidence as to violence* and finds *X* guilty only of theft, the maintaining of the same sentence as was awarded for robbery would be an enhancement. Where *X* is convicted of theft in a 'building' but the appellate Court finds him guilty of simple theft by putting a different construction upon the word 'building,' both the Courts are at one as to the *act committed* and differ as to the application of the law. In the latter case the alteration of the conviction to one of theft and maintaining the sentence is not an enhancement of the sentence. In other words, the alteration of an offence to a less graver offence but maintaining the sentence is not an enhancement when the *act committed* is held to be the same, but the alteration is due to an interpretation of the law.[7]

4. Where the appellate Court passes a sentence which the lower Court has no power to pass, there is an enhancement of the sentence.[8]

5. Where the accused, convicted of two offences, is acquitted as regards *one* of such offences, the maintenance of the whole punishment awarded for the two offences, amounts to an enhancement.[9] The reason alleged for this view is that when

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5. See the cases cited in foot-note (3) above.
6. (1899) 23 Bom 439 (441), *Queen-Empress* v. *Chhagan Jaggannath.*
   (1894) 17 All 67 (68, 69), *Queen-Empress* v. *Ishri.*
7. (1927) 1927 Mad 789 (790) : 28 Cri L Jour 824, *Rangaswami Kandu Pillai* v. *King-Emperor.*
8. (1924) 1924 All 130 (130) : 45 All 594 : 25 Cri L Jour 312, *Mahomed Yakub Ali* v. *King-Emperor.*
   (1911) 12 Cri L Jour 444 (445, 446) : 7 Nag L R 109, *Sitaram* v. *Emperor.*
   (1930) 1930 Lah 318 (318) : 1930 Cri Cas 350 : 31 Cri L Jour 166, *Yusuf* v. *Municipal Committee, Murree.* Alteration of sentence of fine into one of whipping which lower Court could not pass.
   (1927) 1927 Lah 733 (734) : 28 Cri L Jour 575, *Bir Singh* v. *Crown.* (Quaere). [But see (1933) 1933 Lah 128 (129) : 1933 Cri Cas 242 : 34 Cri L Jour 640, *Salihon* v. *Emperor.*]
9. (1933) 1933 Lah 933 (933) : 35 Cri L Jour 108 : 1933 Cri Cas 1392, *Kehr Singh* v. *Emperor.*
   (1907) 5 Cri L Jour 88 (89) : 30 Mad 48, *Paramasiva Pillai* v. *Emperor.* In such cases, some reduction of sentence by the appellate Court must be made, unless the Court thinks that the sentence ought not to be reduced, in which case it should refer the matter to the High Court for enhancement of sentence.
   (1911) 12 Cri L Jour 454 (455) : 11 Ind Cas 798, *In re Prola Narasimham.*
   (1916) 1916 Mad 622 (622) : 16 Cri L Jour 271, *In re Appanda Natha Nainar.*
   (1916) 1916 Mad 788 (788) : 16 Cri L Jour 446, *In re Choitano Ranto.*
   (1908) 7 Cri L Jour 361 (362) (Mad), *In re Somasundaram Pillai.*
   (1910) 11 Cri L Jour 483 (483) : 7 Ind Cas 415 (Mad), *Emperor* v. *Varadhan.*
   (1892) Ratanlal 618 (618), *Queen-Empress* v. *Natha.*
   (1897) 24 Cal 317*n* (318*n*), *Arpin Seikh* v. *Arobdi Datia.*
   (1917) 1917 Lah 358 (360) : 1916 Pun Re Cr No. 31 : 18 Cri L Jour 372, *Mangal Singh* v. *Emperor.*
   (1910) 11 Cri L Jour 727 (727) : 8 Ind Cas 880 (Mad), *In re Kesireddi Panasa Ramudu.*
   (1927) 1927 All 375 (376) : 49 All 484 : 28 Cri L Jour 495, *Mrs. F. M. Thorpey*

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Note 33

a single sentence is awarded for two offences, part of it must be deemed to be for one offence and part for the other so that the maintaining of the whole sentence for one only of the offences is an enhancement.[10] A contrary view has been expressed in the following cases.[10a]

6. Where a person is guilty of acts constituting a single offence, but they are split up into two or more offences and the accused is sentenced separately or given one combined sentence for the two or more supposed offences, the appellate Court is competent to alter the conviction to the proper one for the single offence and maintain the aggregate of the two sentences or the whole of the combined sentence; there is no enhancement in such a case.[11]
7. Where a charge has several counts, the appellate Court setting aside the conviction on some of the counts, but maintaining the entire sentence, does not give any enhanced sentence.[12]
8. A fine in lieu of simple imprisonment is not an enhancement.[13]
9. Rigorous imprisonment in lieu of simple imprisonment for the same term is enhancement.[14]
10. Solitary confinement, even if the imprisonment awarded is reduced, is enhancement.[15]
11. A sentence of imprisonment in lieu of fine is an enhancement.[15a]
12. An increase of fine[16] or a sentence of whipping[17] in lieu of decrease in imprisonment is an enhancement.

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v. *Emperor.*

(1887) 1887 Pun Re Cr No. 45, page 110 (113), *Azim Khan* v. *The Empress.*

(1897) 24 Cal 316 (318), *Ramzan Kunjra* v. *Ramkhelawan Chowbe.*

(1928) 1928 Bom 346 (347) : 29 Cri L Jour 1082, *Ramachandra* v. *Emperor.*

(1896) 22 Bom 760 (761), *Queen-Empress* v. *Banma Balappa.*

(1892) Ratanlal 618 (618), *Queen-Empress* v. *Natha Lunja.*

(1905) 2 Weir 487*a* (487*a*), *In re Ramanujam Pillai.*

10. (1927) 1927 Mad 789 (789, 790) : 28 Cri L Jour 824, *In re Rangaswami Kanda Pillai.*

10a (1908) 8 Cri L Jour 75 (88) (Lah), *Ishar Das* v. *Emperor.*

(1910) 11 Cri L Jour 243 (244) : 5 Ind Cas 754 (Mad), *In re Mari.* Not an enhancement when the true inference to be drawn from the sentence is that the Magistrate did not mean to pass a separate sentence for the offence of which the petitioner was acquitted in appeal.

(1930) 1930 Pat 79 (80) : 1930 Cri Cas 38 : 31 Cri L Jour 173, *Bechu Singh* v. *Emperor.* It depends on the circumstances of the particular case whether the retention of the sentence awarded by the trial Court constitutes an enhancement of sentence. It does not follow that if the conviction on one of several charges in a trial is set aside while one or more others are affirmed, there must necessarily be a reduction of sentence.

11. (1907) 6 Cri L Jour 43 (45) : 3 Nag L R 67, *Balbhadri Bani* v. *Tribhuban Nath.*

12. (1928) 1928 Mad 651 (652) : 29 Cri L Jour 847, *Kaliappa Goundan* v. *Emperor.*

13. (1911) 12 Cri L Jour 445 (446) : 7 Nag L R 109, *Sita Ram* v. *Emperor.*

14. (1924) 1924 All 130 (130) : 45 All 594 : 25 Cri L Jour 312, *Mohammad Yakub Ali* v. *King-Emperor.*

15. (1890) 1890 All W N 170 (170), *Empress* v. *Peman.*

15a (1883) 2 Weir 486 (486), *In re Chadalavad Ramanappa.*

(1893-1900) 1893-1900 Low Bur Rul 423 (425), *Kyawkaing* alias *Chet Pa* v. *Queen-Empress.*

(1893) 18 Bom 751 (751), *Queen-Empress* v. *Dhansung Dada.*

16. (1897) 2 Weir 487 (487), *In re Appu* alias *Mahadeva Ayyar.*

17. (1928) 1928 Rang 265 (265) : 30 Cri L Jour 328, *In re Kyaing Nga Hmwe.*
[But see (1884) 1884 Pun Re Cri No. 3, page 4 (4), *Jiwan* v. *The Empress.* Rigorous imprisonment for 4

13. A substitution of 1 month's imprisonment and a fine of Rs. 200, and in default 2 months' imprisonment, for 2 months' imprisonment and a fine of Rs. 50 and in default 1 month's imprisonment is an enhancement.[18] **Sec. 423 Note 33**

See also the undermentioned cases.[19]

The real solution of the conflict lies in recognising the fact that the question whether a sentence has been enhanced is a *question of fact* to be determined in each particular case with reference to the *facts of that case*.[20] The proper test is whether the accused considers the substituted sentence heavier than that awarded.[21] Thus a substitution of 3 days' rigorous imprisonment and Rs. 100 fine and in default 1 month's rigorous imprisonment, may not be an enhancement if the convict does not consider the fine of Rs. 100 too heavy to pay.[22]

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years substituted by whipping in case of juvenile offender.]

18. (1924) 1924 Pat 563 (564) : 3 Pat 638 : 25 Cri L Jour 1186, *Bhola Singh* v. *King-Emperor*.

19. (1896) 18 All 301 (302), *Queen-Empress* v. *Lakskmi Kant*. Alteration of a sentence of a fine of Rs. 50 or in default two months' simple imprisonment to a sentence of six months' rigorous imprisonment was an enhancement.

(1887) 1887 All W N 100 (101), *Empress* v. *Nada*. The Deputy Magistrate sentenced the accused to 15 days' rigorous imprisonment and a fine of Rs. 10, or, in default, to a further term of one week, the District Magistrate, on appeal, altered the sentence to a fine of Rs. 50 or, in default, to one month's rigorous imprisonment—*Held*, that the District Magistrate's sentence was enhanced.

(1935) 1935 Rang 64 (64, 65) : 1935 Cri Cas 190 : 12 Rang 607 : 36 Cri L Jour 366, *Emperor* v. *Pacho*. Substitution of legal sentence in lieu of illegal sentence of whipping is enhancing sentence—Proper course is to set aside illegal portion of sentence and refer case for revision by High Court.

(1871) 15 Suth W R Cri No. 7 (8, 9), *Queen* v. *Bandaali*.

(1900) 1900 Pun L R Cri No. 32 (p. 33), *Hasana and Nabi Baksh* v. *The Empress*. Order for joint fine — Two persons who have been sentenced to a fine of Rs. 75 each, were jointly fined Rs. 150—On appeal by appellate Court, held this amounted to an enhancement in each case.

20. (1901) 23 All 497 (499), *King-Emperor* v. *Sagwa*.

(1900) 27 Cal 175 (177), *Rakhal Raja* v. *Khirode Pershad Dutt*. Alteration of a sentence of three months' imprisonment to one month's imprisonment with a fine of Rs. 20, or in default of payment to 15 days' rigorous imprisonment, does not amount to enhancement.

21. (1930) 1930 Mad 193 (193, 194) : 1930 Cri Cas 86 : 31 Cri L Jour 203, *Subba Goundan* v. *Emperor*. Alteration of sentence of three months' rigorous imprisonment to one month and fine of Rs. 60, and in default two months is not enhancement.

(1934) 1934 All 1031 (1032) : 1934 Cri Cas 1338 : 36 Cri L Jour 335, *Satyavan Acharya* v. *Emperor*. On appeal fine substituted in lieu of imprisonment — Whether amounts to enhancement of sentence.

(1914) 1914 Lah 539 (539) : 1915 Pun Re Cri No. 7 : 16 Cri L Jour 403, *Kripa Ram* v. *Crown*. Altering a sentence of three months' imprisonment to one of one month's imprisonment and a fine and in default one month's further imprisonment is not enhancement.

[See also (1916) 1916 Lah 130 (130) : 17 Cri L Jour 212, *Mamchand* v. *Emperor*. If on appeal from a sentence of one week's rigorous imprisonment (which had already been undergone) the sentence is altered into one of Rs. 50 fine or in default one week's rigorous imprisonment, the sentence amounts to an enhancement.

(1926) 1926 Lah 543 (543) : 27 Cri L Jour 812, *Kanshi Ram* v. *Emperor*. Where the accused is insolvent and unable to pay the fine, an alteration of a sentence of two months' imprisonment and Rs. 50 fine or in default one month's further imprisonment, to six weeks' imprisonment and Rs. 200 fine, or in default for further imprisonment of six weeks is enhancement of sentence.]

22. (1914) 1914 All 530 (531) : 36 All 485 : 15 Cri L Jour 519, *Mehab Chand* v. *Emperor*.

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As a practical guide to the subordinate Courts in Burma, the High Court of Rangoon has laid down certain principles on which a whipping may be substituted for imprisonment. *See* the undermentioned cases.[23]

An order for costs under Section 31 of the Court-fees Act is not an enhancement of any sentence.[24] Nor is an additional order for security passed under Section 106, sub-section 3, an enhancement of the sentence.[25]

34. "Appeal from any other order"—Clause (c).

Clause (c) applies to an appeal from "any other order" *i. e.*, any other order than an order of acquittal or of conviction.[1a] Thus appeals from orders under Section 514[1] or Section 476[2] or Section 135[3] can be dealt with under this Clause. In an appeal under sub-section 3 of Section 250 the appellate Court can, under this Clause, set aside the order for compensation though it cannot set aside the acquittal.[4]

The only orders that can be passed in appeals from orders not being acquittals or convictions, are those specified in this Clause, namely, *alteration* or *reversal* of the order of the lower Court, and those specified in clause (d) namely, *amendment* or *consequential or incidental orders*.[5] Thus in an appeal against an order under Section 118, a *further inquiry*[6] or a *re-trial*[7] cannot be ordered.

The word "alter" in Clause (c), though literally may include an alteration increasing the severity of the penalty, cannot be so construed; the whole tenor of the Section shows that the Court has no power, by alteration, to increase the severity of the penalty imposed by the trial Court.[8]

35. Subsequent events—Power to take notice of.

An appellate Court has to look to the offence as charged, and the conviction should not be disturbed because it thinks that, owing to subsequent events, the parties may have committed another offence.[1] Thus, facts which

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23. (1929) 1929 Rang 177 (179) : 1929 Cri Cas 169 : 7 Rang 319 : 30 Cri L Jour 986 (F B) *Emperor* v. *Chit Pon.*
(1932) 1932 Rang 150 (151, 152) : 1932 Cri Cas 711 : 10 Rang 317 : 33 Cri L Jour 758, *Emperor* v. *Nga Aung Myat.*

24. (1906) 3 Cri L Jour 460 (460, 461) : 29 Mad 188, *Emperor* v. *Karuppanna Pillai.*
(1903) 26 Mad 421 (422), *Veermurti* v. *Seshanna.*
[But see (1898) 32 Mad 153 (155), *Queen-Empress'* v. *Thangavelu Chetty.*]

25. (1918) 1918 Nag 64 (65) : 20 Cri L Jour 760, *Maharaj Singh* v. *Emperor.*
(1919) 1919 All 375 (376) : 20 Cri L Jour 302, *Zafar Hussain* v. *Emperor.*

Note 34.

1a (1898) 21 Mad 124 (126) (F B), *Queen-Empress* v. *Srinivasalu Naidu.*

1. (1905) 2 Cri L Jour 131 (132) : 1905 Pun Re Cri No. 15, *Masta* v. *Emperor.*
(1912) 13 Cri L Jour 31 (31) : 5 Sind L R 179, *Kahan Bahadin* v. *Emperor.*

2. (1898) 21 Mad 124 (126), *Queen-Empress* v. *Srinivasalu Naidu.*

3. (1885) 1885 Pun Re Cri No. 42, page 89 (89), *Ram Kala* v. *Ganga.* Case in revision — Revisional Court can under S. 439 exercise same powers as appellate Court under S. 423, Cl. (c).

4. (1932) 1932 Cal 120 (121) : 1932 Cri Cas 105 : 58 Cal 1436 : 33 Cri L Jour 269, *Surendra Nath Bhattacharjee* v. *Basanta Chandra.*

5. (1934) 1934 Mad 202 (202) : 1934 Cri Cas 351 : 34 Cri L Jour 947, *Narappa Reddy, In re.*
(1929) 1929 Lah 28 (28) : 30 Cri L Jour 491, *Chandan* v. *Emperor.*

6. (1906) 3 Cri L Jour 243 (243) : 33 Cal 8, *Dayanath* v. *Emperor.*

7. (1934) 1934 Mad 202 (202) : 1934 Cri Cas 351 : 34 Cri L Jour 947, *Narappu Reddy* v. *Emperor.*
(1929) 1929 Lah 28 (28) : 30 Cri L Jour 491, *Chandan* v. *Emperor.*

8. (1923) 1923 Oudh 44 (45) : 24 Oudh Cas 286 : 22 Cri L Jour 766, *Bareeshwar Baksh Singh* v. *Emperor.*

Note 35.

1. (1868) 9 Suth W R Cri 65 (66), *Ramjee* v. *Meeajan Sheikh.*

happened subsequent to the conviction or verdict cannot be utilised for the purpose of altering the verdict or of reducing the sentence.[2]

But where after the verdict of the jury it was discovered that the jurymen had taken bribes, the verdict was set aside.[3]

36. Power to direct sentences to run concurrently.

The High Court can, under this Section, and Section 561-A of the Code, act under Section 397 and direct separate sentences in separate trials to run concurrently.[1]

37. Appellate Court cannot canvass previous convictions.

An appellate Court cannot go into the legality of previous convictions or of orders passed against the accused.[1]

38. Appellate Court, when to report to the High Court.

Where the appellate Court comes to the conclusion that the sentences in respect of the convicted persons ought to be enhanced, and therefore wishes to report to the High Court, it should do so in separate proceedings and not keep the appeal undisposed of till the report is made and orders passed thereon.[1] Nor can an appellate Court refer the matter of the appeal to the High Court without deciding the appeal; it should decide the appeal itself.[2] Where it finds that the lower Court was not competent to try the case, it should not report the matter to the District Magistrate but should direct a re-trial by a competent Court or a commitment to a Court of Session.[3]

39. "Any amendment or any consequential or incidental order" — Clause (d).

The appellate Court has, under Clause (d), power to make any amendment, or any consequential or incidental orders that may be just and proper; it cannot, however, make any order which would make the entire proceeding infructuous and absurd; thus where a person who blocked up a private way was convicted under Section 341 of the Penal Code and was further ordered to remove the obstruction, it was held that the appellate Court could not set aside the order as to the removal of the obstruction inasmuch as the removal is a necessary corollary to the conviction of the accused.[1]

Clause (d) deals with orders to be passed *after the appeal has been heard* and cannot apply to matters that may arise *pending* appeal, such as the release of the appellant on bail.[2] Nor can it apply to matters at the stage of *admission* of the appeal. Thus an order cannot be passed under

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2. (1929) 1929 Cal 92 (93) : 30 Cri L Jour 484, *Intaz Mandal* v. *Emperor*.
3. (1933) 1933 Cal 629 (640) : 1933 Cri Cas 1088 : 60 Cal 751 : 34 Cri L Jour 1072, *Hafez Molla* v. *Emperor*.

Note 36.

1. (1931) 1931 Bom 529 (529) : 1931 Cri Cas 917 : 33 Cri L Jour 77, *Nagappa Vyankappa Sali* v. *Emperor*.

Note 37.

1. (1924) 1924 Rang 295 (297) : 25 Cri L Jour 1303, *On Pe* v. *Emperor*.

Note 38.

1. (1884) 1884 All W N 129 (129), *Empress* v. *Durga Prasad*.
   (1915) 1915 All 185 (186) : 16 Cri L Jour 433, *Emperor* v. *Mohan Lal*.
2. (1868) 9 Suth W R Cr 5 (5), *Sreekissan* v. *Jugal*.
   (1869) 11 Suth W R Cr 24 (24), *Queen* v. *Nussooruddeen*.
   (1914) 1914 Low Bur 226 (226) : 7 Low Bur Rul 251 : 15 Cri L Jour 667, *Emperor* v. *Sulaiman*.
3. (1902) 2 Weir 484 (484, 485), *In re Chinna Mottayyan*.

Note 39.

1. (1899-1900) 5 Cal W N 432 (434), *Debandra* v. *Mohini*.
2. (1934) 1934 All 845 (845) : 1934 Cri Cas 1031 : 36 Cri L Jour 177, *Darsu* v. *Emperor*.

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this clause excusing the delay in filing an appeal after limitation inasmuch as the application of this Section is legitimate only after the preliminary stage indicated in Sections 421 and 422 has been passed *i. e.*, after the appeal is validly admitted.[3] It has, however, been held in the case cited below[3a] that an order dispensing with security by a person convicted under Section 107 of the Code, can be passed *pending appeal* as an incidental order under Clause (d). It is submitted that this is not correct. Clause (d) should be construed along with the first portion of the Section which makes it clear that an order under Clause (d) can be passed only *after perusing the record and hearing the appeal.*

Whether a particular order is "consequential or incidental" depends on the terms of the order under consideration in each particular case and the circumstances in which it is made.[4]

In *Mehi Singh* v. *Mangal Khanda*[5] a Full Bench of the High Court of Calcutta observed as follows:—

"Consequential or incidental orders," within the purview of the provision, must fall under one or other of the two heads:—

> "*First* there are orders which follow as a matter of course being the necessary complements of the main orders passed without which the latter would be incomplete or ineffective. Such are directions as to the refund of fines realised from acquitted appellants, or on the reversal of acquittals, as to the restoration of compensation paid under Section 250; and for them no separate authority is needed.
>
> "*Secondly* there are orders which, though ancillary in character, require more than the support of a criminal Court's inherent jurisdiction, and could not be passed without express authority."

The principle of *Mehi Singh's* case has been generally followed[6] though the Rangoon High Court has, in the undermentioned case, doubted the correctness of the view with reference to the second category of the orders above referred to.[7]

The following have all been held to be "consequential" or "incidental" orders within the meaning of Clause (d):—

1. An order for costs under Section 148 sub-section 3 is incidental to an order for possession under Section 145.[8]
2. An order for re-trial in an appeal against an order under Section 107 of the Code for security is incidental to the reversal of the order for security.[9]

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3. (1923) 1923 Mad 95 (96) : 24 Cri L Jour 89, *Mittoor Moideen, In re.*
3a (1932) 1932 All 680 (680): 1932 Cri Cas 856: 54 All 861 : 33 Cri L Jour 731, *Katwaroo Rai* v. *Emperor.*
4. (1933) 1933 Rang 288 (291) : 1933 Cri Cas 1084 : 11 Rang 361 : 35 Cri L Jour 1 (F B), *Ma Mya Khin* v. *Maung Po Htwa.*
5. (1911) 12 Cri L Jour 529 (531) : 39 Cal 157 (F B), *Mehi Singh* v. *Mangal Khanda.*
6. (1922) 1922 All 107 (109) : 44 All 401 : 23 Cri L Jour 349, *Mr. C. Dun* v. *Emperor.*
7. (1933) 1933 Rang 288 (291) : 1933 Cri Cas 1084 : 11 Rang 361 : 35 Cri L Jour 1 (FB), *Ma Mya Khin* v. *Maung Po.*
8. (1933) 1933 Rang 288 (291) : 1933 Cri Cas 1084 : 11 Rang 361 : 35 Cri L Jour 1 (F B), *Ma Mya Khin* v. *Maung Po Htwa.*
9. (1926) 1926 All 403 (403) : 48 All 501 : 27

3. An order under Section 517 for restoration of property to the person entitled may be passed as a consequential or incidental order.[10]

4. An order under Section 520 of the Code can be passed as consequential to the findings in the appeal.[11] But an appellate Court can only deal with an order under Section 520, simultaneously with the appeal pending before it and not by a separate proceeding initiated subsequent to the disposal of the appeal.[12] *See also* Notes to Section 520, *infra*.

5. Where a member of a Bench of Magistrates has not signed the judgment, the appellate Court can, as an incidental order, send the case back to him for such signature.[13]

6. An order under Section 31 of the Court-fees Act can be passed as an incidental order.[14]

7. An order under Section 471 of the Code is incidental to an order of acquittal on the ground of minority.[15]

8. An order under Section 562[16] or an order setting aside an order under Section 562,[17] can be made as a consequential or incidental order.

9. An order sending a case back for re-hearing can be passed under this clause.[18]

10. An order directing refund of compensation on the setting aside of an order for compensation is a consequential or incidental order within Clause (d).[18a]

11. There is a difference of opinion as to whether an order giving leave to compound an offence can be made under this Clause, some cases holding that it can be made[19] and others holding that it cannot be made.[20] The latter view proceeds on the

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Cri L Jour 945, *Bhagwant Singh* v. *Emperor*.

10. (1928) 1928 Lah 567 (567, 568, 571) : 10 Lah 187 : 29 Cri L Jour 810, *Thiraji* v. *Emperor*.
(1906) 4 Cri L Jour 370 (371) (All), *Emperor* v. *Gopi Nath*. Order as to property which it did not previously include.
(1914) 1914 Cal 658 (660) : 15 Cri L Jour 184, *Hagu Biswas* v. *Manmatha Nath Mitra*.

11. (1923) 1923 Mad 324 (324, 325): 46 Mad 162: 24 Cri L Jour 162, *Arunachal Thevan* v. *Vellachami Thevan*.

12. (1904) 17 C P L R Cri 107 (109 to 111) *Emperor* v. *Hussain Shah*.

13. (1919) 1919 All 308 (308) : 41 All 217 : 20 Cri L Jour 214, *Gopal Das* v. *Emperor*.

14. (1925) 1925 Mad 136 (137) : 47 Mad 914 : 25 Cri L Jour 1213, *Ediga Thimmiah, In re*.

15. (1922) 1922 Mad 54 (55) : 23 Cri L Jour 71, *A. B. Mahammad* v. *Emperor*.
(1915) 1915 Low Bur 34 (35) : 8 Low Bur Rul 290 : 16 Cri L Jour 670, *Emperor* v. *Nga E Moung*.

16. (1902) 24 All 306 (308), *Emperor* v. *Birch*.
(1907) 5 Cri L Jour 136 (137) : 29 Mad 567. *Narayanaswami Naidu* v. *Emperor*.

17. (1911) 12 Cri L Jour 213 (214) : 1911 Pun Re Cr No. 16, *Harnam Singh* v. *Emperor*.

18. (1914) 1914 Mad 50 (51) : 15 Cri L Jour 409, *Public Prosecutor* v. *Raver Unithiri*.

18a (1903) 25 All 315 (316), *In the matter of the complaint of Safdar Hussain*.

19. (1910) 11 Cri L Jour 203 (204) : 32 All 153, *Ram Piyari* v. *Emperor*.
(1913) 14 Cri L Jour 46 (46) : 18 Ind Cas 270 (All), *Naqi Ahmad* v. *King-Emperor*. Hesitatingly.
[See also (1900) 3 Oudh Cas 314 (315), *Girwar Singh* v. *Queen-Empress*.]

20. (1917) 1917 Cal 705 (707) : 43 Cal 1143 : 17 Cri L Jour 339, *Akshoy Singh* v. *Rameshwar Badgi*.
(1916) 1916 Mad 483 (484, 485) : 39 Mad 604 : 16 Cri L Jour 750, *Sankar Rangayya* v. *Sankar Ramayya*.
(1915) 1915 All 8 (9) : 37 All 127 : 16 Cri L

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ground firstly, that Section 345, Clause 7, is exhaustive in its scope and cannot be enlarged by reference to Clause (d) of this Section, and secondly that it is not a consequential or incidental order.

12. Before the present Code, there was no provision corresponding to Clause (d) of this Section and it was held on the language of Section 250, that it was the *Magistrate by whom the case was heard* that could pass an order under that Section and not an appellate Court.[21] The introduction of Clause (d) would appear to make a difference. It has, however, been held that an order under Section 250 is not "consequential" or "incidental" to an order of discharge or acquittal and cannot be passed by the appellate Court under this Clause.[22]

The following orders have been held not to be within Clause (d):—

1. Order expunging remarks in the lower Court's judgment.[23] Such an order is not an "amendment" as "amendment" means amendment of an *effective* order of the Court below. *See* in this connection Notes to Section 561-A.
2. Order as to costs of the *appeal itself*[24] or of the adjournment of the appeal.[24a]
3. Order setting aside an order under Section 31 of the Court-fees Act.[25]
4. Order reviewing the order of the predecessor.[26]
5. Order staying criminal proceedings pending decision of Civil Court.[27] But where an order under Section 476, sub-section 1, is set aside, proceedings under Section 476, sub-section 2, which had been begun may be stayed under Clause (d).[28] *See also* the undermentioned case.[29]

Jour 247, *Ram Chandra* v. *Emperor*. No reference was made to Clause (d).

21. (1875) 8 Mad H C Rul 7*n* (7*n*), *High Court proceedings, 27th February* 1875.

22. (1926) 1926 Lah 427 (427): 7 Lah 152: 27 Cri L Jour 570, *Notified Area, Kharar* v. *Karta Ram.*
(1911) 12 Cri L Jour 529 (531): 39 Cal 157 (F B), *Mehi Singh* v. *Mangal Khanda.* Overruling 11 Cri L Jour 46.
(1924) 1924 All 224 (224): 46 All 80: 25 Cri L Jour 967, *Chedi* v. *Ram Lal.*
(1906) 3 Cri L Jour 441 (442): 28 All 625, *Emperor* v. *Chittan.*
(1901) 3 Bom L R 841 (842), *Hari Chand* v. *Fakir Sadruddin.*
(1933) 1933 Rang 288 (291, 292): 1933 Cri Cas 1084: 11 Rang 361: 35 Cri L Jour 1 (F B), *Ma Mya Khin* v. *Maung Po Htwa.* Quaere.

23. (1922) 1922 All 107 (109): 44 All 401: 23 Cri L Jour 349, *Dunn* v. *King-Emperor.*

24. (1933) 1933 All 264 (269): 1933 Cri Cas 434: 55 All 301: 34 Cri L Jour 414 (F B), *Kapoor Chand* v. *Suraj Prasad.*
(1925) 1925 Mad 438 (440): 48 Mad 262: 26 Cri L Jour 767 (F B), *Veerappa Naidu* v. *Avudayammal.* It does not necessarily follow from an order passed in revision.

24a (1902) 1902 All W N 59 (59, 60), *King-Emperor* v. *Chhabraj Singh.* [But see (1914) 1914 Bom 128 (128): 15 Cri L Jour 522, *Emperor* v. *Ganpat Sitaram Mukadan.* Costs were allowed under S. 14 of the Merchandise Marks Act 4 of 1889.]

25. (1909) 9 Cri L Jour 83 (83, 84): 31 Mad 547, *Emperor* v. *Maddipatla Subbarayudu.*

26. (1929) 1929 Bom 309 (311): 1929 Cri Cas 130: 53 Bom 578: 31 Cri L Jour 309, *Emperor* v. *Lakshman Ram Shet.*

27. (1931) 1931 Pat 411 (413, 414): 1931 Cri Cas 999: 33 Cri L Jour 147, *Jagannath Acharya* v. *Rajagopalachari.*

28. (1912) 13 Cri L Jour 492 (492): 6 Low Bur Rul 49, *Nga San Ten* v. *Emperor.*

29. (1920) 1920 Upp Bur 28 (29): 33 Upp Bur Rul 270: 22 Cri L Jour 309, *Nga San Dun* v. *Emperor.*

40. Verdict of jury—Sub-section 2. **Sec. 423 Note 40**

Section 418, *ante*, provides that an appeal in jury cases is limited to questions of *law*.[1a] This sub-section provides that an appellate Court cannot alter or reverse the verdict of a jury unless such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding by the jury of the law as laid down by him. This sub-section should not, however, be construed as controlling Section 418 and as laying down that no question of law can be taken in appeal unless there is a misdirection by the Judge or a misunderstanding by the jury of the law as laid down by him. Where the trial is illegal in fact, it may be set aside for *that* reason only and no question of misdirection by the Judge or misunderstanding by the jury, of the law, arises at all.[1]

Section 537, *infra*, provides that no finding, sentence or order of a Court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in any proceeding or on account of any misdirection in any charge to the jury unless such error, etc., has occasioned a *failure of justice*. Where there is an error of law or a misdirection by the Judge or a misunderstanding by the jury of the law as laid down by him and there has been a *consequent* erroneous verdict and failure of justice, the appellate Court is entitled to interfere with the verdict.[2] Where there is no mis-

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Note 40.

1a (1934) 1934 Pat 309 (310): 1934 Cri Cas 730: 13 Pat 529: 35 Cri L Jour 1104, *Nanhak Ahir* v. *Emperor*.

1. (1926) 1926 Lah 193 (194): 27 Cri L Jour 793, *Fitzmaurice* v. *Emperor*.
[See also the following cases:—
(1927) 28 Cri L Jour 108 (110): 99 Ind Cas 236 (Cal), *Basanta Kumar Gossain* v. *Emperor*. No misdirection but verdict on mere speculation set aside.
(1931) 1931 Bom 311 (311): 1931 Cri Cas 567: 55 Bom 435: 32 Cri L Jour 1077, *Emperor* v. *Yusuf Mohammad*.
(1923) 1923 Pat 142 (142): 23 Cri L Jour 141, *Maddodar Ram* v. *Emperor*. Where during the trial before a jury, the Public Prosecutor had read an alleged confession of the accused which not having been recorded according to law was ruled out as inadmissible, *held* that the irregularity of allowing it to be read might have influenced the minds of the jury, however carefully the judge may have endeavoured to remove any impression caused thereby and that the accused was entitled to a re-trial.
(1867) 7 Suth W R Cr 6 (7), *Queen* v. *Chand Bagdee*. A conviction on no evidence is wrong in point of law.
(1871) 16 Suth W R Cr 19 (19), *Queen* v. *Rutton Dass*. (Do.)
(1864) 1 Suth W R Cr 21 (21), *Queen* v. *Gopal Bhereewalla*. In a case tried by a jury every petition of appeal should state distinctly in what respect the law has been contravened.]

2. See the following cases:—
(1908) 18 Mad L Jour 541 (541), *In re Ganga Reddy Buchanna*.
(1934) 1934 Pat 309 (310): 1934 Cri Cas 730: 13 Pat 529: 35 Cri L Jour 1104, *Nanhak Ahir* v. *Emperor*.
(1909) 9 Cri L Jour 308 (309): 1 Ind Cas 547 (Mad), *Kuppan* v. *Emperor*.
(1927) 28 Cri L Jour 19 (22): 99 Ind Cas 51 (Cal), *Mamat Ali* v. *Emperor*.
(1920) 1920 Cal 406 (406): 21 Cri L Jour 829, *Edon Karikar* v. *Emperor*. Confused summing up.
(1921) 1921 Cal 257 (257, 258): 22 Cri L Jour 475, *Tenaram* v. *Emperor*.
(1920) 1920 Cal 980 (982, 986): 21 Cri L Jour 802, *Surykanta Bhattacharya* v. *Emperor*.
(1866) 6 Suth W R Cr 17 (17), *Queen* v. *Khutub Sheikh*.
(1912) 13 Cri L Jour 271 (272): 14 Ind Cas 655 (Mad), *Venkattan* v. *Emperor*.
(1868) 10 Suth W R Cr 7 (9), *Queen* v. *Ramgopal Dhur*.
(1867) 8 Suth W R Cr 26 (27), *Queen* v. *Sheik Tufani*.
(1867) 8 Suth W R Cr 19 (25, 26), *Queen* v. *Hewab Jan*.
(1920) 1920 Cal 698 (699): 22 Cri L Jour 60, *Asimuddin Sardar* v. *Emperor*.
(1874) 11 Bom H C R Crown Cas 166 (169, 170), *Reg.* v. *Sakharam Makundji*. Refusal to admit proper evidence, and subsequently withdrawing from the

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jury evidence once legally admitted.
(1910) 11 Cri L Jour 683 (684) : 8 Ind Cas 573 (Mad), *Public Prosecutor* v. *Papakka.*
(1910) 11 Cri L Jour 334 (334) : 5 Ind Cas 935 (Mad), *In re Shivappa Higada.*
(1910) 11 Cri L Jour 222 (222) : 6 Ind Cas 14 (Mad), *In re Suretti.*
(1910) 11 Cri L Jour 187 (188) . 4 Ind Cas 1103 (Mad), *In re Manjunnath.*
(1913) 14 Cri L Jour 623 (623) : 21 Ind Cas 671 (Mad), *In re Subbu Thevan.*
(1916) 1916 Mad 851 (854) : 39 Mad 449 : 16 Cri L Jour 294, *Annava Muthiriyam* v. *Emperor.* Failure to warn jury against considering inadmissible evidence though consented to by the accused.
(1903) 1 Weir 446 (447), *In re Mookkandi Maniagaran.*
(1903) 26 Mad 467 (468), *Dakshinamurthi* v. *Public Prosecutor.*
(1906) 4 Cri L Jour 502 (503) (Mad), *Para Thandan and Para Senna Moonji* v. *Emperor.*
(1881) 10 Cal L R 4 (6), *Jugut Mohini Dassee* v. *Madhu Sudhan Dutt.*
(1908) 8 Cri L Jour 6 (8) : 35 Cal 531, *Natabar Ghose* v. *Emperor.*
(1921) 1921 Cal 64 (65) : 23 Cri L Jour 344, *Annuddi Chowkidar* v. *King-Emperor.*
(1907) 5 Cri L Jour 78 (80) : 30 Mad 44, *Mari Valayan* v. *Emperor.*
(1903) 7 Cri L Jour 358 (358) (Mad), *In re Acchalha Beori.*
(1908) 7 Cri L Jour 325 (328) : 31 Mad 127, *Sankappa Rai, In re.*
(1918) 1918 Cal 314 (318) : 19 Cri L Jour 81, *Asraf Ali* v. *Emperor.*
(1926) 1926 Cal 1107 (1109) : 27 Cri L Jour 1402, *Jahur Sheikh* v. *Emperor.*
(1926) 1926 Cal 728 (730) : 26 Cri L Jour 398, *Hari Charan* v. *Emperor.*
(1926) 1926 Cal 235 (238) : 53 Cal 181 : 26 Cri L Jour 1577, *Abdul Ganni Bhuge* v. *King-Emperor.*
(1926) 1926 Cal 226 (228) : 26 Cri L Jour 1021, *Gadaghar Sarkar* v. *Emperor.*
(1921) 1921 Cal 697 (698) : 22 Cri L Jour 606, *Abdul Rahim Mir* v. *Emperor.*
(1914) 1914 Cal 549 (550) : 15 Cri L Jour 147, *Ofel Mollah* v. *The King-Emperor.*
(1920) 1920 Cal 90 (91) : 21 Cri L Jour 183, *Emperor* v. *Abdul Sheikh.*
(1927) 28 Cri L Jour 108 (110) : 99 Ind Cas 236 (Cal), *Basant Kumar Gossain* v. *Emperor.* Acquittal ordered when the evidence cannot, in any proper view of the case, support a conviction.
(1898) 25 Cal 711 (714), *Taju Paramanik* v. *Queen-Empress.*
(1898) 25 Cal 561 (563, 564), *Biru Mandal* v. *Queen-Empress.*
(1898) 25 Cal 416 (418), *Nabi Baksh* alias *Ali Baksh* v. *Queen-Empress.*
(1898) 25 Cal 230 (231, 234), *Ali Fakir* v. *Queen-Empress.*
(1896) 23 Cal 252 (253), *Queen-Empress* v. *Imam Ali Khan.* Non-direction amounting to misdirection.
(1905) 2 Cri L Jour 311 (313) (Cal), *Panchu Mandal* v. *Emperor.*
(1900) 4 Cal W N 576 (581), *Sadhu Sheikh* v. *Empress.*
(1900) 4 Cal W N 196 (200), *Rahmat Ali* v. *Empress.*
(1900) 4 Cal W N 193 (196), *Shri Prasad Misser* v. *Empress.*
(1897) 1 Cal W N 301 (302, 303), *Tomaji* alias *Zomijuddin Paramanik* v. *Empress.*
(1899) 26 Cal 49 (50), *Basanta Kumar Chattack* v. *Queen-Empress.*
(1908) 7 Cri L Jour 315 (317) (Cal), *Kali Singh* v. *Emperor.*
(1907) 5 Cri L Jour 424 (426) : 34 Cal 325, *Dasarath Mondal* v. *Emperor.*
(1906) 3 Cri L Jour 144 (148) (Cal), *Sourendra Nath Mitra* v. *Emperor.*
(1909) 9 Cri L Jour 404 (404) : 1 Ind Cas 867 (Mad), *In re Giddigadu.*
(1903) 26 Mad 38 (40), *Thandraya Mudaly* v. *Emperor.*
(1898) 21 Mad 83 (90, 91), *Queen-Empress* v. *Raman.*
(1910) 11 Cri L Jour 557 (558) : 8 Ind Cas 52 (Cal), *Asfar Sheik* v. *Emperor.*
(1910) 11 Cri L Jour 538 (539) : 7 Ind Cas 915 (Cal), *Harendra Pal* v. *Emperor.*
(1910) 11 Cri L Jour 9 (10) : 4 Ind Cas 543 (Cal), *Emperor* v. *Nakul Kabiraj.*
(1930) 1930 Cal 370 (378) : 58 Cal 96 : 1930 Cri Cas 634 : 32 Cri L Jour 10, *Government of Bengal* v. *Santiram Mondal.*
(1929) 1929 Cal 726 (727) : 57 Cal 649 : 31 Cri L Jour 909, *Khiro Mondal* v. *Emperor.*
(1930) 1930 Cal 276 (278) : 1930 Cri Cas 356 : 57 Cal 1266 : 31 Cri L Jour 1207, *Panchannan Gogai* v. *Emperor.*
(1926) 1926 Cal 584 (585) : 27 Cri L Jour 125, *Superintendent and Remembrancer of Legal Affairs Bengal* v. *Sader Saik.*
(1930) 1930 Cal 708 (709) : 1930 Cri Cas 1108 : 58 Cal 580 : 32 Cri L Jour 228, *Shaikh Wahab Ali* v. *Emperor.* Non-direction amounting to misdirection.
(1933) 1933 Cal 509 (511) : 1933 Cri Cas 814 : 34 Cri L Jour 841, *Chittua Ranjan Das* v. *Emperor.*
(1931) 1931 Cal 617 (617) : 1931 Cri Cas 801 : 35 Cri L Jour 40, *Bhutnath Mondal* v. *Emperor.*
(1932) 1932 Oudh 28 (31) : 1932 Cri Cas 60 : 33 Cri L Jour 275, *Emperor* v. *Zaman.*

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direction and the verdict is a reasonable and honest one the appellate Court cannot interfere.[3] Nor can it interfere, even if there is a misdirection unless it has resulted in the verdict being erroneous[4] and has further occasioned a failure of justice.[5]

(1934) 1934 Oudh 354 (359) : 1934 Cri Cas 1049 : 35 Cri L Jour 1066, *Lal Behari Singh* v. *Emperor*.

(1925) 1925 Pat 797 (805, 806) : 4 Pat 626 : 27 Cri L Jour 49, *Rupan Singh* v. *King-Emperor*.

(1880) 6 Cal 247 (249), *Gogun Chunder Ghose* v. *The Empress*.

(1926) 1926 Mad 370 (370) : 27 Cri L Jour 176, *Ambalam, In re*. Where the defence case was not adequately put before the jury and evidence was admitted which should have been excluded.

(1929) 1929 Cal 170 (171) : 30 Cri L Jour 912, *Dwarakadas Bhairaghi* v. *Emperor*. Non-direction amounting to misdirection.

3. (1927) 1927 All 108 (109) : 27 Cri L Jour 1355, *Jia Lal* v. *Emperor*.

(1911) 12 Cri L Jour 193 (195) : 10 Ind Cas 684 (Cal), *Rashidazzaman* alias *Bara Kazi* v. *King-Emperor*.

(1909) 9 Cri L Jour 567 (567) : 32 Mad 179, *The Public Prosecutor* v. *Bonigiri Pottigadu*.

(1898) 2 Cal W N 702 (709, 718), *Queen-Empress* v. *Bhairab Chunder*.

(1866) 5 Suth W R Cr 3 (4), *Queen* v. *Narain Bagdee*.

(1924) 1924 Mad 230 (230) : 25 Cri L Jour 269, *Mulimayandi Thevan, In re*. Where misdirection to the jury is not proved the verdict of the jury will be upheld in appeal.

(1927) 1927 Oudh 549 (549) : 28 Cri L Jour 937, *Babban* v. *Emperor*

(1934) 1934 All 1032 (1034) : 1934 Cri Cas 1339 : 36 Cri L Jour 322, *Banshi Dar* v. *Emperor*. The High Court cannot go into questions of fact in such cases.

(1927) 1927 Pat 370 (375) : 7 Pat 15 : 28 Cri L Jour 692, *Ram Charitar Singh* v. *Emperor*. Where the High Court is of opinion that the accused should have been acquitted and that the verdict is against the weight of the evidence, the Court may direct a copy of the judgment to be sent to the Local Government for necessary action.

(1930) 1930 Cal 712 (713) : 1930 Cri Cas 1112 : 32 Cri L Jour 236, *Hafezali Haldar* v. *Emperor*.

(1930) 1930 Cal 437 (439) : 1930 Cri Cas 745 : 32 Cri L Jour 455, *Mohiuddin* v. *Emperor*.

(1893) Ratanlal 644 (652), *Queen-Empress* v. *Yesu*. Non-direction is not misdirection—Verdict will not be interfered with unless non-direction amounts to misdirection.

(1889) Ratanlal 452 (454), *Queen-Empress* v. *Lalsing*.

(1920) 1920 Cal 271 (271) : 46 Cal 635 : 21 Cri L Jour 8, *Mohini Mohan Ghose* v. *Emperor*. Verdict on circumstantial evidence alone—No interference.

(1929) 1929 Pat 313 (315) : 1929 Cri Cas 99 : 8 Pat 344 : 30 Cri L Jour 721, *Ram Das* v. *Emperor*.
[See also (1865) 2 Suth W R Cri 5 (5), *Queen* v. *Gopaul Das*. Pleas that the prosecutor is at feud with the prisoner and that the prisoner's confession was given at the instance of the police are not grounds of appeal.]

4. (1932) 1932 Cal 474 (478) : 1932 Cri Cas 464 : 59 Cal 1361 : 33 Cri L Jour 854, *Saroj Kumar Chakravarthy* v. *Emperor*.

(1909) 10 Cri L Jour 11 (12) : 2 Ind Cas 434 (Mad), *Thoolipatti Rama Goundan* v. *Emperor*.

(1929) 1929 All 364 (364) : 30 Cri L Jour 622, *Abdul Majid Khan* v. *Emperor*. Court of revision also cannot do so.

(1908) 8 Cri L Jour 35 (36) (Bom), *In re Shambulal Vicondas*.

(1935) 1935 All 103 (105) : 1935 Cri Cas 89 : 36 Cri L Jour 612, *Aziz Khan* v. *Emperor*.

(1903) 27 Bom 626 (632), *Emperor* v. *Waman Shivram*.
[See also (1934) 1934 Cal 847 (849) : 1934 Cri Cas 1364 : 62 Cal 337 : 36 Cri L Jour 358, *Enayet Karim* v. *Emperor*. In an appeal for a trial by a jury, on a question as to misdirection as to evidence, the High Court has to see whether, on a proper direction and having all the circumstances before them the jury, as reasonable men, would have found that the charge was proved.]

5. (1909) 9 Cri L Jour 93 (93) (Mad), *In re Kaiyan*.

(1903) 5 Bom L R 207 (208), *Emperor* v. *Apunna Derappa*.

(1926) 1926 All 429 (431, 432) : 27 Cri L Jour 785, *Dhiraji* v. *Akasi*. Misdirection must have affected jury's verdict.

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The admission of inadmissible evidence and the rejection of admissible evidence during the trial are questions of law. Where the Judge in his charge to the jury puts inadmissible evidence before the jury or fails to warn them against considering such evidence there will be a misdirection and will, subject to the provisions of Section 537, form a ground of interference in appeal.[6] Where inadmissible evidence has been admitted during the trial but there has been no misdirection, it will nevertheless be *an error of law* and will, subject to the provisions of Section 537 be a ground of appeal.[6a]

Where a verdict is set aside on the ground of misdirection or error of law, the appellate Court should ordinarily direct a re-trial[7] though where the Court is satisfied that the evidence is wholly insufficient to support the

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(1914) 1914 P C 155 (164) : 15 Cri L Jour 326 (PC), *Ibrahim* v. *King-Emperor.*

(1927) 1927 Cal 680 (682) : 54 Cal 539 : 28 Cri L Jour 689, *Haji Ayub Mandal* v. *Emperor.*

(1926) 1926 Cal 147 (148) : 27 Cri L Jour 277, *Keramat Mandal* v. *Emperor.* Contravention of law by the judge on an unimportant matter and having a remote bearing on the question in issue does not justify reversal of verdict of jury.

(1933) 1933 Mad W N 320 (323), *Arumugha Goundan* v. *Emperor.*

(1909) 10 Cri L Jour 498 (499) : 4 Ind Cas 120 (Cal), *Kesheb Pal* v. *Emperor.* No failure of justice—No interference.

(1924) 25 Cri L Jour 294 (295) : 76 Ind Cas 966 (967) (Cal) (FB), *Emperor* v. *Charu Chunder Mukerjee.*

(1870) 13 Suth W R Cri 23 (24), *The Queen* v. *Sheppard.*

(1873) 19 Suth W R Cri 71 (72), *The Queen* v. *Raj Kumar Bose.*

(1909) 9 Cri L Jour 311 (311, 312) : 1 Ind Cas 546 (Mad), *Sinna Thevan* alias *Sinna Karuppan Thevan* v. *Emperor.*

(1866) 5 Suth W R Cri 80 (87, 93), *In re Elahee Buksh.* Improper advice given by a judge to the jury upon a question of fact, or the omission of the judge to give that advice which he, in the exercise of a sound judicial discretion ought to give the jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty.

(1934) 1934 Pat 309 (312) : 1934 Cri Cas 730 : 13 Pat 529: 35 Cri L Jour 1104, *Nanhak Ahir* v. *Emperor.*

(1928) 1928 Pat 326 (330, 333): 29 Cri L Jour 325, *Mt. Champa Pasin* v. *Emperor.* The considerations governing the appeal from the trial held with the aid of assessors differ greatly from those governing an appeal from the trial by a jury. In the latter case the appeal is restricted by the provisions of Ss. 423 (2) and 537, Criminal P. C., whereas in the former case the whole case is before the appellate Court.

6. (1889) 12 Mad 196 (197), *Queen-Empress* v. *Arumugha.* A Sessions Judge should caution the jury not to accept an approver's evidence unless it is corroborated. It is a misdirection not to do so.

(1931) 1931 Cal 65 (66) : 32 Cri L Jour 421 1931 Cri Cas 63, *Ohedali Sheikh* v. *Emperor.* Inadmissible evidence referred to in charge.

(1898) 25 Cal 736 (742), *Abbas Peada* v. *Queen-Empress.*

6a (1926) 1926 Bom 238 (240) : 27 Cri L Jour 481, *Emperor* v. *Kuthubuddin Khan.* Misreception of evidence held on facts not to occasion failure of justice.

(1903) 27 Bom 627 (632), *Emperor* v. *Waman Shivram Damle.*

(1931) 1931 Bom 311 (313) : 1931 Cri Cas 567 : 55 Bom 435 : 32 Cri L Jour 1077, *Issuf Mohammad* v. *Emperor.* Mis-reception of evidence which might have influenced the jury — Verdict set aside.

7. (1926) 1926 All 429 (431, 432) : 27 Cri L Jour 785, *Dhiraji* v. *Akasi.*

(1919) 1919 Cal 115 (116) : 46 Cal 212*n* : 20 Cri L Jour 225, *Beni Madhub Kundu* v. *Emperor.* On appeal to the High Court the verdict of the jury was set aside with the remark that it would be open to the Crown to proceed further with the case if it be so advised and that the accused be enlarged on bail till a fresh trial, if any. *Held*, the order of the High Court was an order for re-trial subject to the right of the Crown, if it thought fit to withdraw the proceeding.

Sec. 423 Note 40

conviction[8] or where the accused has been sufficiently harassed by repeated trials,[9] it may discharge or acquit the accused. But can the Court go into the evidence and decide upon the *facts* whether upon the merits the decision is right and if so confirm the conviction notwithstanding a misdirection or an error of law?

In *Wafadar Khan* v. *Queen Empress*,[10] it was held by the High Court of Calcutta, that it was not open to the appellate Court to do so; the word "erroneous" according to that decision is not to be read as meaning "wrong on facts" but as meaning that the verdict had been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law. The appellate Court cannot determine for itself whether the verdict, as a conclusion of fact is right or wrong, as, to hold otherwise, would be to substitute the decision of the Court for the verdict of the jury. In *Romesh Chander* v. *Emperor*[11] where inadmissible evidence had been received, but there was no misdirection, it was held that the misreception of evidence was likely to have adversely affected the appellant, that the verdict must be set aside on the ground of an error of law, and that a re-trial only should be ordered. Referring to Section 167 of the Evidence Act which runs as follows:—

> "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

it was observed that the Section merely says that the improper admission of evidence is not a "ground of itself" for interference, that the fact that the trial is by a jury is *another factor* to be taken into account, that the appellate

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8. (1871) 15 Suth W R Cr 37 (39, 40) *Queen* v. *Mahima Chandra Das.*
(1902) 29 Cal 782 (791), *Jamiruddi Masalli* v. *Emperor.*
(1899) 2 Weir 386 (388), *Kizhakedath Unniram, In re.* Evidence worthless — No re-trial was ordered.
(1926) 1926 All 429 (431, 432) : 27 Cri L Jour 785, *Dhiraji* v. *Akasi.*
(1898) 25 Cal 711 (714, 716), *Taju Parammanick* v. *Queen-Empress.* Nowhere does the law lay down where the verdict of the jury is set aside the Court must necessarily direct a new trial.
(1926) 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ram Prasad* v. *Emperor.*
(1928) 1928 Pat 326 (335) : 29 Cri L Jour 325, *Mt. Champa* v, *Emperor.*
(1932) 1932 Oudh 23 (25) : 1932 Cri Cas 55 : 33 Cri L Jour 167 : 7 Luck 390, *Sita Ram* v. *King-Emperor.*
[See also (1889) Ratanlal 466 (466), *Queen-Empress* v. *Ramabin Babaji.*]

9. (1926) 1926 All 429 (431, 432) : 27 Cri L Jour 785, *Dhiraji* v. *Akasi.*
[See also (1931) 1931 Bom 311 (313) : 1931 Cri Cas 567 : 55 Bom 435 : 32 Cri L Jour 1077, *Issuf Muhammad* v. *Emperor.* Accused young and been in prison for four months—Retrial not ordered.]

10. (1894) 21 Cal 955 (977), *Wafadar* v. *Empress.*
[See also (1925) 1925 Cal 161 (163, 161) : 26 Cri L Jour 307, *Harendra Nath* v. *Emperor.* Two points to be considered : — (a) whether jury were influenced and (b) whether independent of that evidence there is other evidence to justify decision.
(1875) 24 Suth W R Cr 18 (20), *The Queen* v. *Lucky Narain Nigori.*
(1900) 4 Cal W N 576 (581, 582), *Sadhu Sheikh* v. *The Empress.*]
[But see (1930) 1930 Cal 199 (200) : 1930 Cri Cas 231 : 31 Cri L Jour 737, *Emperor* v. *Dinabandhu Ooriya.* Appellate Court can deal with the case as a whole and consider whether verdict has been rightly arrived at.]

11. (1919) 1919 Cal 574 (578) : 46 Cal 895 : 20 Cri L Jour 324, *Ramesh Chunder Das* v. *Emperor.* 21 Cal 955 ; 4 Cal W N 576, followed.

Sec. 423 Note 40

Court cannot say on the principle of *Wafadar Khan's case* that there is other evidence which would justify the decision, and cannot confirm the decision unless it is satisfied that the *verdict of the jury* would have been the same if no evidence had been wrongly received. The High Court of Allahabad has, in *Ikramuddin* v. *Emperor*[11a] followed the view of the Calcutta High Court as expressed in *Wafadar Khan's* case, and has held that an appellate Court has no power to look at the evidence and find the accused guilty of any offence with which he was not charged in the trial Court and which was not laid before the jury. The High Court of Bombay has, on the other hand, held that, where a verdict of the jury is vitiated by a misdirection or a misreception of evidence, the appellate Court has power to convict or acquit the accused as the evidence, *according to its own view*, is or is not sufficient for conviction or, where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, to order a new trial.[12] A similar view has been taken by the High Court of Madras[13] and the Judicial Commissioner's Courts of Nagpur[14] and Sind.[14a]

There is no specific provision in the Code that repugnancy in the verdict of a jury is, as in English law, by itself a sufficient ground for quashing a conviction. The powers under Section 423, have, however, been held to be large enough to invoke the application of the English law rule inasmuch as it is a rule of practice based upon natural and substantial justice.[15]

Sec. 424

Judgments of Subordinate Appellate Courts.

424.* The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any appellate Court other than a High Court:

* (Code of 1882—S. 424—Same.)

11a (1917) 1917 All 173 (175, 176) : 39 All 348 : 18 Cri L Jour 491, *Ikramuddin* v. *Emperor*.

12. (1933) 1933 Bom 153 (156) : 1933 Cri Cas 465 : 35 Cri L Jour 747, *Emperor* v. *Ramachandra*.

(1903) 27 Bom 626 (636), *Emperor* v. *Waman Shivram*.

(1869) 6 Bom H C R Crown Cas 47 (49, 51), *Reg.* v. *Ramaswami Mudaliar* Case under the Code of 1861—If the appellate Court thinks that it is material and has prejudiced the accused, it may treat the case as if it had been tried with the aid of assessors and after excluding such evidence if it considers that the remaining evidence is sufficient to sustain the verdict it may uphold the conviction.

(1873) 10 Bom H C R 497 (501, 502), *Reg.* v. *Amirta Govinda*.

[See also (1918) 1918 Pat 201 (208, 209) : 19 Cri L Jour 886, *Ram Bhagwan* v. *Emperor*. Admission of evidence which should have been rejected — High Court can consider whether rest of evidence is sufficient to sustain verdict.]

13. (1903) 26 Mad 1 (8), *Emperor* v. *Edward William Smither*.

(1935) 1935 Mad 793 (794) : 1935 Cri Cas 1049 : 37 Cri L Jour 64 (S B), *M. Ramanuja Ayyangar* v. *Emperor*. S. 167, Evidence Act, not inapplicable to jury trials.

(1895) 2 Weir 493 (493), *In re Muppidi Krishnamurthi*. "If it were clear that any offence committed by the prisoner were triable by assessors we could have dealt with the matter ourselves."

14. (1926) 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ram Prasad* v. *Emperor*. No restriction on the powers of the appellate Court to deal with the case of which it has complete seisin in any of the manners provided by S. 423 of the Code

14a (1925) 1925 Sind 116 (123) : 25 Cri L Jour 761, *Topandas* v. *Emperor*.

15. (1925) 1925 Cal 501 (506, 507) : 26 Cri L Jour 662, *I. G. Singleton* v. *Emperor*.

Provided that, unless the appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered. Sec. 424 Note 1

Synopsis.

Other Topics.

Appellate Judgment—Not to impute motives to lower Court Judge. See Note 6, Pt. 6.
Applicability to appeals from orders under Sections 110, 250, 476 and 123 (3). See Note 2, Pts. 6 to 9.
Benefit of doubt to accused. See Note 7, Pt. 28.
Comparison with Order 20, Rule 2. See Note 8, Pt. 1.
Consideration of defence evidence though not referred to by vakil. See Note 7, Pt. 27.
Consideration of improper evidence—Irregular. See Note 7, Pt. 31.
Damaging remarks or unfounded and unnecessary observations about parties or counsel or witnesses. See Note 6, Pts. 1 to 3.
Death of High Court Judge without signing. See Note 9 Pt. 2.
Delay in revision—Fatal See Note 10, Pt. 5.
Dictation of judgments. See Note 8.
Document of party—As part of judgment. See Note 3, Pt 5.
Inapplicable to summary rejection under Section 421. See Note 2, Pt. 5.
Inconsistent findings. See Note 7, Pt. 30.
Independent judgment with its explicit opinion. See Note 7, Pts. 9, 20 and 21.
Judgment—Not to be supplemented by explanation to superior Court. See Note 3, Pt. 3.
Judgment on merits even in case of default of appearance. See Note 7, Pts. 25 and 26.
Judgment—To be definite. See Note 6, Pt. 7.
Judgment to be self-contained and to give full analysis of evidence. See Note 2, Pt. 3 and Note 7, Pt. 9.
Judgment to be temperate and sober and not satirical. See Note 7, Pt. 29.
Judgment written after transfer and pronounced by successor—Illegal. See Note 8, Pt. 1.
No discussion of evidence or statement of reasons—Mere assurance of careful consideration—Not sufficient. See Note 2, Pt. 4; Note 7, Pts. 3 to 6, 10.
Opinion of Advocate-General or Public Prosecutor—Irrelevant. See Note 5, Pt. 6.
Perfunctory judgment — Bad. See Note 7, F-N (6).
Points for determination, decisions and reasons. See Note 7, Pt. 2; Note 10, Pt. 2.
Section 367. See Note 7, Pt. 1; Note 3 and Note 5, Pt. 1.
Separate discussion and finding as to each accused. See Note 7, Pt. 24, F-N (6).
"So far as practicable." See Note 7, Pt. 1; Note 10, Pt. 4.
What are not proper judgments. See Note 7, Pts. 10 to 17, 26.

1. Legislative changes.

This Section was first introduced in the 1882 Code: there has been no amendment to it since.

Even before the enactment of this Section, the High Courts had insisted on the appellate Courts observing the principle embodied in this Section, viz., that when an appeal is dismissed the appellate Court should write a proper reasoned judgment.[1]

(Codes of 1872 and 1861—Nil.)

Section 424—Note 1.

1. (1871) 8 Bom H C R Crown Cas 101 (102), *Reg.* v *Moroba Bhaskarji.*
(1869) 5 Mad H C Rul App 12 (12), *High Court Proceedings, 10th December* 1869.
(1901) 25 Mad 534 (534), *In re Balasubbanna.*
(1876) 1876 Pun Re Cr No. 6, (p. 9), *Utam* v. *Crown.*
(1872-1892) 1872-1892 Low Bur Rul 516 (517), *Kyawzan* v. *Empress.*

Sec. 424 Notes 2—3

2. Scope and object of the Section.

The object of the Section is twofold, *firstly* to produce uniformity in procedure and to ensure that judgments of Subordinate Criminal Courts should contain such matter as may tend to promote public confidence in their decisions and to safeguard them against the possible suggestion that cases are disposed of without proper consideration[1] and secondly to enable the High Court in revision to grasp the nature of the case without reference to the records.[2] The High Court in criminal revision as a rule depends mainly upon the findings arrived at by the lower appellate Courts on questions of evidence. It is, therefore, the duty of such Courts to see that their judgments must be self-contained and should give a full analysis of the evidence.[3]

Where an appellate Court merely says that it has very carefully gone through the records of the case and dismisses the appeal without a discussion of the evidence or giving reasons, the assurance of the appellate Court can hardly be considered as a substitute for the judicial determination of the questions of evidence involved in the case. Such a judgment is not likely to inspire confidence in the trial of appeals in Courts below.[4]

This Section applies only when an appeal is admitted and heard under Section 423 but not where it is summarily rejected under Section 421 of the Code.[5] *See also* Section 421 and Notes thereunder.

The provisions of this Section have been held to apply to cases of appeals against orders passed under Section 110,[6] Section 250[7] and Section 476.[8] It has been held in the undermentioned case[9] that it is doubtful whether the provisions of this Section would govern orders passed under Section 123, Clause 3. But *vide* sub-clause 6 to Section 367 which was newly added in 1923.

3. Contents of judgment—General.

Section 367, *ante*, lays down the form and the rules to be observed in recording judgments. The object of these rules is to ensure that a criminal Court should consider the case before it in all its bearings and should, on such consideration, arrive at definite conclusions after considering the evidence in

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Note 2.

1. (1912) 13 Cri L Jour 559 (560) : 8 Nag L R 84, *Jairam* v. *Emperor.*
   (1897) 19 All 506 (507), *Empress* v. *Pandeh Bhat.*
2. (1897) 1897 Pun Re Cr No. 18 p. 49 (50), *Sanwant* v. *Empress.*
   (1917) 1917 Pat 336 (337) : 18 Cri L Jour 750 (751), *Talebar* v. *Emperor.*
   (1927) 1927 Nag 88 (89) : 27 Cri L Jour 1404, *Maroti* v. *Mt. Kasa Bai.*
3. (1930) 1930 Lah 1051 (1052) : 32 Cri L Jour 271 : 1930 Cri Cas 1221, *Ahmad Ali* v. *Emperor.*
4. (1930) 1930 Lah 1051 (1052) : 32 Cri L Jour 271 : 1930 Cri Cas 1221, *Ahmad Ali* v. *Emperor.*
5. (1900-1902) 1 Low Bur Rul 270 (271), *Nga Taung Bo* v. *Crown.*
   (1893-1900) 1893-1900 Low Bur Rul 606 (607), *Nga Po Kin* v. *Empress.*
   (1899) 1 Bom L R 225 (225), *Empress* v. *Gopala.*
   (1895) 20 Bom 540 (541), *Empress* v. *Warubhai.*
   (1917) 1917 Pat 336 (337) : 18 Cri L Jour 750 (751), *Talebar* v. *Emperor.*
6. (1922) 23 Cri L Jour 378 (378) : 67 Ind Cas 202 (202) (All), *Sunehri* v. *Emperor.*
   (1913) 14 Cri L Jour 419 (420) : 40 Cal 376, *Fidoi Hossen* v. *Emperor.*
   (1916) 1916 All 197 (197) : 17 Cri L Jour 309 : 38 All 393 (394), *Lal Behari* v. *Emperor.*
7. (1922) 1922 Pat 157 (158) : 23 Cri L Jour 261, *Deo Narain Mahto* v. *Chhatoo Raut.*
8. (1927) 1927 Cal 284 (285) : 54 Cal 355, *Hamid Ali* v. *Madhu Sudan Das.*
9. (1910) 11 Cri L Jour 23 (23) : 37 Cal 91, *Kalu Mirza* v. *Emperor.*

Sec. 424 Note 3

the case.[1]

Where there are separate trials, separate judgments must be recorded. Where, however, two cases are closely connected together, the Court may write a detailed judgment containing a complete recital of the facts in the more important of the two cases and it would not be objectionable to refer to such recital in the separate judgment recorded in the less important case. At the same time the Court should always be careful to see that evidence which is only admissible in one of the two cases is not referred to or put forward as a reason for a conviction or acquittal in the other case in which it is not relevant.[2]

A judgment once delivered cannot be supplemented by means of an explanation furnished to the superior Court.[3]

When a case is forwarded to a superior Magistrate under Section 349, *ante*, with the opinion of the forwarding Magistrate, the superior Magistrate must write an independent judgment and cannot merely adopt the opinion of the Magistrate by whom the case was forwarded.[4]

It is undesirable to make a document prepared by a party part of a judgment unless the Court has checked the document and found it to be correct.[5]

A judgment should specifically set forth facts and orders necessary to give authority to the Court in the particular case.[6]

A judgment should not be unnecessarily long.[7] But it should be written in such a way that it would be easy to summarily dismiss an appeal against it on a perusal of the judgment alone.[8]

In a trial with the aid of assessors, merely recording a finding on facts

Note 3.

1. (1897) 19 All 506 (507) (F B), *Queen-Empress* v. *Pandeh Bhat.*
   [See (1932) 1932 Sind 180 (180) : 34 Cri L Jour 163, *Gul Sheru* v. *Emperor*. Intention of S. 367 is that the Magistrate should direct his own attention to every material question of fact or law to which he would be required to apply his mind.]
2. (1920) 1920 All 79 (80) : 21 Cri L Jour 442, *Bhola Nath* v. *Emperor.*
   (1927) 1927 Mad 56 (57) : 27 Cri L Jour 1164, *Thangaya Nadar* v. *Emperor.* Where in a joint trial of several accused persons for various offences, some triable by jury and others triable with the aid of assessors, the Judge summed up the case at some length to the jury with regard to all the charges, but when he came to write his judgment with regard to the charges triable by himself with the assessors, he merely referred to the charge to the jury without giving any reasons for agreeing with the jury. *Held*: there was no sufficient compliance with the requirements of S. 367 in respect of the offences triable with the aid of assessors and the judgment was therefore defective.
3. (1908) 7 Cri L Jour 312 (312) (Cal), *Jurakhan* v. *King-Emperor.*
   (1905) 2 Cal L Jour 524 (529), *Ramanath Kalapahar* v. *King-Emperor.*
   (1898) 25 Cal 625 (626), *Abhoy Chandra Das* v. *Municipal Ward Inspector.*
   (1903) 7 Cal W N 859 (860), *Madhu Sudan Das* v. *Sastri Prosad Nandy.*
   [See (1901) 6 Cal W N 118 (120), *Nazir* v. *Hari Charan.*
   (1930) 1930 Cal 379 (379) : 32 Cri L Jour 18, *Mani Krishna Sen* v. *Emperor.* Trying Magistrate is not entitled to make any suggestion or representation in the explanation which is not founded on the record before him.]
4. (1919) 1919 Pat 290 (290) : 20 Cri L Jour 444, *Thakur Singh* v. *Emperor*
5. (1920) 1920 Cal 87 (89) : 47 Cal 154 : 21 Cri L Jour 386, *Kasem Ali* v. *Emperor.*
6. (1886) Ratanlal 310 (310), *Queen-Empress* v. *Kana.*
   (1887) Ratanl 325 (326), *Queen-Empress* v. *Yeshwant.*
   (1866) 1866 Pun Re Cr No. 111, page 108 (108), *Mahram, on behalf of his brother Bahwul.*
7. (1933) 1933 Mad 233 (239) : 56 Mad 231 : 34 Cri L Jour 481, *Narayana* v. *Emperor.*
8. (1893-1900) 1893-1900 Low Bur Rul 626 (627), *Nga Ngyin Baju* v. *Queen-Empress.*

Sec. 424 Notes 3—6

and evidence as explained to the assessors in summing up the evidence to them is not sufficient compliance with the Section.[9]

4. Points for determination.

A judgment which does not set forth the points for determination is defective.[1]

5. Reasons for decision.

Section 367 requires that the judgment should give reasons for the decision on the various points arising for determination.[1] The judgment should therefore contain a discussion of the evidence.[2] It is not proper to base a conviction merely on the appearance and manner of speech of the accused.[3] Where there are several accused persons, the judgment should analyse the evidence against each of them separately.[4]

The Court should arrive at an independent conclusion on the case before it.[5] A reference to the opinion of the Advocate-General or the Public Prosecutor in the judgment is irrelevant.[6]

6. Remarks in judgment.

A judgment should not contain any damaging remarks against the character of persons neither parties nor witnesses before the Court who have had no opportunity of defending themselves against such remarks.[1] Even in

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9. (1909) 10 Cri L Jour 325 (334): 3 Ind Cas 625 (Cal), *Khudiram Bose* v. *Emperor*.

Note 4.

1. (1896) Ratanlal 844 (845), *Queen-Empress* v. *Shidlingappa*.

Note 5.

1. [See (1895) Ratanlal 833 (834), *Queen-Empress* v *Dhurmiya*. There should be sufficient particulars in a judgment to enable appellate Court to know what facts were found and how].
   (1865) 4 Suth W R 18 (18), *Queen* v. *Aruj Shaikh*
   (1912) 13 Cri L Jour 595 (596): 16 Ind Cas 163 (Cal), *Ambica Misser* v. *Emperor*. Findings in judgment inconsistent with ultimate conclusion arrived at by Court—Judgment cannot be supported.
   (1913) 14 Cri Jour 295 (296): 19 Ind Cas 951 (Cal), *Baburam* v. *Emperor*. If the findings of an appellate Court are inconsistent with the conclusion arrived at by that Court, that would only be a ground for re-hearing of the appeal.
2. (1895) 17 All 524 (526), *Queen-Empress* v. *Pirbhu*. It is advisable to state specifically in the judgment whether the accused wished to examine any witnesses and whether these witnesses were examined.
   (1867) 7 Suth. W R Cri 25 (26), *Queen* v. *Nawab Khan*.
3. (1922) 23 Cri L Jour 161 (162): 65 Ind Cas 625 (Lah), *Ghulam Mahomed* v. *Emperor*
4. (1924) 1924 Mad 350 (351): 25 Cri L Jour 790, *In re Sama Chari*.
   (1924) 1924 Rang 67 (67): 25 Cri L Jour 205, *Nga Mu* v. *Emperor*.
   (1925) 1925 Sind 204 (205): 25 Cri L Jour 1377: 19 Sind L R 96, *Khairo* v. *Emperor*.
   (1883) 1883 All W N 145 (146), *Empress* v. *Gayadin*.
   (1916) 1916 Mad 834 (834): 16 Cri L Jour 809 (809), *In re Ramaswami Naidu*.
5. See (1907) 7 Cri L Jour 400 (401) (Cal), *Mohesh Somar* v. *King-Emperor*.
6. (1918) 1918 Bom 226 (227, 228): 42 Bom 400: 19 Cri L Jour 607, *Hubert Crawford, In re*.

Note 6.

1. (1921) 1921 Bom 394 (395): 45 Bom 1127: 22 Cri L Jour 335, *Holibasappa, In re*.
   (1929) 1929 Lah 201 (202): 29 Cri L Jour 1102, *Maharam* v. *Emperor*.
   (1933) 1933 Sind 91 (92): 27 Sind L R 13: 34 Cri L Jour 367: 1933 Cri Cas 219, *Tejumal Narayandas* v. *Emperor*.
   (1925) 1925 Lah 392 (394): 26 Cri L Jour 1326: 6 Lah 116, *Benarsi Das* v. *Crown*.
   (1897) 21 Mad 83 (91), *Queen-Empress* v. *Raman*. Judge should not censure conduct of a police officer without giving opportunity to Public Prosecutor to call him.
   (1890) 18 Cal 201 (214) (P C), *Kali Kishore* v. *Bausan*. Hasty, uncalled for, and indiscreet expressions casting suspicions of grave crimes against unnamed absent persons, without one tittle of evidence to support them are wholly unwarrantable, and cannot but destroy respect for the judgment and discretion of the Judge and lower the confidence which might otherwise attach to

the case of parties and witnesses the Court should not make any unfounded and unnecessary observations which are calculated to injure their reputation or wound their feelings, especially when the person attacked has had no opportunity of defending himself.[2] Similarly, unfounded remarks against the conduct of counsel should not find a place in the judgment.[3]

Though a humorous judgment is not necessarily a bad judgment,[4] facetious comments which do not contribute to the disposal of the case and which are likely to wound the feelings of persons should be avoided.[5]

An appellate judgment should not impute motives to the judge or magistrate whose judgment is under appeal.[6]

A judgment should not contain any remarks calculated to throw doubt on the conclusion which it embodies.[7]

7. What the appellate judgment should contain.

The appellate judgment should comply so far as may be practicable with the provisions of Section 367.[1] Thus the appellate judgment should contain, among other things, the point or points for determination, the deci-

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his decision.

2. (1930) 1930 Lah 1048 (1050) : 32 Cri L Jour 268 : 1930 Cri Cas 1224, *Emperor* v. *Wazir Singh.* Remarks imputing perjury and incompetence to an official in the discharge of his official duties to be avoided except in very clear cases and after giving the official concerned an opportunity during the trial of explaining his conduct.
(1925) 1925 Lah 187 (188) : 5 Lah 476 : 26 Cri L Jour 463, *Amarnath* v. *King-Emperor.* Court ought not to comment adversely on witness's conduct relying on matters which are not evidence.
(1911) 12 Cri L Jour 393 (394) : 11 Ind Cas 577 (Lah), *Naba* v. *Emperor.*
(1904) 1 Cri L Jour 99 (101, 102) : 1903 Pun Re Cri No. 27, *Nur Din* alias *Kada* v. *Emperor.* Great danger to administration of justice would result if witnesses were restrained from giving their real views for fear of offending the presiding Judge.
(1867) 8 Suth W R Cri 13 (15), *Queen* v. *Dhuram Dutt.* Remarks to the effect that the prisoner was a person of wealth and influence, and had prevented truth from appearing, ought not, unless established in evidence, to be made
(1911) 12 Cri L Jour 464 (465): 11 I. C. 1000 (Rang), *Ma Kya* v. *Kin Lat Gyi.* Immunity which Judges and Magistrates enjoy in writing judgments carries with it the duty of circumspection—Temptations to pillory or pour ridicule on strangers should be restrained and comments on the conduct of the parties and witnesses should not go beyond what is really necessary for the elucidation of the case.
(1875) 23 Suth W R Cri 65 (66), *The Queen* v. *Budri Roy.* Testimony or conduct of Police Officers concerned in the trial should be scrutinised and commented on in the same degree as those of other material witnesses, and no further.
3. (1914) 1914 Oudh 171 (173): 15 Cri L Jour 420. *Lachchu* v. *Emperor.*
(1877) 1 Cal L R 62 (64), *Re Jemeshear.* Comment on the defence counsel's mode of examining the witnesses, at a previous trial is unwarranted.
4. (1911) 12 Cri L Jour 464 (465): 11 I. C. 1000 (Rang), *Ma Kya* v. *Kin Lat Gyi.*
5. (1911) 12 Cri L Jour 464 (465): 11 I. C. 1000 (Rang), *Ma Kya* v *Kin Lat Gyi.*
(1882) 5 C P L R 24 (27), *Empress* v. *Baldeo.*
(1931) 1931 Mad W N 1152 (1156), *Public Prosecutor* v. *Diraviya Thevan.* Atmosphere of a Court of law should be as scientific as that of a hospital or lecture room and the language of a judgment should be entirely devoid of anything approaching facetiousness.
(1912) 13 Cri L Jour 259 (265) : 14 Ind Cas 643 (Rang), *Emperor* v. *Thomas.*
6. (1883) 2 Weir 535 (535), *Re Yacoob.*
7. (1878) 2 All 33 (35), *Empress of India* v. *Chatter Singh.* Adding a note throwing doubt on the conclusion on evidence is unwarranted.
(1930) 1930 Mad W N 1253 (1254), *Nanjunda Naicken* v. *Ratnasabapathi.* After scrutinising the evidence against the accused it is improper for a Magistrate to observe that the accused has "escaped from the clutches of the law."

Note 7.

1. (1925) 1925 Cal 266 (266) : 25 Cri L Jour 901, *Gaharali* v. *Emperor.*
(1913) 14 Cri L Jour 570 (570) : (1913) 1 Upp Bur Rul 169, *Nga Po Han* v. *Emperor.*

Sec. 424 Note 7

sion thereon and the reasons for the decision.[2] There is a difference of opinion on the question whether, when the appellate Court agrees with the judgment of the lower Court and dismisses an appeal, it is sufficient merely to state in the appellate judgment "I have considered the evidence, and I agree with the Magistrate in his conclusions and in his reasons;" one set of cases holding that it is sufficient,[3] another set of cases holding that it is not sufficient[4] and third class of cases holding that it may be sufficient in a *simple* case but not in a *complicated* case.[5]

The true test, would, however, appear to be really to see whether the judgment indicates that the appellate Court has really and not nominally *considered* the case and arrived at an *independent judgment*.[6] It is not necessary for the appellate Court to write a long and elaborate judgment[7] or repeat in extenso all that has been stated by the trial Court.[8] The judgment, should

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2. (1910) 11 Cri L Jour 348 (349) : 37 Cal 194, *Ram Lal Singh* v. *Hari Charan Ahir*.
   (1922) 1922 Pat 157 (158) : 23 Cri L Jour 261, *Deo Narain Mahto* v. *Chhatoo Raut*.
   (1904) 9 Cal W N 23*n* (23*n*), *Ektar Khan* v. *Emperor*.
   (1920) 1920 Lah 335 (335) : 21 Cri L Jour 223, *Bindraban* v. *Emperor*.
   (1921) 1921 Lah 102 (102) : 2 Lah 308 : 23 Cri L Jour 9, *Dalip Singh* v. *Emperor*.
   (1892) 1892 All W N 60 (60), *In the matter of the petition of Zafaryab Ali*.
   (1905) 2 Cri L Jour 170 (171) : 32 Cal 178, *Ekcowri Mukerjee* v. *Emperor*.
3. (1897) 19 All 506 (509), *Empress* v. *Pandeh Bhat*.
   (1926) 1926 Bom 512 (512) : 27 Cri L Jour 1153, *Patilbuva Raoji Bala* v. *Emperor*.
   (1929) 1929 Pat 231 (232) : 30 Cri L Jour 1070, *Lakhan Singh* v. *Emperor*.
   (1864) 1864 Suth W R Gap Cri 6 (8), *Empress* v. *Hurihur Churan Singh*.
4. See the cases cited in foot-notes (6) and (9) to (17).
5. (1926) 1926 All 318 (318, 319): 27 Cri L Jour 449, *Shankar* v. *Emperor*.
   [See also (1931) 1931 Pat 379 (381): 1931 Cri Cas 907 : 11 Pat 143 : 32 Cri L Jour 1197, *Agore Dutta* v. *Emperor*.]
6. (1921) 1921 Lah 102 (102, 103) : 2 Lah 308 : 23 Cri L Jour 9, *Dalip Singh* v. *Emperor*.
   (1909) 9 Cri L Jour 528 (529) : 2 Ind Cas 225 (All), *Shiam* v. *Emperor*.
   (1919) 1919 Cal 668 (669) : 20 Cri L Jour 238, *Kafiluddin Sarkar* v. *Emperor*.
   (1928) 1928 Lah 863 (863) : 29 Cri L Jour 705, *Qadir Baksh* v. *Emperor*.
   (1916) 1916 All 180 (181) : 17 Cri L Jour 167, *Sarwan* v. *Emperor*.
   (1916) 1916 All 48 (49) : 17 Cri L Jour 461, *Gayani* v *Emperor*.
   (1921) 1921 Oudh 102 (102) : 24 Oudh Cas 230, *Madad Ali* v. *Emperor*. No proper consideration of case against one accused.
   (1922) 23 Cri L Jour 378 (378) : 67 Ind Cas 202 (202) (All), *Sunehri* v. *Emperor*. Perfunctory judgment bad.
   (1910) 11 Cri L Jour 331 (331, 332) : 5 Ind Cas 928 (Mad), *In re Seperumal Udayan*.
   (1927) 1927 Nag 88 (89) : 27 Cri L Jour 1404, *Maroti* v. *Mt. Kasa Bai*.
   (1920) 1920 Pat 121 (122) : 21 Cri L Jour 648, *Narain Prosad Bose* v. *Emperor*.
   (1923) 1923 Rang 188 (188) : 1 Rang 301 : 24 Cri L Jour 920, *Bhag* v. *Emperor*. It should not be a mere supplement to the trial Court's judgment.
   (1897) 1 Cal W N 169 (170), *Kasimuddi* v. *Empress*.
   [See also (1912) 13 Cri L Jour 737 (738) : 1913 Pun Re Cri No. 2, *Emperor* v. *Chandu Singh*.
   (1884) 1884 Pun Re Cri No. 31 (p. 56), *Hakim Singh* v. *Empress*.
   (1905) 10 Cal W N 39*n* (39*n*) *Bhagbat* v. *Emperor*.
   (1907) 6 Cri L Jour 137 (137) (Lah), *Mohammad Shah* v. *Emperor*.
   (1931) 1931 Mad W N 119 (119, 120), *Manika Reddi* v. *Emperor*.]
7. (1928) 1928 Lah 863 (863) : 29 Cri L Jour 705, *Qadir Baksh* v. *Emperor*.
   (1921) 1921 Lah 102 (103) : 2 Lah 308 : 23 Cri L Jour 9, *Dalip Singh* v. *Emperor*.
   (1909) 9 Cri L Jour 528 (529) : 2 Ind Cas 225 (All), *Shiam Lal* v. *Emperor*.
   (1925) 2 Cri L Jour 170 (171) : 32 Cal 178, *Ekcowri Mukerjee* v. *Emperor*.
   (1864) 1864 Suth W R Gap Cri 6 (8), *Queen* v. *Hurihur Churan Singh*.
8. (1917) 1917 Cal 285 (286) : 20 Cal W N 1296 (1300) : 18 Cri L Jour 294, *Arindra Rajbanshi* v. *Emperor*.
   (1919) 1919 Cal 668 (669) : 20 Cri L Jour 238 (239), *Kufiluddin Sarkar* v. *Emperor*.
   (1916) 1916 All 48 (49) : 17 Cri L Jour 461 (461), *Gayani* v. *Emperor*.

however, be independent and self-contained so that the High Court in revision may be able to follow it without reference to the trial Court's judgment.[9]

It was held in the following cases that there was no proper judgment where it simply stated:

1. "I have heard the appellant's pleader, and have also gone through the evidence and read the judgment of the lower Court. I do not see any reason to alter the finding of the lower Court."[10]
2. "I see no reason to doubt the guilt of the accused. The appeal is rejected."[11]
3. "I can see no reason to suspect the evidence as regards the finding of the property."[12]
4. "Read proceedings. I see no reason for interfering with the decision or sentence. Appeal dismissed."[13]
5. "After recording the arguments of the pleaders for the appellants and examining the record, I am of opinion that the lower Court had ample ground for convicting the accused of rioting. I do not consider the sentence too severe."[14]
6. "I am satisfied that the judgment of the trial Court is substantially right."[15]
7. "I see no reason to distrust the finding of the lower Court. The sentence passed is, however, harsh. I reduce the term of imprisonment to 15 days."[16]
8. "I agree with the lower Court that the opposite side is in cultivating possession of the same."[17]

Evidence must be discussed:—

The law of appeal constitutes the appellate Court judge of facts as completely as the Court of first instance.[18] It is the final Court on facts[19] and the appellant is entitled to have an explicit opinion on the question of fact.[20] It is therefore the duty of a Court of appeal to exercise an independent judgment in reviewing the evidence as well as in determining questions of law or procedure.[21]

(1931) 1931 Mad W N 119 (119, 120), *Manika Reddi* v. *Emperor*.

9. (1924) 1924 Lah 660 (661) : 25 Cri L Jour 113, *Solhu* v. *Krishna Ram*.
(1923) 1923 Lah 344 (344): 25 Cri L Jour 246, *Rahm Ali* v. *Crown*.
(1903) 7 Cal W N 30 (31, 32), *Bholanath Mullick* v. *Emperor*.
[See however, (1910) 11 Cri L Jour 331 (331, 332): 5 Ind Cas 928 (Mad), *In re Seperumal Udayan*.]

10. (1905) 10 Cal W N 46*n* (46*n*), *Syed Khan* v. *Abhoy*.
[See also (1885) 11 Cal 449 (450), *Kamruddin Dai* v. *Sonatun Mandal*. (1896) 23 Cal 420 (421), *Girish Myti* v. *Empress*.]

11. (1905) 9 Cal W N 245*n* (245*n*), *Mohararseet* v. *Emperor*.

12. (1913) 14 Cri L Jour 570 (570): (1913) 1 Upp Bur Rul 169, *Nga Po Han* v. *Emperor*.

13. (1888) 1888 All W N 280 (280), *Empress* v. *Sameshar*.

14. (1895) 22 Cal 241 (243, 244), *Farkan* v. *Somsher Mahomed*.

15. (1924) 1924 Cal 537 (537) : 24 Cri L Jour 311, *Baishnav* v. *Emperor*.

16. (1886) 13 Cal 110 (111), *In re Ram Das Maghi*.
[See also (1888) 15 Bom 11 (12), *In re Shivappa Din Shidlingappa*.]
[But see (1897) 19 All 506 (509), *Empress* v. *Pandeh Bhat*.]

17. (1921) 1921 Pat 504 (504) : 22 Cri L Jour 656, *Mangla Majhi* v. *Emperor*.

18. (1876) 1876 Pun Re Cri No. 5 (p. 7), *Turni* v. *Crown*.

19. (1924) 1924 Pat 380 (381): 24 Cri L Jour 407, *Jiwan Raut* v. *Emperor*.

20. (1924) 1924 Cal 618 (619) : 25 Cri L Jour 1044, *Inatulla* v. *Emperor*.

21. (1890) 1890 All W N 148 (148), *Empress* v. *Bishan*.

Sec. 424 Note 7

The Court of appeal should discuss the evidence and probabilities arising from the circumstances of the case;[22] the reason for the finding should also be stated.[23]

Case of each accused should be considered:—

Where there are more than one accused the appellate Court should discuss the evidence against each accused and give its finding as to the guilt or innocence of each accused.[24]

Court bound to consider the case on merits even when accused is absent:—

When the appeal is once admitted it cannot be disposed of summarily. If the appellant or his pleader is absent, it is still the duty of the appellate Court to go through the record and write a judgment in accordance with law.[25] A judgment stating "No one appears; I see no reason to interfere. I dismiss the appeal," has been held to be not a proper judgment.[26]

(1915) 1915 Mad 538 (538) : 15 Cri L Jour 694, *In re Perumal Naidu.*
(1925) 1925 Mad 706 (706) : 26 Cri L Jour 1036, *Kadalnatha Pillai, In re.*
(1916) 1916 Mad 1021 (1022) : 16 Cri L Jour 542, *T. V. R. Indra Talavar* v. *R. Narasimha Rao.*
[See also (1921) 1921 Pat 487 (487), *Harinath Chandurji* v. *Emperor.*
(1915) 1915 Bom 139 (139) : 16 Cri L Jour 832, *Devendra Shivapa* v. *Emperor.*
(1895) Ratanlal 826 (827), *Empress* v. *Dagdu Gangaram.*]

22. (1919) 1919 Pat 529 (530) : 20 Cri L Jour 645 (647), *Darogi Chamar* v. *Emperor.*
(1904) 1 Cri L Jour 305 (311) : 28 Bom 479, *Emperor* v. *Balgangadhar.*
(1912) 13 Cri L Jour 712 (712) : 16 Ind Cas 520 (Mad), *Balusu Lakshmiyya* v. *Emperor.*
(1925) 1925 Cal 266 (266) : 25 Cri L Jour 901, *Gohar Ali* v. *Emperor.*
(1926) 27 Cri L Jour 114 (114) : 91 Ind Cas 690 (Lah), *Hurmat Ali* v. *Emperor.*
(1928) 29 Cri L Jour 1031 (1032) : 112 Ind Cas 359 (Lah), *Dalip Singh* v. *Emperor.*
(1927) 1927 Lah 797 (798), *Sardul Singh* v. *Crown.*
(1872) 17 Suth W R Cri 59 (60), *In re Gomanee.*

23. (1925) 1925 Lah 644 (644) : 26 Cri L Jour 1380 (1380), *Thakar Singh* v. *Emperor.*
(1903) 7 Cal W N 30 (31), *Bholanath Mullick* v. *Emperor.*
(1925) 1925 Rang 112 (112) : 2 Rang 641 : 26 Cri L Jour 395, *San Dun* v. *Emperor.*
(1924) 1924 Pat 380 (381) : 24 Cri L Jour 407, *Jiwan Raut* v. *Emperor.*
[See also (1907) 5 Cri L Jour 349 (350) (Cal), *Rupa Mandal* v. *Keshab Mandal.*
(1908) 8 Cri L Jour 203 (205) : 35 Cal 718, *Manaruddi* v. *Emperor.*
(1910) 11 Cri L Jour 348 (349) : 37 Cal 194, *Ram Lal Singh* v. *Hari Charan Ahir.*
(1917) 1917 Cal 792 (793) : 18 Cri L Jour 698 (699), *Kabbat Ali* v. *Emperor.*
(1918) 1918 Mad 814 (815) : 18 Cri L Jour 752 (752), *In re Veerappa Naick.*
(1912) 13 Cri L Jour 48 (48) : 13 Ind Cas 288, (Ajmer—Merwara.) *Mt. Suriya* v. *Lachmi Narain.*
(1911) 12 Cri L Jour 496 (496) : 12 Ind Cas 216 (Mad), *Goripati* v. *Emperor.*
(1912) 34 All 455 (464) : 15 Oudh Cas 271 : 39 Ind App 156 : 16 Ind Cas 197 (201) (PC), *Mirza Sajjad* v. *Nawab.* Civil Case.]

24. (1918) 1918 Mad 350 (351) : 19 Cri L Jour 200, *Dakshinamurthi Rajali* v. *Emperor.*
(1921) 1921 Oudh 102 (102) : 24 Oudh Cas 230, *Madad Ali* v. *Emperor.*
(1924) 1924 Cal 618 (619) : 25 Cri L Jour 1044, *Inatulla Sarkar* v. *Emperor.*
(1916) 1916 Mad 1125 (1125) : 16 Cri L Jour 496 (496), *In re Cherukath Mammad.*
(1916) 1916 Mad 732 (733) : 16 Cri L Jour 735, *In re Bapu Naidu.*
(1911) 12 Cri L Jour 43 (43) : 9 Ind Cas 261 (Cal), *Jatra Mohan Bysack* v. *Akhil Chandra Bysack.*
(1925) 1925 Mad 712 (712) : 26 Cri L Jour 1089, *Chinna Manikkam, In re.*
(1907) 6 Cri L Jour 427 (429) : 35 Cal 138, *Jamait Mullick* v. *Emperor.*

25. (1923) 1923 Pat 368 (368) : 24 Cri L Jour 453, *Newal Lal Rai* v. *Emperor.*
(1907) 11 Cal W N 135*n* (135*n*), *Noai* v. *Emperor.*

26. (1916) 1916 All 43 (44) : 17 Cri L Jour 353 (353), *Ram Bharose* v. *Emperor.*
(1925) 1925 Lah 644 (644) : 26 Cri L Jour 1380, *Thakar Singh* v. *Emperor.*
[See also (1923) 1923 Pat 297 (298) : 26 Cri L Jour 419, *Kabir Saheb* v. *Emperor.*]

Sec. 424 Notes 7—9

It has been held that even where the counsel for appellant does not refer to the defence evidence the Court should consider it and give a decision.[27]

Miscellaneous:—

The appellate Court should give to the accused the benefit of doubt, if, on going through the records it has reasonable doubts about the guilt of the accused.[28]

The judgment should be temperate, sober and not satirical.[29] The Court should not give inconsistent findings.[30] It is irregular to consider evidence not properly placed before the Court.[31]

As to the power of the appellate Court to raise a plea of private defence on behalf of the accused when he has not himself raised the point in the lower Courts, *see* the undermentioned case.[32]

8. Who can pronounce judgment.

There is nothing in this Code corresponding to Order 20, Rule 2 of the Civil Procedure Code. Where after the hearing of a criminal appeal the Judge was transferred and he subsequently wrote the judgment and forwarded the same to his successor, who pronounced it, it was held that the judgment was passed without jurisdiction and should be set aside.[1]

Before the amendment of Section 367 it was held that the judgments should always be *written* by the Magistrates.[2] But the amendment of 1923 empowers Magistrates to *dictate* their judgments. *See* Section 367.

9. "Other than a High Court."

The provisions of this Section apply only to Subordinate Courts and not to the judgment of a High Court; the High Court can undoubtedly dismiss an appeal without giving reasons.[1] There is no provision in the Code requiring the High Court after pronouncing a judgment in open Court to date and sign the same. Where certain appeals were heard by a High Court Judge and judgments were delivered in open Court and taken down by the judgment-writer, but the judgments were not signed owing to the death of the Judge it was held that nevertheless the appeals should be deemed to have been finally disposed of.[2]

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27. (1913) 14 Cri L Jour 419 (420) : 40 Cal 376, *Fidoi Hossein* v. *Emperor*.
(1917) 1917 Oudh 323 (323) : 18 Cri L Jour 689 (689), *Beni* v. *Emperor*.
28. (1898) 1898 Pun Re Cr No. 6, (page 17), *Moula Baksh* v. *Empress*.
(1883) 2 Weir 535 (535), *In re Yakoob Sahib*.
(1884) 2 Weir 536 (536), *Samshir Ali Shah, Petitioner*.
29. (1912) 13 Cri L Jour 259 (265) : 14 Ind Cas 643 (Rang), *Emperor* v. *Thomas Pellako*.
30. (1913) 14 Cri L Jour 295 (296) : 19 Ind Cas 951 (Cal), *Baluram* v. *Emperor*.
(1912) 13 Cri L Jour 595 (596) : 16 Ind Cas 163 (Cal), *Ambica Missir* v. *Emperor*
31. (1916) 1916 Cal 912 (913) : 17 Cri L Jour 439 (440), *Superintendent and Remembrancer of Legal Affairs* v. *Mon Mohan Roy*.
(1913) 21 Ind Cas 413 (414) (Cal), *Nilmadhub Mahta* v. *Raj Kishore Das*.
32. (1898) 21 All 122 (125, 126,) *Queen-Empress* v. *Timmal*.

Note 8.

1. (1931) 1931 Cal 637 (638) : 33 Cri L Jour 60 : 1931 Cri Cas 837, *Jogesh Chandra Roy* v. *Surendra Mohan Roy*.
2. (1891) Ratanlal 545 (546), *Empress* v. *Lakshmibai*.

Note 9.

1. (1933) 1933 Pat 38 (40) : 1933 Cri Cas 54 : 11 Pat 697 : 34 Cri L Jour 118, *Kuldip Das* v. *Emperor*.
(1926) 1926 Sind 275 (276) : 20 Sind L R 82 : 27 Cri L Jour 343, *Dwarka* v. *Emperor*.
2. (1933) 1933 All 40 (40) : 55 All 132 : 1933 Cri Cas 51 : 34 Cri L Jour 703, *Prag Nadho Singh* v. *Emperor*.

Sec. 424 Note 10

10. Effect of non-observance of the provisions of this Section.

In some cases[1] it has been held that the omission to write a proper judgment is an illegality and it cannot be cured by Section 537 and appellate judgments have been set aside and the appeals have been remanded for a proper hearing. This Section has been held to be mandatory and could not be violated though no serious inconvenience, harm or injustice has resulted from a violation of the provisions contained therein. No judgment of an appellate Court (except High Court) is legal unless it contains the points for determination, the decision thereon and the reasons therefor.[2] But in other cases[3] the High Courts have held that Section 537 applied, and unless the appellant is able to show failure of justice by the violation of the provisions of the Section the judgments cannot be set aside. It has been observed in a Sind case[4] that the words "so far as practicable" in this Section would certainly bring the error within the scope of Section 537.

In an Allahabad case where an appellate Court dismissed the appeal without giving any reasons, and a revision to the High Court was filed nine months later, it was held that the appellate Court's order would, if the application for revision had been made without such delay, have been set aside, but the High Court refused to interfere because of such delay.[5]

Sec. 425

Order by High Court on appeal to be certified to lower Court.

425.* (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conform-

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* (1882—S. 425 ; 1872—S. 299 and 1861—S. 406.)

Note 10.

1. (1928) 29 Cri L Jour 270 (270) : 107 Ind Cas 665 (Nag), *Kalikram* v. *Emperor.*
   (1891) 15 Bom 11 (12), *In re Shivappa* bin *Shidlingappa.*
   (1895) Ratanlal 772 (773), *Empress* v. *Ganesh Bhikaji.*
   (1899) 1 Bom L R 225 (225), *Empress* v. *Gopala.*
   (1905) 9 Cal W N 223*n* (223*n*), *Manick Joardar* v. *Emperor.*
2. (1912) 13 Cri L Jour 559 (562) : 8 Nag L R 84, *Jairam* v. *Emperor.*
   (1915) 1915 Bom 139 (139) : 16 Cri L Jour 832, *Devendra Shivappa* v. *Emperor.*
   (1930) 1930 Bom 163 (164) : 31 Cri L Jour 925 : 1930 Cri Cas 487, *Basappa* v. *Emperor.*
   (1921) 22 Cri L Jour 640 (640) : 63 Ind Cas 336 (Pat), *Kali Charan* v. *Geli Bewa.*
   (1928) 29 Cri L Jour 270 (270, 271) : 107 Ind Cas 665 (Nag), *Kalikram* v. *Emperor.* Order dismissing appeal set aside and appeal directed to be reheard.
   (1921) 1921 Pat 504 (1) (504) : 22 Cri L Jour 656, *Mangla Majhi* v. *Emperor.*
3. (1893) 20 Cal 353 (356), *Rohimuddi* v. *Empress.*
   (1926) 1926 Bom 512 (512) : 27 Cri L Jour 1153, *P. Raoji Bala* v. *Emperor.*
   (1909) 10 Cri L Jour 460 (463) : 4 Ind Cas 10 (Cal), *Parasulla* v. *Emperor.*
   (1912) 13 Cri L Jour 859 (859) : 17 Ind Cas 795 (All), *Kanhai Singh* v. *Emperor.*
   (1893) 21 Cal 121 (125, 128), *Damu* v. *Sridhar.*
   (1895) 22 Cal 241 (243), *Farkan* v. *Somsher Mahomed.*
4. (1926) 1926 Sind 244 (245) : 20 Sind L R 261 : 27 Cri L Jour 833, *Fakir Bux* v. *Emperor.*
5. (1886) 8 All 514 (515), *Empress* v. *Ram Narain.*

able to the judgment or order of the High Court, and, if necessary, the record shall be amended in accordance therewith. Sec. 425

426.* (1) Pending any appeal by a convicted person, the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended, and, also, if he is in confinement, that he be released on bail or on his own bond. Sec. 426

Suspension of sentence pending appeal. Release of appellant on bail.

(2) The power conferred by this Section on an appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

Synopsis.

	Note No.		Note No.
Scope of the Section.	1	"Sentence."	5
"Pending an appeal."	2	Release on bail.	6
"A convicted person."	3	High Court—Sub-section 2.	7
"Appellate Court."	4	Exclusion of time—Sub-section 3.	8

Other Topics.

Applicability to appeals from orders under Section 107 or 118. See Note 3, Pts. 1 and 2.
Bail refused by appellate Court — High Court can grant. See Note 7, Pt. 1.
Detention under Section 10, Reformatory Schools Act—Not sentence. See Note 5, Pt. 1.
Leave to appeal to Privy Council — No power to stay execution. See Note 4, Pt. 4.
Legislative changes. See Note 6.
Release and not mere suspension of sentence for exclusion of term. See Note 8, Pt. 1.
Release — Offence if bailable or not. See Note 6.
Section 561-A—Inherent jurisdiction of High Court pending appeal to Privy Council. See Note 7, Pts. 2 and 3.
Suspension of sentence by Court which passed it. See Note 4, Pt. 2; Note 7, Pts. 2 and 3.
Suspension only by appellate Court and not other Courts. See Note 4, Pts. 1 and 3.

* (Code of 1882—S. 426—Same.)

(Code of 1872—S. 281.)

Suspension of sentence pending appeal. Release of appellant on bail.

281. In any case in which an appeal is allowed, the appellate Court may, pending the appeal, order that the sentence be suspended, and, if the appellant be in confinement for an offence which is bailable, may order that he be released on bail.

The period during which the sentence is suspended shall be omitted in reckoning the completion of the punishment.

(Code of 1861—S. 421.)

Appellate Court may suspend sentence pending appeal, and release defendant on bail.

421. In any case in which an appeal is allowed, the appellate Court may, pending the appeal, order that the sentence be suspended, and if the appellant be in confinement for an offence which is bailable, may order that he be released on bail.

Sec. 426 Notes 1—5

1. Scope of the Section.

This Section provides for the suspension of sentences pending appeal and for release of the appellant on bail. In *Queen Empress* v. *Pohpi*,[1] Young, J., observed as follows:—

"Section 426 of the Criminal Procedure Code provides a procedure by which the appellate Court may, for special reason, order that the execution of the sentence or order appealed against be suspended ; and if the appellant is in confinement that he be released on bail or on his own bond. Such special provision is provided for special circumstances only and therefore is not generally applicable to all cases, seeing that in many cases (as in the case now under consideration) the appellant is in jail under a legal warrant and cannot appear in any Court until such warrant is set aside, and such warrant can be set aside only under some special provision such as that referred to in the special cases to which Section 426, Criminal Procedure Code, alludes."

2. "Pending an appeal."

The *pendency* of an appeal by a convicted person is a condition precedent to the exercise of jurisdiction under this Section.[1]

3. "A convicted person."

There is a difference of opinion as to whether the words "convicted person" mean only persons convicted of an *offence* or whether they would include persons against whom an order is passed under Section 107 or under Section 118. According to the High Court of Allahabad, the words are not confined to an association with *offences* but would include persons against whom any order is made from which an appeal is allowed.[1] The High Court of Patna has taken a contrary view.[2]

4. "Appellate Court."

The only Courts which have power to suspend the execution of a sentence or order under this Section are the appellate Court and the High Court.[1] So a sentence cannot be suspended by the Court which passed it[2] or a Court to which the appeal does not lie.[3] It has been held that the Privy Council, in an application for leave to appeal to itself, is not a Court of criminal appeal, and cannot stay execution of the sentence.[4]

5. "Sentence."

An order of detention by a District Magistrate under Section 10 of the Reformatory Schools Act, in lieu of a sentence of imprisonment is not a *sentence*

Section 426—Note 1.

1. (1891) 13 All 171 (188), *Queen-Empress* v. *Pohpi*.

Note 2.

1. (1930) 1930 Pat 274 (275) : 1930 Cri Cas 455 : 31 Cri L Jour 958 : 9 Pat 131, *Charan Mahto* v *Emperor*.
   (1932) 1932 Mad 720 (721) : 56 Mad 149 : 33 Cri L Jour 826, *Pitchai* v. *Muhammad Atham*. Words "pending any appeal by convicted person" govern whole section.

Note 3.

1. (1932) 1932 All 680 (681) : 1932 Cri Cas 856 : 54 All 861 : 33 Cri L Jour 731, *Katwaroo Rai* v. *Emperor*. Order under S. 107.
   [See also (1934) 1934 All 845 (845) : 1934 Cri Cas 1031 : 36 Cri L Jour 177, *Darsu* v. *Emperor*.]
2. (1930) 1930 Pat 274 (275) : 1930 Cri Cas 455 : 9 Pat 131 : 31 Cri L Jour 958, *Charan Mahto* v. *Emperor*. Order under S. 118.

Note 4.

1. (1891) 2 Weir 536 (536), *Government Pleader* v. *Kodu Moidin Rowther*.
   (1869) 12 Suth W R Cri 47 (47, 48), *In re Kishen Soonder Bhuttacharjee*.
2. (1868) 4 Mad H C Rul App 1 (2), *High Court Proceedings, 17th January* 1868
   (1869) 12 Suth W R Cri 47 (47), *In re Kishen Soonder Bhattacharjee*.
3. (1891) 2 Weir 536 (536), *Government Pleader* v. *Kodu Moidin Rowther*.
4. (1915) 1915 P C 29 (30) : 42 Cal 739 : 16 Cri L Jour 494 : 42 Ind App 133 (P C), *Balmukund* v. *Emperor*.

within the meaning of the Section. An appellate Court therefore has no power to suspend operation of such order.[1] Sec. 426 Notes 5—8

6. Release on bail.

Under the Code of 1861, a convicted person could be released on bail, only if the offence of which he was convicted was a bailable offence.[1] But now, the appellate Court can release the accused on bail whether the offence is bailable or not.

7. High Court—Sub-section 2.

Sub-section 2 confers on the High Court the same powers as it confers on an appellate Court. The High Court can exercise this power, even after the appellate Court rejects an application under this Section, though in such cases, it would exercise it, only if the order of the appellate Court is manifestly wrong or where no discretion has been exercised at all. The High Court has unfettered powers to grant bail, yet in exercising these powers it ought to have regard to the limitations imposed on lower appellate Courts.[1]

On the question whether the High Court can suspend the execution of sentence[2] or grant bail[3] pending the hearing of an appeal to the Privy Council, against its own sentence, it has been held that it can do so under its inherent jurisdiction under Section 561-A.

8. Exclusion of time—Sub-section 3.

Under sub-section 3, when the appeal fails, the time during which the accused is released under this Section should be excluded in computing the term of which he is sentenced. But it is only when he is *released* and not where his sentence has been suspended that the term is to be excluded.[1]

The sub-section does not mean that the period during which a person is released under the Section should be excluded from the *term* of punishment to which he has been sentenced. What the sub-section means is that in *calculating* the term, the period of release should be left out of account.[2]

427.* When an appeal is presented under Section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail. Sec. 427

Arrest of accused in appeal from acquittal.

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*(Code of 1882—S. 427—Same.)

(Codes of 1872 and 1861—Nil.)

Note 5.

1. (1915) 1915 Mad 1067 (1068) : 16 Cri L Jour 134, *Emperor* v. *Krishna Pandaram.*

Note 6.

1. (1865) 3 Suth W R Cri 57 (57), *Queen* v. *Moorali Kin Kur Mookerjee.*

Note 7.

1. (1926) 1926 Nag 279 (280) : 27 Cri L Jour 319, *Shaikh Karim* v. *Emperor.*
2. (1924) 1924 Cal 545 (552) : 26 Cri L Jour 52, *Barendra* v. *King-Emperor.*
3. (1927) 1927 All 97 (98) : 49 All 247 : 27 Cri L Jour 1377, *Ram Saroop* v. *Emperor.*

Note 8.

1. (1891) 2 Weir 536 (537), *Government Pleader* v. *Kodu Moidin Rowther.*
2. (1936) 1936 All 12 (13) : 1936 Cri Cas 15, *Emperor* v. *Narain Singh.*

Sec. 427 Note 1

Synopsis.

Scope of the Section. Note No. 1

Other Topics.

Legislative changes—History of the Section. See Note 1, Pt. 1.
Previous law. See Note 1, Pts. 1 and 2.

1. Scope of the Section.

This Section was added to the Code in 1882. Even before it was added it was held that the High Court had the power to re-arrest the accused pending the disposal of an appeal against his acquittal.[1] This Section only gives statutory effect to that power.[2]

Sec. 428

Appellate Court may take further evidence or direct it to be taken.

428.* (1) In dealing with any appeal under this Chapter, the appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the appellate Court is a High Court, by a Court of Session or a Magistrate.

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* **(Code of 1882—S. 428—Same.)**

(Code of 1872—S. 282, Paras 1, 3 and 4.)

Appellate Court may make or direct further enquiry.

282. In any case in which an appeal has been allowed, the appellate Court, if it thinks further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the appellant to be necessary, may either make such further inquiry and take such additional evidence itself, or may direct such inquiry to be made and additional evidence to be taken.

* * * * *

When the evidence has not been taken before itself, the result of the further inquiry and the additional evidence shall be certified to the appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

Unless the appellate Court otherwise directs, the presence of the appellant may be dispensed with when the further inquiry is made or evidence taken.

* * * * *

(Code of 1861—S. 422.)

Appellate Court may direct further enquiry, &c.

422. In any case in which an appeal has been allowed, it shall be competent to the appellate Court, if it think further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused to be necessary, to direct such enquiry to be made and additional evidence to be taken. The result of the further enquiry and the additional evidence shall be certified to the appellate Court, and the appellate Court shall thereupon proceed to pass such judgment, sentence, or order as to such Court shall seem right.

Section 427—Note 1.

1. (1878-1880) 2 All 340 (341, 342), *Queen-Empress of India* v. *Mangu.*
(1875-76) 1 Cal 281 (282), *Queen* v. *Gobin Tewari.*
(1865) 3 Suth W R Cr 4 (5), *Queen* v. *Madree Chowledar.*
[See also (1869) Ratanlal 17 (18), *Reg.* v. *Gopala Shiru.*
(1878-80) 2 All 386 (389), *Empress of India* v. *Karim Buksh.*]
2. (1887) 9 All 528 (529), *Queen-Empress* v. *Gobar Dhan.*

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the appellate Court, and such Court shall thereupon proceed to dispose of the appeal. Sec. 428 Note 1

(3) Unless the appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this Section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

Synopsis.

Other Topics.

Act 11 of 1846 and rules—Further evidence by High Court on appeal from Agent of Mewar Estates. See Note 3, Pt. 6.
Additional evidence and Sections 195 and 476. See Note 9, Pt. 3.
Additional evidence not to fill up gap in prosecution case. See Note 4, Pts. 1 to 4.
Additional evidence or remand under Section 423. See Note 4, Pts. 13 and 14; Note 6, Pt. 5.
Additional evidence—Where formal proof is wanted. See Note 4, Pts. 1 to 4.
Chemical report—No order as to its admission—Nor record of reasons—Effect. See Note 5, Pt. 3.
Discretion in taking additional evidence. See Note 4, Pts. 6 to 12.
Disposal of appeal by appellate Court itself after fresh evidence. See Note 7, Pt. 2.
Evidence to be taken afresh—Reading out prior evidence—Insufficient. See Note 9, F-N (2).
Examination of accused after additional evidence. See Note 9.
Inapplicable to Section 125. See Note 3, Pt. 1.
Inapplicable to Section 437. See Note 3, Pt. 2.
Inapplicable to Sections 476-B and 195. See Note 3, Pt. 3, F-N (3) and F-N. (4).
Inherent power of supplementing evidence under Section 476-B. See Note 3.
Judgment after additional evidence—Original or appellate—Legislative changes. See Note 10, Pts. 1 and 2.
Map in appeal—Proper proof needed. See Note 9, Pt. 2.
"Necessary"—Explained. See Note 4, Pt. 5.
No evidence at all—Section inapplicable. See Note 4, Pt. 9.
No reference to police for further investigation. See Note 6, Pt. 4.
No report or finding. See Note 6, Pts. 2 and 3.
No record of reasons. See Note 5, Pts. 3 and 4.
Object of record of reasons. See Note 5, Pt. 2.
Object of the Section. See Note 2, Pts. 2 to 5; Note 4, Pts. 1 to 4.
Order for further evidence—Withdrawal of appeal and cancellation of order. See Note 10, Pt. 4.
Presence of accused—Legislative changes. See Note 8, Pt. 1.
Proceedings where additional evidence taken. See Note 2, Pts. 6 to 8; Note 3, Pts. 5 and 6.
Proof of sanction under Section 196—Not proper. See Note 2, Pt. 4.
Record of reasons—Legislative changes. See Note 5, Pt. 1.
Sections 540, 375 and 439—Order 41, Rule 27. See Note 2, Pt. 1.
Using evidence under Section 288. See Note 9, F-N (2).

1. Legislative changes.

Under the Code of 1872, additional evidence could be taken only upon

Sec. 428 Notes 1—2

any point "bearing upon the guilt or innocence of the applicant."[1] These words were omitted in the Code of 1882.

2. Scope and object of the Section.

This Section is analogous to Order 41, Rule 27 of the Civil Procedure Code; and enables the appellate Court to take additional evidence,[1a] but having regard to the difference in language between the two Sections the decisions passed under the Civil Procedure Code are not a trustworthy guide in interpreting this Section.[1] In this Code itself there are other Sections which empower Courts to take additional evidence. *See* Sections 540, 375 and 439.

The object of the Section is to see that justice is done between the prosecutor and the person prosecuted.[2] The object is also "the prevention of a guilty person's escape through some careless or ignorant proceedings of a Magistrate or the vindication of a wrongfully accused person's innocence, where the same carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth."[3] In *Varadarajulu* v. *Emperor*,[4] Wallis, C. J., observed:—

> "It would not . . . . . be creditable to the administration of justice or in accordance with modern ideas on the subject that a conviction or a charge . . . . . , . . should be upset owing to a misconception on the part of the prosecution as to the proper mode of proving a statutory requisite [sanction of the Local Government under S. 196], not affecting the merits, a misconception shared by the trial Magistrate."

Another reason for the enactment of this Section is to save public time by taking only the additional evidence necessary instead of remanding the whole case for examining once again the witnesses already examined.[5]

The additional evidence can be taken in appeals against conviction or appeals against acquittal.[6] It can be taken for the prosecution or for the defence.[7] Section 307 provides that the High Court has, in proceedings under that Section, all the powers of an appellate Court. The High Court can therefore on a reference under Section 307 call for further evidence under this Section.[8]

Section 428—Note 1.

1. (1875) 23 Suth W R Cri 34 (35), *Sheikh Mohamad Golab* v. *Mohabeer Singh.*

Note 2.

1a (1933) 1933 Cal 364 (366): 1933 Cri Cas 500: 60 Cal 814: 34 Cri L Jour 320, *Amarchand* v. *Emperor.*
(1928) 1928 Bom 241 (242): 52 Bom 686: 29 Cri L Jour 990, *Bansi Lal Gangaram* v. *Emperor.*
1. (1928) 1928 Mad 1174 (1175): 30 Cri L Jour 133, *Subramania Iyer* v *Emperor.*
2. (1926) 1926 Lah 309 (310): 7 Lah 148: 27 Cri L Jour 463, *Dulla* v. *Emperor.*
(1925) 1925 Pat 450 (452): 4 Pat 204: 27 Cri L Jour 524, *Guhi Mian* v. *Emperor.*
3. (1872) 18 Suth W R Cri 31 (32), *Udai Chand Mukhopadhya, In re.*
(1925) 1925 Pat 526 (528): 26 Cri L Jour 1171, *Aktar Hussain* v. *Emperor.*
4. (1920) 1920 Mad 928 (929): 42 Mad 885: 20 Cri L Jour 455, *Varadarajulu Naidu* v. *Emperor.*
5. (1918) 1918 All 133 (134): 19 Cri L Jour 485, *Ishwar Prasad* v. *Emperor.*
[See (1935) 1935 Nag 125 (127): 1935 Cri Cas 565: 31 Nag L R 246: 36 Cri L Jour 740, *Potram* v. *Emperor.* If appellate Court considers additional evidence necessary, it should proceed under this section. It cannot order a re-trial with the condition that the evidence already on record should be taken into consideration.]
6. (1914) 1914 Mad 628 (631): 38 Mad 1028: 15 Cri L Jour 236, *In re Sinnu Goundan.*
7. (1925) 1925 Mad 106 (109, 111): 25 Cri L Jour 401, *In re Narayana Menon.*
(1928) 1928 Mad 1174 (1175): 30 Cri L Jour 133, *Subramania Iyer* v. *Emperor.*
8. (1929) 1929 Cal 244 (246): 56 Cal 566: 30 Cri L Jour 1031, *Debendra Narayan Chakravarthy* v. *Emperor.*
(1873) 20 Suth W R Cri 1 (5), *Empress* v. *Koonju.*

Section 439 also provides specifically that the High Court in revision may exercise the powers under this Section.

Sec. 428 Notes 2—4

3. "Appeal under this Chapter."

The powers under this Section can be exercised only where *firstly* there is an *appeal* and *secondly* the appeal is one *under this Chapter* (Chapter XXXI). A proceeding under Section 125 of the Code is not an *appellate* proceeding and consequently this Section does not apply.[1] A proceeding under Section 437 of the Code is one in *revision* and this Section has no application to such a proceeding also.[2] An appeal under Section 476-B of the Code is one under Chapter XXXV and not *under this Chapter* and consequently this Section does not apply.[3] It has, however, been held in the undermentioned cases[4] that independently of this Section the appellate Court in an appeal under Section 476-B, has an *inherent* power to *itself* take evidence and complete an enquiry which it finds to be incomplete.

An appeal under Section 250, sub-section 3, must be considered to be one under this Chapter inasmuch as the forum of such an appeal is to be ascertained only by virtue of the provisions of this Chapter; the appellate Court may therefore record additional evidence in such cases.[5]

It has been held by the Oudh Chief Court that in an appeal to the Sessions Court from the judgment of *an Assistant Sessions Judge*, the former has no power under this Section to record additional evidence or to direct such evidence to be taken and that the language of sub-section 1 shows that it is only when a Sessions Court is sitting to hear an appeal from a judgment of a Magistrate has it got such power.[5a]

It has been held in the undermentioned case[6] that Section 4, of Act 11 of 1846 read with Rule 44 of the Rules under that Act, empowers the High Court to resort to this Section in appeals against convictions by the Agent of the Mewar Estates in West Khandesh. *See also* the undermentioned case.[7]

4. "If it thinks additional evidence to be necessary."

There is a conflict of opinion on the questions whether additional evidence can be taken for the purpose of supplementing a gap in the pro-

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Note 3.

1. (1919) 1919 Pat 171 (172) : 20 Cri L Jour 221, *Mt. Narain* v. *Emperor.*
2. (1907) 6 Cri L Jour 357 (358) (Cal), *Moni Mohun Mondol* v. *Ishwar Chunder Mookerjee.*
   (1882) 1882 All W N 146 (147), *Empress* v. *Sanwallia.*
3. (1928) 1928 Mad 391 (392) : 51 Mad 603 : 29 Cri L Jour 445, *Sami Vannia Nainar* v. *Periaswami Naidu.*
   (1910) 11 Cri L Jour 280 (281) : 33 Mad 90 *Krishna Reddi* v. *Emperor.* Case under old S. 195, sub-s. 6.
   (1907) 5 Cri L Jour 288 (289) : 30 Mad 311, *Rama Iyer* v. *Venkatachala Padayachi.* (Do.)
4. (1931) 1931 Lah 761 (762) : 13 Lah 342 : 33 Cri L Jour 178 : 1931 Cri Cas 1065 (F B), *Dhanpat Rai* v. *Balak Ram.*
   (1931) 1931 Sind 115 (115) : 1931 Cri Cas 733 : 25 Sind L R 68 : 33 Cri L Jour 43, *Ramchand Bansi Ram* v. *Lila Ram.*
   (1921) 1921 Mad 453 (454) : 44 Mad 47 : 22 Cri L Jour 372, *In re Subbasari.* They also held that an application against an order granting sanction was *not* an appeal.
5. (1930) 1930 Mad 483 (484) : 1930 Cri Cas 507 : 53 Mad 688 : 31 Cri L Jour 602, *Seeniah Naidu* v. *Abdul Wahab.*
5a (1935) 1935 Oudh 402 (403) : 1935 Cri Cas 928 : 36 Cri L Jour 844, *Hori Lal* v. *Emperor.*
6. (1916) 1916 Bom 313 (315) : 17 Cri L Jour 533, *Emperor* v. *Khalpa Ranchod.*
7. (1934) 1934 Mad 55 (59) : 1934 Cri Cas 55 : 57 Mad 259 : 35 Cri L Jour 511, *Mohomed Naina Marikayar* v. *Ahmad.* Appeal to High Court from order under S. 19 of Fugitive Offenders Act (1881)—High Court can direct additional evidence, though Act does not define powers of appellate Court.

Sec. 428 Note 4

secution evidence and whether such evidence should be taken only by way of *formal* proof.

It was held in the undermentioned cases[1] that the power to take additional evidence should not be exercised for the purpose of filling a gap in the prosecution case when the necessary evidence was available to the prosecution at the hearing and ought to have been produced then. In *Varadarajalu Naidu* v. *Emperor*[2] Wallis, C. J., dissented from the above view but held that before additional evidence is allowed the Court should be satisfied that the case is one of *formal* proof only. In the cases cited below[3] it has been held that it is not correct to hold that the provisions of the Section are to be invoked only for supplying formal proof. In *Akhtar Hussain* v. *Emperor*,[4] Macpherson, J., observed as follows:—

> "In India the *onus* is placed on the Court not merely to listen to the evidence, but to inquire to the utmost into the truth of the matter, and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on the appellate Court by Section 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice; on the contrary the enactment is, like the other provisions referred to, directed to the attainment of justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of the case. The conditions for the exercise of the power are set out in the Section itself, and within these limits it is contemplated that the power will be exercised . . . . . the appellate Court is by no means condemned to countenance a miscarriage of justice because the prosecutor or even the trial Court fails to realize the necessity of bringing certain evidence on the record, even if that evidence is not purely formal."

In the undermentioned Madras case[5] it has been explained that the word "necessary" does not import that it is impossible to pronounce judgment without the additional evidence. There may be many cases where judgment can be pronounced without any additional evidence, but there are cases where it is necessary as a general measure of justice to record additional evidence.

The necessity for taking additional evidence under this Section must be determined on the particular facts of each case.[6] But it has been held that the necessity for additional evidence must be apparent from the record in the case and must not be derived from external information.[6a] The discretion vested in the Court of appeal should not be exercised arbitrarily[7] but only when the interests of justice demand such a procedure.[8]

Note 4.

1. (1935) 1935 Mad 325 (326): 1935 Cri Cas 445: 37 Cri L Jour 99, *United Motor Finance Co., Ltd., In re.*
   (1925) 1925 Lah 85 (86): 5 Lah 404: 26 Cri L Jour 320, *Crown* v. *Jaswant Rai.*
   (1882) 5 All 217 (221), *Empress* v. *Fateh.*
   (1874) 21 Suth W R Cri 13 (14), *Queen* v. *Madhub Chunder Giri Mohunt.*
2. (1920) 1920 Mad 928 (929): 42 Mad 885: 20 Cri L Jour 455, *Varadarajulu Naidu* v. *Emperor.*
3. (1925) 1925 Mad 106 (109, 111): 25 Cri L Jour 401, *Narayana Menon, In re.*
   (1928) 1928 Mad 1174 (1175): 30 Cri L Jour 133, *Subramania Ayyar* v. *Emperor.*
   (1930) 1930 Mad 854 (855): 1930 Cri Cas 1149: 54 Mad 63: 32 Cri L Jour 109, *Konda Reddi* v. *Mangala Babanna.*
   [See also (1926) 1926 Lah 309 (309): 7 Lah 148: 27 Cri L Jour 463, *Dulla* v. *Emperor.*]
4. (1925) 1925 Pat 526 (529): 26 Cri L Jour 1171, *Akhtar Hussain* v. *Emperor.*
5. (1925) 1925 Mad 106 (108): 25 Cri L Jour 401, *Narayana Menon, In re.*
6. (1911) 12 Cri L Jour 585 (590, 591): 36 Mad 457, *Jeremiah* v. *Vas.*
6a (1906) 3 Cri L Jour 234 (236) (Rang), *Emperor* v. *Nga Po Gyi.*
7. (1920) 1920 Mad 928 (929, 933): 42 Mad 885: 20 Cri L Jour 455, *Varadarajulu* v. *Emperor.*
   (1910) 11 Cri L Jour 571 (574): 8 Ind Cas 145 (Mad), *Bhami Luxuman Shanbaga, In re.*
8. (1935) 1935 All 63 (64): 36 Cri L Jour 117: 1935 Cri Cas 105, *Sarnam Singh* v.

No hard and fast rule can however, be laid down. The appellate Court will not exercise the power under this Section when there is no evidence at all; but where there is some *prima facie* evidence bearing upon the guilt or innocence of the accused, the appellate Court may act under this Section.[9]

It has been held in the following cases that the taking of additional evidence is not an improper exercise of discretion:—

1. Where the Court of first instance refuses to take the evidence offered either on the erroneous view as to its inadmissibility or for any other reason.[10]
2. Where the accused complains that a confession has been obtained from him by undue influence or force and where the trial Court fails to inquire into the allegations.[11]
3. Where the accused is said to be insane and the medical or expert evidence has not been taken on the point.[12]

The Court of appeal has also under Section 423, the power to remand the whole case for re-trial. Whether a remand under that Section or taking additional evidence under this Section is the proper procedure will depend upon the facts of each case;[13] but where an illegality in the conduct of the case has been committed, as for instance the non-compliance with the provisions of Section 256 or Section 342, the proper course would be to remand the case.[14]

5. "Shall record its reasons."

The provision was first introduced in the 1898 Code. Whenever additional evidence is now taken under this Section reasons for the same should

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Emperor.
(1931) 1931 Mad W N 731 (732), *Subba Reddi* v. *Emperor.*
(1884) 1884 Pun Re Cri No. 28, p. 48 (50), *Gohar* v. *Empress.*
(1928) 1928 Bom 241 (242) : 52 Bom 686 : 29 Cri L Jour 990, *Bansilal Gangaram* v. *Emperor.*
(1901) 25 Mad 627 (631), *Emperor* v. *Allan.*
(1923) 1923 Mad 600 (601) : 24 Cri L Jour 403, *In re Cholancherri Ayamma.*
(1921) 1921 All 158 (158) : 23 Cri L Jour 402, *Muhammad Ata* v. *Emperor.*
(1883) Ratanlal 190 (191), *Empress* v. *Shivanna.*
(1921) 1921 All 215 (216) : 27 Cri L Jour 813, *Nagina* v. *Emperor.*
[See also (1914) 1914 All 538 (540) : 16 Cri L Jour 49, *Dick* v. *Emperor.*
(1883) 5 All 217 (221), *Empress* v. *Fateh.*
(1929) 1929 Cal 244 (246) : 56 Cal 566 : 30 Cri L Jour 1031, *Debendra Narayan* v. *Emperor.*
(1921) 1921 Mad 687 (688) : 23 Cri L J 700, *In re Ramaswami Tevan.*]

9. (1872) 18 Suth W R Cri 31 (32), *In re Udaichand Mukhopadhya.*

10. (1896) 19 Mad 375 (381, 382), *Empress* v. *Virasami.*
(1911) 12 Cri L Jour 585 (590, 591) : 36 Mad 457, *Jeremiah* v. *Vas.*
(1883) 2 Weir 480 (480), *In re Iyachi Kone.*
(1911) 12 Cri L Jour 412 (420) : 11 I C 596 (Lah), *Bhagwan Kaur* v. *Emperor.*
(1887) Ratanlal 347 (349), *Empress* v. *Bhabhutgar.*
(1907) 5 Cri L Jour 164 (167, 168) : 31 Bom 218, *Emperor* v. *Isap Mahmad.*

11. (1886) Ratanlal 242 (244), *Queen* v. *Bhagi.*
(1871) 8 Bom H C R Crown Cas 126 (149), *Reg.* v. *Kashinath.*
(1864) 2 Bom H C R Crown Cas 398 (399), *Reg.* v. *Ganu Bapu.*
(1906) 3 Cri L Jour 351 (352) : 3 Low Bur Rul 114, *Emperor* v. *Po Gyi.*
(1911) 12 Cri L Jour 40 (40) : 9 Ind Cas 251 (Mad), *Gurumurthi Chetty* v. *Archibold Read.*

12. (1864) 1 Suth W R Cr 1 (1), *Queen* v. *Sheikh Mustafa.*
(1910) 11 Cri L Jour 105 (105) : 4 Ind Cas 985 (Lah), *Chajju Mal* v. *Emperor.*

13. (1866) 2 Bom H C R Crown Cas 395 (396, 397), *Reg.* v. *Kalla Lakhmaji.*
(1919) 1919 Cal 862 (872) : 19 Cri L Jour 753, *Grande Venkata Ratnam* v. *Corporation of Calcutta.*

14. (1929) 1929 Bom 309 (310, 313) : 1929 Cri Cas 130 : 53 Bom 578 : 31 Cri L Jour 309, *Emperor* v. *Lakshman Ramshet.*
(1925) 1925 Cal 172 (172) : 26 Cri L Jour 313, *Abdur Samad* v. *Emperor.*

Sec. 428 Notes 5—7

be given.[1] This provision is a guarantee against the appellate Court exercising its powers arbitrarily.[2]

In an appeal against the conviction of an accused for possession of cocaine, the appellate Court sent for the Chemical Examiner's report which was not tendered in evidence in the lower Court, and without any formal order admitting this further evidence and without recording the reasons for taking such additional evidence admitted the report and ultimately dismissed the appeal. It was held that the additional evidence ought not to have been perused in appeal unless the provisions of this Section were complied with.[3]

It has, however, been held that the mere fact that reasons have not been recorded, is not an illegality vitiating the trial and that the defect is curable under Section 537 if it had not caused a failure of justice.[4]

6. "Direct it to be taken by a Magistrate."

The Court can only direct additional evidence to be taken by a Magistrate. It cannot call for a *report* from such Magistrate[1] or a *finding* on such additional evidence[2] and act thereon[3] nor can it send the case to the *police* for further investigation.[4]

A Court or Magistrate who is directed to take additional evidence can take only such evidence as has been directed or asked to be taken, and not more; whereas if the case is remanded under Section 423 the accused is entitled to lead such additional evidence as he may desire.[5]

7. "Shall certify such evidence to the appellate Court," etc.—Sub-clause 2.

The Magistrate directed to take additional evidence under this Section should properly complete the same[1] and certify the evidence to the appellate Court which after perusing the additional evidence should itself dispose of the appeal.[2]

Note 5.

1. (1924) 1924 All 193 (194) : 26 Cri L Jour 200, *Wali Muhammad* v. *Emperor.*
   (1926) 1926 Lah 309 (309) : 7 Lah 148 : 27 Cri L Jour 463, *Dulla* v. *Emperor.*
   (1910) 11 Cri L Jour 571 (574) : 8 Ind Cas 145 (Mad), *In re Bhami Luxuman Shanbaga.*
   (1910) 11 Cri L Jour 734 (734) : 8 Ind Cas 943 (Mad), *In re Chintalapudi Kotiah.*
2. (1920) 1920 Mad 928 (933) : 42 Mad 885 : 20 Cri L Jour 455, *Varadarajulu Naidu* v. *Emperor.*
3. (1924) 1924 All 193 (194) : 26 Cri L Jour 200, *Wali Muhammad* v. *Emperor.*
4. (1911) 12 Cri L Jour 240 (241) : 10 Ind Cas 290 (Mad), *Emperor* v. *Karnan Benu Patnaik.*
   (1930) 1930 Mad 483 (484) : 53 Mad 688 : 31 Cri L Jour 602 : 1930 Cri Cas 507, *V. Seeniah Naidu* v. *Abdul Wahab Sahib.*

Note 6.

1. (1925) 1925 Pat 450 (452) : 4 Pat 204 : 27 Cri L Jour 524, *Guhi Mian* v. *Emperor.*
2. (1915) 1915 Mad 756 (756) : 16 Cri L Jour 79, *Muthukaruppan Servai* v. *Vellaya Kudumban.*
   (1911) 12 Cri L Jour 240 (241) : 10 Ind Cas 290 (Mad), *Emperor* v. *Karnan Benu.*
   (1934) 1934 Lah 316 (316) : 35 Cri L Jour 1166 : 1934 Cri Cas 548, *Mahammad Din* v. *Emperor.*
   (1869) 3 Bom L R App Cr 62 (64), *Anonymous.*
   (1916) 1916 Pat 219 (221) : 17 Cri L Jour 332 : 1 Pat L Jour 99, *Gajanand* v. *Emperor.*
   (1918) 1918 Pat 582 (583) : 19 Cri L Jour 77, *Bhaso Singh* v. *Emperor.*
3. (1916) 1916 Mad 775 (776, 778) : 16 Cri L Jour 767, *Sudalaimuthu Chettiar* v. *Enan Samban.*
4. (1900) 1900 All W N 130 (130), *Empress* v. *Maheshri.*
5. (1906) 3 Cri L Jour 304 (305) (Cal), *Mir Sarwarjan* v. *Emperor.*

Note 7.

1. (1865) 4 Suth W R Cr Cir No. 1 (1), *Criminal Circular No.* 10 *of* 20*th November* 1865.
2. (1916) 1916 Mad 775 (776, 778) : 16 Cri L Jour 767, *Sudalaimuthu Chettiar* v. *Enan Samban.*
   (1915) 1915 Mad 756 (756) : 16 Cri L Jour

8. Presence of accused while additional evidence is taken—Sub-clause 3.

Under the corresponding Section of the Code of 1872 the presence of the appellant might be dispensed with unless the appellate Court otherwise directed. Under the later Codes, the evidence should ordinarily be taken in the *presence* of the accused, though the Court has power to dispense with such presence.[1] If the original trial had been with a jury or assessors, it is not necessary that the additional evidence should be taken in the presence of the jury or the assessors.[2]

9. Procedure in taking additional evidence—Sub-clause (4).

In taking additional evidence under this Section the provisions contained in Chapter XXV, *viz.*, Section 353, etc., should be followed.[1] Thus where a map is ordered to be prepared in appeal it is necessary that evidence should be taken to prove it properly.[2]

If during the reception of the additional evidence by the Magistrate any offence against public justice as is mentioned under Section 195 is committed, such Magistrate is competent to prefer a complaint with reference to the same under Section 476, *infra*.[3] As to the necessity of examining the accused after additional evidence is taken, *see* Note 9 to Section 342.

10. Appeal or revision.

Under Section 422 of the Code of 1861, where a Court of appeal took additional evidence and disposed of the appeal, the judgment was considered to be an original judgment and it was held that an appeal lay against such judgment to the High Court on the merits.[1] The Section was amended in 1869, and since then a judgment passed by the appellate Court after taking the additional evidence was held to be only an appellate judgment from which there was no appeal.[2]

A Court of revision will not interfere with an order under this Section made by a Court of appeal unless it is satisfied that the appellate Court had committed an error of law which has prejudiced the accused on the merits.[3]

An appeal was pending before the first class Magistrate. He ordered some additional evidence to be taken under this Section. One of the parties

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79, *Muthukaruppan Servai* v. *Vellayya Kudumban*.

Note 8.

1. (1928) 1928 Bom 200 (200) : 52 Bom 699 : 29 Cri L Jour 972, *Narayan Keshav* v. *Emperor*.
   (1906) 3 All L Jour 112*n* (112*n*), *Sheo Achal* v. *Emperor*.
   (1891) 13 All 171 (188), *Empress* v. *Pohpi*.
   (1906) 3 Cri L Jour 376 (378) : 29 Mad 100, *Suryanarayana Row* v *Emperor*.
2. (1907) 6 Cri L Jour 154 (159) (Cal), *Emperor* v. *Jasha Bewa*.
   (1893) 15 All 136 (137), *Empress* v. *Ram Lall*.

Note 9.

1. (1910) 11 Cri L Jour 734 (734) : 8 Ind Cas 943 (Mad), *In re Chintalapudi Kotiah*.
2. (1926) 1926 Cal 424 (425) : 26 Cri L Jour 1510, *Rez Muhammad* v. *Emperor*.
   [See also (1883) 1883 A W N 226 (226), *Empress* v. *Ashiq Hussain*. Evidence should be taken again—Memo of prior examination should not be read out and the witness asked if it was correct.
   (1921) 1921 All 215 (216) : 27 Cri L Jour 813, *Nagina* v. *Emperor*. Using evidence under S. 288.]
3. (1871) 15 Suth W R Cr 61 (66), *Queen* v. *Buktear Maijaraz*.

Note 10.

1. (1865) 2 Suth W R Cr 13 (14, 24), *Queen* v. *Mohesh Chunder*.
2. (1871) 15 Suth W R Cr 33 (34), *In re Dhunobar Ghose*.
   (1900) 27 Cal 372 (375), *Empress* v. *Isahak*.
   (1869) 6 Bom 11 C R Crown Cases 64 (66), *Reg.* v. *Nantanram Uttamram*.
3. (1925) 1925 Pat 526 (530) : 26 Cri L Jour 1171, *Akhtar Hussain* v. *Emperor*.
   (1918) 1918 Pat 272 (273) : 19 Cri L Jour 902 : 3 Pat L Jour 632, *Mahomed* v. *Emperor*.

Sec. 428 Note 10

to the appeal filed a petition before the Additional District Magistrate who withdrew the appeal to his file and disposed it of without taking the additional evidence. It was held that he had the power to do so and that he was not bound by the opinion of the first class Magistrate.[4] It was observed that

> "Under Section 428 the appellate Court may take such additional evidence as it thinks necessary before deciding the appeal but there is nothing in the Code of Criminal Procedure or any reason to render it illegal or irregular for the appellate Court to dispense with such evidence if further consideration or argument leads the Court to the conclusion that such evidence is not necessary."

Sec. 429

Procedure where Judges of Court of appeal are equally divided.

429.* When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing, (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Synopsis.

Other Topics.

Death or transportation—Difference of view as to—Effect. See Note 3, Pt. 3.
Difference of view—No ground for acquittal. See Note 3, Pt. 2.
Inapplicability to bails. See Note 1, Pt. 5.
Inapplicability to revisions under S. 107, Government of India Act. See Note 1, Pt. 6.
Leglislative changes. See Note 1.
Letters Patent. See Note 1, Pts. 1, 4, 5 and 6; Note 4, Pt. 1.
No reference to Full Bench by the third Judge. See Note 1, Pt. 7.
Reference under Section 307. See Note 1, Pt. 3.
Reference under Sind Courts Act. See Note 2, F-N (1).
Revisions—Section 439. See Note 1, Pt. 2.
Scope of enquiry before third Judge. See Note 2.
Section 195—Inapplicability of this Section to. See Note 1, Pt. 4.
Several accused—Difference of view as to one only. See Note 2, Pt. 4.
Third Judge not to disagree on agreed points. See Note 2, Pts. 2 and 3.
Whole case is before third Judge and not merely points of difference. See Note 2, Pt. 1.

1. Scope and applicability of the Section.

This Section provides for the procedure to be followed where the Judges of the Court of appeal are equally divided in opinion. This provision

* (Code of 1882—S. 429—Same.)

(Code of 1872—S. 271, Para. 8.)

271. * * * * *

When, under the provisions of the law in force, judgments or orders made or passed by the High Court are made or passed, either in appeal, reference or revision, by a Court consisting of more than one Judge, any difference of opinion shall be settled by adding, when the High Court is composed of more than two judges and the Court is equally divided, one or more Judges, and in such event the judgment or order shall follow the opinion of the majority of the Judges.

(Code of 1861—Nil.)

4. (1908) 7 Cri L Jour 329 (330) : 31 Mad 277, *In re Alagu Ambalam.*

was first introduced in the Code of 1872. Before that year such cases were governed by the Letters Patent. Under the Letters Patent the opinion of the senior Judge prevailed and no reference to a third Judge was allowed.[1]

The Section applies not only to appeals but also to revision petitions by virtue of Section 439, sub-section 1.[2]

The same procedure has been provided for such cases in a reference under Section 378 for confirmation of death sentence. The principle of this Section applies to a reference under Section 307.[3]

The powers conferred by the Code under Section 195, sub-section 6 (now repealed)[4] or over applications for bail[5] are not, however, part of the appellate and revisional jurisdiction conferred under Chapters XXXI and XXXII of the Code and consequently, where there is a difference of opinion this Section does not apply; the opinion of the Senior Judge prevails under Clause 36 of the Letters Patent.

Nor does the Section apply to revision petitions preferred to the High Court under Section 107 of the Government of India Act, as such petitions are outside the powers conferred by the Code. In such cases the opinion of the senior Judge prevails under the Letters Patent.[6]

A third Judge to whom reference is made, under this Section, cannot make a reference to a Full Bench.[7]

2. "Case."

Where upon a difference of opinion between two Judges the 'case' is laid before a third Judge, the *whole case* is referred to a third Judge and not merely the point or points *upon which the Judges differ*; it is the duty of the third Judge, to consider *all* the points involved before he gives his opinion.[1] The third Judge should not, however, differ on a point on which both the referring Judges agreed unless there are strong grounds to do so. Such cases may occur where the Judges are agreed that an accused cannot be acquitted but differ whether he ought to be convicted or whether a new trial should be ordered[2] or where they are agreed that the accused is guilty but disagree on

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Section 429—Note 1.

1. (1870) 2 N W P H C R 117 (119) (F B), *Queen* v. *Nyn Singh.*
   (1868) 10 Suth W R Cri 45 (45), *Queen* v. *Kazim Thakoor.*
2. (1932) 1932 Mad W N 873 (888), *Kunhambu* v. *Local Fund Overseer, Chirakkal.*
3. (1891) 15 Bom 452 (474, 475), *Queen-Empress* v. *Dada Ana.*
   [See also (1906) 3 Cri L Jour 371 (375) : 29 Mad 91, *Emperor* v. *Chellan.*]
4. (1916) 1916 Mad 1110 (1119) : 39 Mad 750 : 13 Cri L Jour 209, *Bapu* v. *Bapu.*
   (1912) 13 Cri L Jour 19 (20) : 13 Ind Cas 211 (Mad), *Muthuvarapu Seshiah* v. *Gatram Ramiah.*
   (1912) 13 Cri L Jour 291 (292, 293) : 14 Ind Cas 755 (Cal), *Mathura Sahu* v. *Damri Ram.*
5. (1909) 9 Cri L Jour 409 (411) : 36 Cal 174, *Jamini Mullick* v. *Emperor.*
6. (1920) 1920 Cal 417 (418) : 47 Cal 438 : 21 Cri L Jour 25, *Moiram Bewah* v. *Mrijan Sardar.*
   (1920) 1920 Cal 824 (829) : 22 Cri L Jour 99, *India Iron and Steel Co., Ltd.* v. *Banso Gopal Tewari.*
7. (1925) 1925 Cal 1040 (1045, 1046) : 26 Cri L Jour 915, *Ishan Chandra Samanta* v. *Hridoy Krishna Bose.*

Note 2.

1. (1910) 11 Cri L Jour 515 (517, 518) : 38 Cal 202, *Sarat Chandra Mitter* v. *King-Emperor.*
   (1932) 1932 Mad W N 873 (888, 889), *Kunhambu* v. *Local Fund Overseer, Chirakkal.* Per Pandalai, J.
   (1927) 1927 Bom 177 (182) : 51 Bom 310 : 28 Cri L Jour 373, *Sejmal Punanchand* v. *Emperor.*
   (1930) 1930 Sind 225 (241) : 31 Cri L Jour 1026 : 1930 Cri Cas 865, *Mohamed Yusuf* v. *Emperor.* A reference under S. 9 (c) of the Sind Courts Act.
2. (1919) 1919 Cal 862 (870) : 19 Cri L Jour 753, *Garande Venkata Ratnam* v. *Corporation of Calcutta.*
   (1930) 1930 Sind 225 (241) : 31 Cri L Jour

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a subsidiary point, *e. g.*, a consequential order under Section 517 of the Code.[3]

In cases, however, where there are two or more accused, and the Judges are agreed in opinion with regard to *one* of them, but are divided as regards the others, the case which is laid before the third Judge is only the case of the accused with regard to whom there is a difference of opinion.[4]

3. "Judgment or order shall follow such opinion."

Where a case is referred to a third Judge, he is entitled to give his own opinion, and it will be according to such opinion that judgment will follow.[1] He need not necessarily decide the case according to the opinion of the Judge who was in favour of an *acquittal*.[2] Where the Judges are agreed as to the guilt of the accused in a murder case but differ as to whether the sentence should be one for transportation for life or of death, the High Court of Calcutta has held that the fact that there is such a difference of opinion is itself a ground for holding that the death penalty should not be awarded, though the rule is not an inflexible one and cannot be considered to prevent the third Judge to whom a reference is made under this Section, from considering the case for himself and to judge for himself whether death penalty should or should not be given.[3]

4. Appeal.

Under Clause 41 of the Letters Patent no appeal lies to the Privy Council, from the judgment of a Judge of a High Court on a reference to him on difference between two other Judges of the same Court.[1]

Sec. 430

430.* Finality of orders on appeal.

Judgments and orders passed by an appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Chapter XXXII.

Synopsis.

Other Topics.

Allahabad High Court practice—Jail appeal—No bar to appeal by pleader. See Note 1, F-N (3).

Appeal—Judgment without hearing appellant—Whether bar to Court's reconsidering matter. See Note 1.

Appellate Court judgment—Not open to further appeal except as under Section 417. See Note 1.

Dismissal on ground of limitation is one after perusal of petition. See Note 1, F-N 7.

Jail appeal—Dismissal without perusing petition of appeal—Not valid judgment. See Note 1, Pt. 6.

* (1882—S. 430 ; 1872—S. 285 and 1861—S. 428.)

1026 : 1930 Cri Cas 865, *Mohammad Yusuf* v. *Emperor*.

3. (1932) 1932 Mad W N 873 (891), *Kunhambu* v. *Local Fund Overseer, Chirakkal*. Per Waller, J.

4. (1910) 11 Cri L Jour 515 (517, 518) : 38 Cal 202, *Sarat Chandra Mitra* v. *Emperor*.
(1931) 1931 Lah 513 (520) : 32 Cri L Jour 868 : 1931 Cri Cas 737, *Ahmad Sher* v. *Emperor*.

Note 3.

1. (1910) 11 Cri L Jour 515 (517, 518) : 38 Cal 202, *Sarat Chandra* v. *Emperor*.
2. (1887) 1887 All W N 125 (127), *Empress* v. *Bundu*. Dissenting from (1886) All W N 275 (276.)
3. (1930) 1930 Cal 193 (198) : 31 Cri L Jour 817 : 1930 Cri Cas 225, *Emperor* v. *Dukari Chandra Karmakar*.

Note 4.

1. (1913) 14 Cri L Jour 672 (672) : 21 Ind Cas 912 (Cal), *Atawar Singh* v. *Emperor*.

Jail appeals and non-jail appeals—Difference in procedure. See Note 1.
Jail appeal and appeal through pleader—Both filed—Dismissal of former by Court in ignorance of latter appeal — Latter appeal cannot be considered. See Note 1, Pt. 13.
No temporary dismissal of appeal—But appeal may be postponed. See Note 2.
Object of this Section. See Note 1, Pt. 1a.
Section 369—Not affected by this Section. See Note 1.
Section 421—Dismissal as barred by limitation—Whether valid and final. See Note 1, Pts. 14, 15.

1. Scope of the Section.

Section 408 to Section 415-A, *ante*, provide for appeals against convictions, and Section 417 for appeals against acquittals, in trials. An appeal is, to all intents and purposes, a trial.[1] Therefore, in the absence of a specific provision to the contrary, it would be open to contend that a conviction by an *appellate* Court is also open to appeal under the said provisions. This Section is intended to negative such a result and provides that an appellate judgment or order is *final*,[1a] subject to the provisions of Section 417 and Chapter XXXII (Revision). A sentence is said to be final when it cannot be set aside or interfered with in any manner by any Court.[2]

This Section does not, in any way affect the provisions of Section 369, *ante*, which, by force of Section 424, is applicable to judgments in appeals also.

Reading the two Sections together, as they ought to be, it follows that an appellate Court, like the trial Court, cannot alter or review its own judgment or order. Nor is such judgment or order open to any *further appeal* except as provided by Section 417.

The question has arisen as to whether a judgment given in an appeal without hearing the appellant or his pleader is a bar to the Court reconsidering the matter subsequently either by directly reviewing its previous decision or by way of entertaining a fresh appeal or application for the same purpose. The answer to the question depends largely upon a consideration of the provisions of Sections 421 and 423, *ante*. Section 421 lays down the conditions, on the fulfilment of which an appellate Court is entitled to dismiss an appeal. These conditions vary with two classes of appeals, which may, for the sake of convenience of expression, be called *jail appeals*, that is, appeals which are presented through the officer in charge of the jail, and *non-jail appeals* which would include all other appeals.

As regards jail appeals, the Section requires the Court to peruse the petition of appeal and the copy of the judgment under appeal before dismissing it. If this is done, the judgment of dismissal is final, and cannot, under the provisions of Section 369, be altered or reviewed by the same Court, as for example, by entertaining a fresh appeal or application in respect of the same

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Section 430—Note 1.

1. See Note 18 to S. 423 *ante*.

1a See the cases cited in the following footnotes.
[See also (1873) 1873 Pun Re Cr No. 6, page (6), *In re A reference from Commissioner, Rawalpindi.* Case under Code of 1872—No appeal from appellate Court's enhancing sentence.
(1923) 1923 All 473 (474) : 45 All 143: 24 Cri L Jour 766, *Kale* v. *King-Emperor*. High Court has no power to review its own order dismissing a criminal appeal and confirming the conviction and sentence.
(1866) 5 Suth W R Cr 61 (63), *Queen* v. *Godai Raout*. (Do.)
(1872) 17 Suth W R Cr 2 (2), *In re Krishno Churnand Moheram of Assam*. (Do.)
(1872) 17 Suth W R Cr 47 (47), *Queen* v. *Chundro Joogi*. (Do.)]

2. (1886) 12 Cal 536 (538), *Dular Dat Rai* v. *Nijabat Hosein*.

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matter,[3] even though the appellant was actually not heard in the matter.[4] The reason is that in jail appeals this Section does not make it essential that the *appellant should be heard* before the appeal is dismissed.[5] On the other hand where the Court dismisses a jail appeal without perusing the petition of appeal or the copy of the judgment accompanying it, it will be acting without jurisdiction and the dismissal is not a valid judgment or order which is entitled to that finality which is conferred on judgments by Section 369; a subsequent appeal or application in respect of the same matter is open to consideration on its merits.[6]

As regards non-jail appeals, this Section imposes an additional duty on the appellate Court, besides that of a perusal of the petition of appeal and of the copy of the judgment appealed against; and that is, that the appellant or his pleader should have had a reasonable opportunity of being heard in support of the appeal, before it is dismissed summarily. Where these conditions are satisfied and the appeal is dismissed, the dismissal is final and cannot be reconsidered in any manner such as the entertainment of a fresh appeal or application for the same purpose,[7] even though the appellant or his pleader was absent at the hearing and was consequently not heard.[8] But where no such opportunity has been given, the dismissal of the appeal would be without jurisdiction and will not bar a reconsideration of the matter.[9]

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3. (1919) 1919 Cal 409 (410) : 46 Cal 60 : 20 Cri L Jour 265, *Rajab Ali* v. *Emperor.*
   (1923) 1923 Mad 426 (427) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhahamad Haji* v. *Emperor.* Dismissal of jail appeal as time-barred—Decision is one on the merits.
   (1926) 1926 All 178 (179) : 48 All 208 : 26 Cri L Jour 1621, *Emperor* v. *Mewa Ram.*
   (1922) 1922 All 480 (481) : 44 All 759 : 23 Cri L Jour 505, *Khiali* v. *Emperor.* There cannot be more than one judicial determination upon the question raised by the appeal.
   (1923) 1923 Oudh 56 (56) : 23 Cri L Jour 148 : 24 Oudh Cas 304, *Ganga Din* alias *Nanga* v. *King-Emperor.* Dissenting from 17 Cri L Jour 453.
   (1924) 1924 Oudh 425 (425) : 25 Cri L Jour 1313, *Ram Autar* v. *Emperor.* Dissenting from 17 Cri L Jour 453.
   (1882) 2 Weir 475 (475), *In re Naga.*
   (1935) 1935 Pat 426 (427): 1935 Cri Cas 1123: 37 Cri L Jour 58 : 14 Pat 392, *Pem Mahton* v. *Emperor.* The Code does not confer more than one right of appeal.
   [But see (1934) 1934 All 988 (988) : 1934 Cri Cas 1305: 36 Cri LJour 300, *Lachhman Chamar* v. *Emperor.* It is the practice of the Allahabad High Court that a jail appeal does not debar an appeal by a pleader.]

4. (1926) 1926 Mad 420 (420) : 27 Cri L Jour 184, *Arumugha Padayachi, In re.*
   [But see (1887) 1887 Pun Re Cr No. 24 (p.48), *Nihala* v. *Empress.* Even if no opportunity is given the judgment is final under S. 43.]

5. (1935) 1935 Pat 426 (427) : 1935 Cri Cas 1123: 37 Cri L Jour 58 : 14 Pat 392, *Pem Mahton* v. *Emperor.*

6. [See (1934) 1934 All 206 (207) : 1934 Cri Cas 254 : 56 All 299 : 35 Cri L Jour 441, *Bansgopal* v. *Emperor.* It is only an order (not final) and not a judgment, therefore can be re-heard.]

7. (1895) 19 Bom 732 (734), *Queen-Empress* v. *Bhimappa bin Ramanna.* Dismissal on the ground of limitation—The dismissal must be deemed to have been made after perusal of the petition and judgment.
   (1904) 1 Cri L Jour 329 (330) (Bom), *Emperor* v. *Raghunath Ramchandra.* (Do.)
   (1935) 1935 Sind 84 (85) : 1935 Cri Cas 370: 36 Cri L Jour 831 (F B), *Shahu* v. *Emperor.*

8. (1926) 1926 Lah 196 (197) : 27 Cri L Jour 23, *Nazar Muhammad Khan* v. *Emperor.*
   (1935) 1935 Sind 84 (86) : 1935 Cri Cas 370: 36 Cri L Jour 831 (F B), *Sahu* v. *Emperor.*
   (1879-80) 4 Bom 101 (103), *Empress* v. *Mahomed Yasin.* Even if the records are not called for.

9. (1925) 1925 Lah 355 (356) : 26 Cri L Jour 1169, *Muhammad Sadiq* v. *The Crown.*
   (1873) 7 Mad H C R App 29 (29), *High*

Where an appeal is not dismissed under this Section the Court is bound to give notice to the parties under Section 422, send for the records of the case from the lower Court, peruse the same, and hear the parties if they appear, before making a final order in the appeal. If these conditions are fulfilled the judgment or order of the appellate Court is not open to reconsideration by the same Court and is final. The fact that the parties or their pleaders were not present notwithstanding the opportunity given to them, and were consequently not heard does not affect the finality of the appellate judgment or order.[10] But where the conditions of Sections 422 and 423 are not fulfilled, as where an appeal is dismissed for *default of appearance* of the parties,[11] or when no notice has been given to the parties as to the date and place of hearing,[12] or the parties, though present, are not heard, the judgment will be without jurisdiction and will not be a bar to a subsequent reconsideration of the same matter.

Where a convicted person has preferred both a jail appeal and an appeal through a pleader and both of them are pending, and the Court, in ignorance of the latter appeal dismisses the former summarily, it cannot, nevertheless consider the latter appeal and set aside the prior dismissal.[13]

It has been held by the High Courts of Madras and Bombay that the dismissal of an appeal under Section 421 on the ground that the appeal is barred by limitation, is a valid judgment and is final.[14] A contrary view has however been expressed in the undermentioned case.[15] It is submitted that the latter view is incorrect.

A was charged with offences under Sections 302 and 304 of the Penal Code. At the trial, he was acquitted of the offence under Section 302 and was convicted of the offence under Section 304. *A's* appeal against his conviction under Section 304 was dismissed by the High Court. Then the Local Government appealed against *A's* acquittal of the offence under Section 302: It was held that the order of the High Court passed in *A's* appeal from his conviction under Section 304 did not preclude the High Court from hearing the appeal against his acquittal.[16]

2. Temporary dismissal of appeal.

The temporary dismissal of an appeal is a procedure unknown to the law. An appellate Court cannot, therefore, dismiss an appeal till the decision

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Court Proceedings, 7th November 1873.

10. (1923) 1923 Pat 297 (298) : 26 Cri L Jour 419, *Kabir Shah* v. *King-Emperor.*

11. (1909) 9 Cri L Jour 553 (554) : 5 Nag L R 76, *Ratanchand* v. *Emperor.*

(1923) 1923 Mad 426 (432, 433) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhahamad Haji* v. *Emperor.*

(1919) 1919 Cal 409 (410) : 46 Cal 60 : 20 Cri L Jour 265, *Rajab Ali* v. *Emperor.*

12. (1919) 1919 Cal 409 (410) : 46 Cal 60 : 20 Cri L Jour 265, *Rajab Ali* v. *Emperor.*

13. (1926) 1926 All 178 (179) : 48 All 208 : 26 Cri L Jour 1621, *Emperor* v. *Mewa Ram.*

14. (1923) 1923 Mad 426 (427) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhahamad Haji* v. *Emperor.*

(1895) 19 Bom 732 (734), *Queen-Empress* v. *Bhimappa bin Ramanna.*

15. (1934) 1934 All 206 (207) : 1934 Cri Cas 254: 56 All 299 : 35 Cri L Jour 441, *Bansgopal* v. *Emperor.*

16. (1932) 1932 Nag 121 (123, 124): 1932 Cri Cas 672: 28 Nag L R 233 : 33 Cri L Jour 849 (*FB*), *Mohammadi Gul Rohilla* v. *Emperor.*

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of a civil suit between the parties.[1] The appellate Court can, however, postpone the decision of an appeal in suitable cases.[2]

3. Effect of dismissal of appeal on application under Section 439 for enhancement of sentence.

See Notes to Section 439, *infra*.

Note 2.

1. (1918) 1918 All 247 (248) : 19 Cri L Jour 358 (359), *Lachhmi Narain* v. *Bindraban*.

2. (1918) 1918 All 247 (248) : 19 Cri L Jour 358 (359), *Lachhmi Narain* v. *Bindraban*.

END OF VOLUME II.

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